Circuit Court for Prince George's County
Case No. CT150255A

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1972

September Term, 2016

CURTIS LEE HILL, JR.

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Kehoe,
Rodowsky, Lawrence F.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Rodowsky, J.

Filed: September 11, 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.

Appellant, Curtis Lee Hill, Jr., was convicted at a jury trial in the Circuit Court for Prince George's County of illegal possession of a regulated firearm and of wearing, carrying, and transporting a handgun. He was found not guilty on a charge of possessing Phencyclidine (PCP). The court imposed a sentence of five years, of which all but eighteen months was suspended.

In this Court, Hill contends that the circuit court erred in denying his motion to suppress physical evidence seized in a street encounter that began with the police smelling PCP. Because the police had probable cause, or reasonable articulable suspicion to investigate, we shall affirm.

Facts

About 8:00 p.m. on Thursday, January 15, 2015, three uniformed officers of the Prince George's County Police Department were on "special assignment" patrol, in two marked patrol cars, in the Seat Pleasant area of Capitol Heights. Special assignment patrols are directed to high crime areas. The lead car was driven by Officer Chandler Coleman, who had five and one-half years' experience in that Department. He was accompanied by Officer Cody Katzemaier, who had three years of service. The rear car was driven by Officer Kenneth Meushaw, a twelve-year veteran. Officer Katzemaier's window was down. Officer Coleman was not asked if his window was down. Officer Meushaw's window was down because he always does so when patrolling in order to hear gunshots.

The patrols turned off Seat Pleasant Drive onto Birchleaf Avenue, a neighborhood of single family homes and townhouses. Birchleaf Avenue dead ends at Birchleaf Park.

The lead patrol car was "toward the middle" of the block between Seat Pleasant Drive and the park when Officer Coleman smelled PCP. It was "a strong odor." "At that time, [he] observed a dark blue Ford Expedition" (the SUV), with one right front passenger and one right rear passenger, both males. Appellant was standing by the driver's door. Officer Coleman started to smell PCP when his car was "[p]robably four to five car lengths" from the SUV. In his five and one-half years as a Prince George's County policeman, Officer Coleman has made "probably like" thirty-five to fifty arrests in which he has smelled PCP. Likewise, Officer Katzemaier initially smelled PCP when the patrol car was approximately half-way down Birchleaf Avenue.

Officer Meushaw testified that "[w]e detected a strong odor of phencyclidine in the area" that grew stronger the closer "we" got to the park. Officer Coleman "alerted" him about the SUV. Coleman said "[t]hat the source of phencyclidine that we were smelling on the street, he had determined that it was emanating from that vehicle." The State was unable, over objections, directly to elicit whether Officer Meushaw, before he parked his cruiser, personally confirmed the information received from Officer Coleman. Officer Meushaw, however, was asked, "How close were you to the car that the Defendant was in when you first smelled PCP?" He replied, "I was probably within 15 feet of the car." Thereafter, Officer Meushaw parked his cruiser. Asked what he observed when alighting, he said: "The vehicle was occupied three times and a very strong odor of phencyclidine was emanating from the vehicle."

Officer Coleman parked the lead cruiser "a car length in front" of the SUV. Officer Meushaw confirmed that Officers Coleman and Katzemaier "stopped their vehicle towards the front" of the SUV "[w]hen they called out the" SUV. Officer Meushaw's rear patrol car "went around" the lead car and "stopped probably right, maybe half way past the car length of my vehicle [past] the" SUV. "So [Meushaw was] behind, [Coleman and Katzemaier] were in front."

The officers alighted their vehicles and, while approaching the SUV, the appellant "hop[ped]" into the driver's seat. Officer Coleman observed that the windows at the front and right rear passenger positions of the SUV were completely down; the driver's window was open a crack.

Officer Meushaw went to the right rear of the SUV and engaged that passenger in conversation. Officer Coleman went to the front passenger, who was later determined to be appellant's brother. Officer Katzemaier went to the driver's position. He heard the SUV's locks being engaged. He attempted to have a conversation with the appellant, but the latter was evasive.

The officer saw appellant "reaching around his waistband" and asked him to step out of the SUV. Appellant refused and questioned why. Officer Katzemaier explained that the police had smelled PCP. Appellant's brother urged appellant to comply and unlocked the driver's door. The officer opened the door. Appellant "kept reaching at his waistband." The officer grabbed appellant's hands. Appellant stepped out of the SUV but did so "bent over at the waist as if trying to conceal something in his waistband." The

officer did a pat down and felt an object that he "knew" was a gun. It was a handgun, a Colt MK4 Mustang .380.

Officer Katzemaier called out "gun" when he felt the object and Officer Meushaw assisted him in the takedown.

Search of the appellant produced a baggy containing eight grams of crack. Search of the SUV revealed, from the back seat, a vial containing suspected PCP.[1]

In its ruling from the bench at the conclusion of the suppression hearing, the court was emphatic in its finding that it was PCP that the officers had smelled. "They all said it was PCP. It really wasn't challenged as to their ability to detect it as being PCP." The court's "perspective" was that the odor of PCP was not enough to "get anyone out of a car at that point." Persuasive to the court was that appellant was "making furtive movements" and would not stop after being asked to desist.

Appellant also argued at the suppression hearing that because the smell of PCP alone did not justify a search, the police were not conducting a *Terry* stop when they "boxed in" the SUV.[2]

Additional facts will be stated in the discussion of particular issues.

Questions Presented

> "1. Does the purported odor of illegal drugs emanating from an unknown source on a residential street next to a public park give rise to a reasonable articulable suspicion of criminal activity sufficient to justify the

[1]Appellant's trial court memorandum in support of the motion to suppress says that one-eighth of an ounce of PCP was found in the SUV.

[2]*Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968).

seizure of any individual who is legally parked on that street, absent a particularized basis to believe that the individual is the source of the odor?

"2. Does testimony that the police smelled PCP while driving down a residential street give rise to a reasonable articulable suspicion of criminal activity when the record does not reflect whether PCP itself has a distinctive odor or whether the odor the police smelled was a lawful substance associated with PCP?

"3. Does an individual's reaching toward his waist create a reasonable articulable suspicion that the individual is armed and dangerous, and therefore justify a frisk of the individual, if the police do not observe specific facts, in addition to the alleged reaching, that indicate that the individual is concealing a weapon?"

Standard of Review

"When reviewing the denial of a motion to suppress, the record at the suppression hearing is the exclusive source of facts for our review." *Darling v. State*, 232 Md. App. 430, 445, *cert. denied*, No. 124, Sept. Term, 2017 WL 3310452 (Md. Aug. 4, 2017). We consider the evidence and all reasonable inferences drawn from that evidence in the light most favorable to the party prevailing on the motion, in this case, the State. *Barnes v. State*, 437 Md. 375, 389 (2014); *Grimm v. State,* 232 Md. App. 382, 396 (2017). Ordinarily, we give great deference to a hearing judge's factual findings, and we will not disturb them unless they are clearly erroneous. *Henderson v. State,* 416 Md. 125, 143-44 (2010); *Darling*, 232 Md. App. at 445. We review the motions court's factual findings for clear error, but we make our own independent constitutional appraisal of the record, "reviewing the relevant law and applying it to the facts and circumstances of th[e] case." *State v. Lucket*, 413 Md. 360, 375 n.3 (2010). *Accord Moore v. State*, 422 Md. 516, 528 (2011).

Ordinarily, Maryland appellate courts "will not decide any … issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Maryland Rule 8-131(a). One well-recognized exception to this general principle is that

> "where the record in a case adequately demonstrates that the decision of the trial court was correct, although on a ground not relied upon by the trial court and perhaps not even raised by the parties, an appellate court will affirm. In other words, a trial court's decision may be correct although for a different reason than relied on by that court."

Robeson v. State, 285 Md. 498, 502 (1979), *cert. denied*, 444 U.S. 1021, 100 S. Ct. 680 (1980) (citations omitted).

Discussion

I

In this Court, appellant argues that "[t]he police seized [him] when they blocked his legally parked car." The evidence at the suppression hearing is confusing concerning the positions of the two police cars in relation to the SUV when they were parked and the officers alighted. Nevertheless, we shall assume, *arguendo*, that, once parked, the police cars blocked in the SUV in such a way that the SUV was seized. We shall further assume, *arguendo*, that appellant did not waive any claim of illegal seizure of his person when he voluntarily got into the assumedly blocked SUV and locked the vehicle's doors as the police approached on foot.

A.

When the police detected the odor of PCP emanating from the SUV is critical. Under the evidence most favorable to the State as the prevailing party at the suppression

hearing, Officer Coleman, the driver of the lead patrol car, identified the SUV as the source of the PCP while Officer Meushaw, in the rear patrol car, was still driving down Birchleaf Avenue toward the park. Under Officer Meushaw's evidence, that is when he was "alerted," apparently by radio, that the odor emanated from the SUV. Consequently, the officers had probable cause to search the SUV *before* it was, as we assume, blocked fore and aft. *See State v. Wallace*, 372 Md. 137, 155-56 (2002), *cert. denied*, 540 U.S. 1140, 124 S. Ct. 1036 (2004) (acknowledging that odor of drugs in vehicle, detected by a narcotics dog, constitutes probable cause to search the vehicle). It is an application of the Carroll Doctrine. *See Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280 (1925).

B.

Appellant's principal argument is that the evidence was not sufficient to permit finding reasonable articulable suspicion (much less probable cause) that the PCP odor emanated from the SUV because the suspicion could not be particularized to the SUV. Appellant points out that the SUV was legally parked in a residential area and that Officer Katzemaier said that there were other cars parked on the street. Officer Meushaw testified that there were cars "around" the SUV, but he could not recall how many.

An argument similar to appellant's was made and rejected in *United States v. Ramos*, 443 F.3d 304 (3d Cir. 2006), a case that arose from the Virgin Islands. Police officers on patrol in an unmarked vehicle saw two vehicles "parked next to each other" on the parking lot of a night club. *Id*. at 306. One was a van, the other a Honda Accord. *Id*. They were the only vehicles in the area. *Id*. at 309 n.7. The officers drove between the

two vehicles, passing within three to four feet of the passenger side of the Honda, the window of which was partially down. *Id*. at 306. One officer smelled marijuana smoke through his window. *Id*. A subsequent stop and search of the Honda revealed handguns and drugs. *Id*. The District Court held there was no probable cause for the traffic stop and that the marijuana smell could not be particularized to the defendants' car. *Id*. at 307.

On appeal, the Government argued that the marijuana odor furnished reasonable suspicion that justified the stop. *Id*. The defendants, on the other hand, contended that the odor was not particularized to their car. *Id*.

The Third Circuit sustained the search. It reasoned:

> "To establish reasonable suspicion, the particularity requirement need not be as stringent as it might be for probable cause.[6] Thus, while probable cause may require the odor to be particularized to a specific person or place, in this case we are satisfied that the totality of the circumstances sufficiently particularized the odor to justify a *Terry* stop of the defendants' car.
>
> "Here, it is undisputed that the officers drove in-between the two vehicles that were parked next to each other. As the officers drove by, coming to within three or four feet of defendants' car, they smelled an identifiable marijuana odor. Officer Huertas also testified that … both the defendants' car window (facing the officers' SUV) and the officers' own window were open. While it is true that no officer testified directly as to *which* car the odor had come from, relying on their skill and experience, it would have been reasonable for the officers to conclude that the odor was coming from one, the other, or both vehicles. For the purposes of reasonable suspicion, that probability establishes the odor as sufficiently particularized.
>
> "[6]As defendants point out, courts that have addressed the particularity requirement in the context of marijuana odor have established that the odor should be particularized to some specific person or place. However, these cases all addressed the particularity requirement in the context of a probable

> cause inquiry. *See* [*United States v.*] *Humphries*, 372 F.3d [653,] 659 [(4th Cir. 2004)]; *United States v. Parker*, 72 F.3d 1444, 1450 (10th Cir. 1995)."

Id. at 309 (footnote 7 omitted).

The totality of the circumstances in the case before us presents probable cause, because the proof of possession is stronger than in *Ramos*. Here, there was no car double parked "next to" the SUV. Although there were other cars parked on the residential street, the PCP odor was detected at night in the dead of winter. The fair inference is that the windows of the other vehicles were closed, but two of the windows on the SUV were fully open and the driver's window was partially open. It is also a fair inference from the season of the year and time of day that the other vehicles parked on the street were unoccupied. There were two men in the SUV and appellant was standing outside of it. Thus, when the officers in the lead patrol car smelled PCP, it was entirely reasonable that they would focus on the SUV as the source.

We alternatively hold that the police had "reasonable suspicion that criminal activity [was] afoot" and thereby were authorized to "conduct a brief investigative 'stop'" of the appellant. *Holt v. State*, 435 Md. 443, 459 (2013). *See also Crosby v. State*, 408 Md. 490, 506 (2009).

II

Appellant next contends that the testimony of the officers, describing the odor as PCP, was conclusory. Hill asserts that the officers were required to, but "failed to describe in any detail the characteristics of the odor they smelled that led them to distinguish it from other odors that are commonly associated with PCP, but are also consistent with

legal activity, such as ether." In essence, appellant submits that the case at hand is a reprise of *Bailey v. State*, 412 Md. 349 (2010). It is not.

In *Bailey*, a police officer on patrol at night in a high crime area observed from the sidewalk a man standing alone in the shadows on the side of a home. *Id*. at 358-59. The officer, yelling, asked if the man lived at that home but received no reply. *Id*. at 359. The officer stopped within a few feet of the subject and smelled a strong odor of ether which, the officer testified, is associated with PCP. *Id*. Upon smelling ether, the officer grabbed both of the subject's hands, placed them on top of the subject's head, and searched him. *Id*. at 360. The search revealed a vial, three to four inches in length and one inch in diameter, that was half full of a liquid that field tested to be PCP. *Id*.

The analysis by the Court of Appeals was that there initially was an accosting or consensual encounter that almost immediately escalated into a warrantless seizure. *Id*. at 364. Bailey was not free to go when the officer placed the subject's hands on his head. *Id*. at 365. This was a *de facto* arrest, *id*. at 374, but there was no probable cause. *Id*. at 386. Although "the odor of contraband alone is sufficient to establish probable cause for a belief that contraband is present[,]" *id*. at 376-77, the officer in *Bailey* testified that he smelled "ether," a lawful substance, and there were no other circumstances indicating that a crime had been or was being committed. *Id*. at 383.

Nor was the seizure a *Terry* frisk. *Id*. at 366-67. The officer did not have reasonable articulable suspicion that the subject was armed and dangerous. *Id*. at 368. It was not necessary for the Court to consider whether the officer had reasonable suspicion

for an investigative stop when he approached Bailey, because, as a matter of fact, there had been no investigative stop. *Id*. at 364. Once the officer smelled ether, he did not inquire why Bailey smelled like ether. *Id*. at 360.

Here, the officers who apprehended appellant testified that they smelled PCP and that they knew PCP when they smelled it. The trier of fact accepted this evidence unqualifiedly. Appellant argues that more is required in that the police must distinguish what they identified as PCP from a lawful substance. He submits: "If what the police smelled was a lawful substance commonly associated with PCP, they failed to specify which chemical they smelled and how they were able to conclude that it was evidence of PCP use or trafficking (and not lawful activity)." Appellant's Brief at 20. He relies on the following passage from *Bailey*:

> "Unlike marijuana, which has a readily identifiable, distinctive odor, it is unclear from the case law or the record in the present case whether PCP has its own distinctive odor when it is transported or consumed, or whether the odor is that of other substances allegedly associated with the drug, such as ether. … Moreover, the record in the present case is barren of information about the qualities of PCP odors. There is no information in the record indicating whether the odor of PCP may have different qualities, similar to the distinction between the odor of burning marijuana and raw marijuana. …
>
> "We are unaware of any cases in which a court held that the smell of ether or another lawful substance associated with contraband, on its own, constituted probable cause for a belief that contraband was present or a crime was committed."

Id. at 379-81 (citation and footnote omitted).

In the case before us, the officers testified, without objection, that the odor detected was PCP. They described a present sense impression based on their experience. This

satisfied the State's burden to produce evidence that the seizure fell within an exception to the warrant requirement. The officers had probable cause to believe a crime was being or had been committed. Appellant seems to contend that the burden was on the State to produce, *at the suppression hearing*, evidence that the odor, believed to be PCP, was not produced by some lawful substance. That is the State's burden at trial, when, through expert testimony, the State must show beyond a reasonable doubt that the source producing the odor was contraband. At the suppression hearing, the appellant was free to produce evidence that a lawful substance, that would be expected to be found on a residential street in the dead of winter, could have produced an odor confusingly similar to that of PCP. The defense did not do so.

In any event, even if the officers' testimony was legally insufficient to permit a finding of probable cause, it demonstrated reasonable articulable suspicion that criminal activity was afoot. It was articulable because the officers said that the odor smelled like the PCP that they had previously encountered. It was reasonable because that description impliedly was based on their firsthand experience in making arrests for PCP possession where there had been later laboratory confirmation that the seized substance was in fact PCP.[3]

III

[3]As noted, *supra*, *Bailey* did not address whether an investigatory stop could be based on an odor identified by the arresting officer as ether, much less did it address an investigatory stop based on an odor identified as PCP.

Appellant contends that this is a pure "waistband" case. He relies on *In re Jeremy P.*, 197 Md. App. 1 (2011), where, in a pure waistband case, this Court reversed a denial of suppression. *Jeremy P.* is distinguishable.

There, the arresting officer, from his patrol car, observed seventeen-year-old Jeremy leaving a fast food restaurant on foot. *Id*. at 4. As the subject and his companion were standing, about to cross the street, the subject made certain movements two or three times. *Id*. at 5. "He kept playing around with his waistband area. We [the police] call that a high risk area [of the clothing]. And he kept making firm movements in his waistband area." *Id*. at 4 (emphasis omitted). The officer called for back-up, drove past the two, waited, and made a stop. *Id*. at 5-6. He ordered the two to the ground. *Id*. at 6. Jeremy again was "making the movements to the waistband and fiddling around." *Id*. at 6. In preparation for a pat down, the officer ordered Jeremy to stand up and a handgun fell out of his waistband area. *Id*.

We explained:

> "Appellant cites a number of 'waistband' cases decided in other jurisdictions and our research uncovered others. Although there can be no bright-line rule given the individualized nature of such cases, our review indicates that a police officer's observation of a suspect making an adjustment in the vicinity of his waistband does not give rise to reasonable suspicion sufficient to justify a *Terry* stop. Typically, to provide the reasonable and articulable suspicion necessary to warrant an investigative detention *in the absence of other suspicious behavior indicating the possibility of criminal activity*, the officer must be able to recount specific facts, in addition to the waistband adjustment, that suggest the suspect is concealing a weapon in that location, such as a distinctive bulge consistent in appearance with the presence of a gun."

Id. at 14 (emphasis added).

In the case before us, there was suspicious behavior, prior to the waistband adjusting, that indicated criminal activity. The officers smelled what they identified as PCP emanating from the area of the SUV. There were two males in passenger positions in the SUV and the driver's seat was unoccupied. Appellant was standing next to the SUV, but, after looking in the direction of the first patrol car to pull up, he entered the driver's seat, indicating his control of the source of the PCP odor. The odor became stronger as the officers approached the SUV on foot.

Appellant locked the doors to the SUV. Through the driver's window that was down a couple of inches, Officer Katzemaier began to engage appellant in conversation. Appellant said he lived in the area but not in the residence in front of which he was parked. His demeanor was "erratic." He was "reaching around the vehicle and reaching into his waistband." His answers to the officer's questions were "very evasive."

Officer Katzemaier asked appellant to step out of the SUV, but he refused. He repeatedly asked the officer why he should get out and Officer Katzemaier explained to him that the police had smelled PCP.

Appellant's brother, in the front, right seat, told the appellant "to listen to what [the police] were asking him to do, to not cause any more trouble." The brother unlocked the doors.

Officer Katzemaier opened the driver door, but appellant would not come out. The officer tried "to coax him out." Appellant "kept reaching at his waistband." Officer

Katzemaier "grabbed [appellant's] hands to stop him from reaching, because at that point we don't know if he is reaching for a weapon."

Appellant started to step out and bent over at the waist "as if trying to conceal something in his waistband." He said he "had back problems, complaining about a back issue." That is when the officer patted down appellant and felt the handgun for the possession of which appellant was convicted.

Officer Katzemaier's description of these additional facts, coupled with the hand to waistband movement, presented reasonable suspicion that appellant was armed.

Conclusion

Based on our independent constitutional review of the record, we conclude that there was no violation of appellant's right to be free from unreasonable searches and seizures.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED.

COSTS TO BE PAID BY THE APPELLANT.