Circuit Court for Prince George's County
Case No. CT160015X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2086

September Term, 2016

ANDRE DAVIS

v.

STATE OF MARYLAND

Woodward C.J.,
Friedman,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned)

JJ.

PER CURIAM

Filed: December 7, 2017

A jury sitting in the Circuit Court for Prince George's County convicted appellant, Andre Davis, of wearing, carrying, and transporting a handgun. He appeals from the court's pre-trial denial of a motion to suppress the fruits of a search of his vehicle. Appellant argues that his parked vehicle was unlawfully "stopped" within the meaning of the Fourth Amendment when the police, in a marked vehicle, parked perpendicularly behind him, "partially blocking egress from [his parking] space." Appellant argues that "despite the technical availability of a route out," a reasonable person would not have felt free to leave, and therefore the police action constituted a "stop" of which the State failed to meet its burden of showing was supported by reasonable articulable suspicion. We affirm.

BACKGROUND

On October 23, 2015, Officer Trae Shelton, and Corporal Stephen Saraullo of the Prince George's County Police Department were on patrol in a marked police cruiser in the 6800 block of Central Avenue. At approximately 8:55 p.m. they entered the parking lot of an apartment complex at that location and observed a Porsche SUV to be parked in a parking space near the entrance of the parking lot with its engine running.

The parking lot was long and rectangular in shape and had parking spaces on the left hand side and a two-way lane on the right. Corporal Saraullo testified that while the traffic lane was a "pretty narrow space," it was large enough for two cars to get through. The officers drove the length of the parking lot, turned around and returned to the entrance of the parking lot. Observing the SUV to still have its lights on, Officer Shelton parked his marked patrol vehicle in the traffic lane of the parking lot and within five to six feet of the

SUV. Officer Shelton testified that although he was parked in the traffic lane, close to the SUV, the SUV had enough room to back out of its parking space and leave the parking lot. Officer Shelton also testified that, the patrol vehicle was blocking traffic entering and exiting the lot. Corporal Saraullo testified, however, that during the entire stop, other vehicles were driving past the police cruiser. Corporal Saraullo agreed with Officer Shelton that appellant's vehicle had enough space to pull out of its parking space and exit the lot.

Officer Shelton and Corporal Saraullo exited their patrol vehicle and approached the SUV. As Officer Shelton approached, he smelled the odor of what he believed through his training, knowledge, and experience to be burnt marijuana. He then knocked on the driver's side window and instructed the driver to roll the window down. Officer Shelton noted that the odor of marijuana became stronger as the window was rolled down. As he spoke with appellant, the sole occupant of the SUV, who was seated in the driver's seat, Officer Shelton opened the door and immediately noticed a scale, a box of sandwich baggies and a knife in the door pocket.

A subsequent search of the vehicle revealed a burnt marijuana cigarette and a bag of marijuana in the center console, a handgun in a compartment located under the driver's armrest, and a book bag in the rear seat of the vehicle containing an extended magazine clip along with packaging materials for large quantities of marijuana with residue inside.

During the search, Officer Shelton called out to Corporal Saraullo and asked him to ask appellant for his "ID." Appellant then told Corporal Saraullo that his passport was in

the center console "where the gun was." Officer Shelton then searched that area and found appellant's passport underneath some papers.

DISCUSSION

Appellant argues that "despite the technical availability of a route out," a reasonable person would not have felt free to leave, and therefore the police action constituted a "stop" of which the State failed to meet its burden of showing was supported by reasonable articulable suspicion.

As an initial matter, defense counsel affirmatively waived appellate review of the court's denial of the motion to suppress the fruits of the search of appellant's vehicle. The motion was denied prior to trial. At trial the State moved to introduce the gun, magazine clip, bullets, and photos of those objects. Each time the State moved to introduce an item into evidence, the court asked the defense whether they objected to the admission. On each occasion, and as to each piece of evidence, the defense responded that there was no objection.

A pretrial ruling denying a motion to suppress evidence is "preserved for appellate review, even if no contemporary objection is made at trial." *Jackson v. State*, 52 Md. App. 327, 331, *cert. denied*, 294 Md. 652 (1982). "The right of appellate review," however, "can be waived in many ways." *Id.* "If a pretrial motion is denied and at trial appellant says he has no objection to the admission of the contested evidence, his statement effects a waiver." *Id.* at 332. Such is the case here. At trial appellant was specifically asked if he objected to the admission of the evidence found during the search of his vehicle. On each

occasion, appellant, through defense counsel, indicated that he did not object. As a result, he has waived appellate review of the lower court's denial of his motion to suppress.

Nevertheless, even had this issue been preserved for review, we would not have held that the court's ruling was in error. We review a trial court's ruling on a motion to suppress *de novo*, and "look only to the record of the suppression hearing and we do not consider any evidence adduced at the trial." *Brown v. State*, 397 Md. 89, 98 (2007). An investigative stop implicates the Fourth Amendment and requires that the police have "reasonable suspicion that a person has committed or is about to commit a crime." *Swift v. State*, 393 Md. 139, 150 (2006) (citation omitted). A person is seized if, "in view of all the circumstances surrounding the incident, by means of physical force or show of authority a reasonable person would have believed that he was not free to leave or is compelled to respond to questions." *Id.* at 151. "A seizure can occur by means of physical force, or show of authority along with submission to the assertion of authority." *Ferris v. State*, 355 Md. 356, 375 (1999). "[B]ecause an individual is free to leave at any time" during a consensual encounter, such person is not "seized" within the meaning of the Fourth Amendment and therefore the encounter "need not be supported by any suspicion." *Swift*, 393 Md. at 151.

In the present case there is no dispute that once the officers detected the odor of marijuana coming from the vehicle, they had reasonable articulable suspicion to conduct an investigatory stop. The issue in this case is whether appellant was "seized" within the meaning of the Fourth Amendment from the time the officers stopped their vehicle to the time they approached appellant's vehicle on foot and smelled the odor of marijuana.

Both officers testified that, while their vehicle was parked behind appellant's vehicle, it was not completely blocking appellant's vehicle, and that appellant would have been able to back out of the parking space and exit the parking lot. Officer Shelton further testified that all of the parking spaces were occupied, and that as a result he was forced to park in a traffic lane.

We considered a similar encounter in *Pyon v. State*, 222 Md. App. 412 (2015), and determined that it constituted a *Terry* stop. The present case, however, is distinguishable. In *Pyon* the police vehicle partially blocked, but did not completely block the egress of that defendant's vehicle. Unlike the present case, however, the police vehicle in *Pyon* had room to park "unobtrusively" behind defendant's vehicle, and therefore its position "cater-corner" to the rear of defendant's vehicle "would thereby say something to a reasonable person about his freedom to leave." *Id.* at 448. Further, in *Pyon*, we noted that the time and place of the police encounter, "shortly after midnight on a lonely residential street apparently with no other persons abroad in the neighborhood," was a "circumstance that could well have been more threatening than reassuring." *Id.* at 450. In contrast, the encounter in the present case occurred in a busy residential parking lot at 8:55 p.m. Additionally, the officer in *Pyon* approached defendant, who was seated in the passenger seat, and immediately asked for his license, whereupon the officer smelled the odor of marijuana. *Id.* at 428. We held that the officer did not have justification to ask for the license and that such an inquiry "is hardly a conducive introduction to a request for mutually consensual conversation." *Id.* at 450. Here, Officer Shelton smelled the odor of marijuana upon approach to appellant's vehicle and therefore his ultimate request for

identification is not a factor we consider when determining if the initial encounter was voluntary. Finally, we found that the officer's call in *Pyon*, and subsequent wait for back-up, after parking partially behind the defendant's vehicle, and before approaching the defendant, conclusive in our determination that the encounter was not voluntary. *Id.* 456. We noted that "[i]n assessing the tone and mood of a police-citizen encounter, a call for reinforcements is quintessentially confrontational." *Id.* There was no such call and wait in the present case. Both officers testified that they parked their vehicle and then approached appellant's vehicle. Finally, in the present case, there is no indication that, even if the police expressed a show of authority, which would have lead a reasonable person to believe that he was not free to leave, the appellant submitted to that show of authority. Under the totality of the circumstances, we hold that the police encounter in the present case was voluntary and as a result, it did not need to have been supported by reasonable articulable suspicion.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.