Circuit Court for Howard County
Case No. 13-K-16-56847

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2446

September Term, 2016

NICHOLAS JAMES CLEMENS

v.

STATE OF MARYLAND

Berger,
Beachley,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: December 12, 2017

The State charged appellant Nicholas Clemens with driving under the influence of alcohol. Following the denial of his motion to suppress the results of his field sobriety tests, appellant waived his right to a jury trial, pleaded not guilty, and stipulated to the results of his breathalyzer test. The trial court found appellant guilty of driving under the influence of alcohol and sentenced him to one year of incarceration, suspended, with three years of supervised probation. Appellant timely appealed and presents the following two issues for our review:

1. Did the seizure of the [a]ppellant by police violate the Fourth Amendment?
2. Did the failure to provide *Miranda* warnings render the field sobriety tests inadmissible?

We affirm appellant's conviction.

BACKGROUND

On the evening of June 11, 2016, Howard County Police officers arrested and charged appellant with driving under the influence of alcohol. After transfer of the case to the circuit court on appellant's request for a jury trial, appellant moved to suppress any evidence of the events that took place after the officers initiated field sobriety tests. Prior to the hearing on the motion to suppress, appellant reached an agreement with the State wherein, if his motion were denied, he would waive his right to a jury trial and stipulate to the results of his breathalyzer test. Appellant's suppression hearing was held in the circuit court on December 15, 2016.

The State's first witness at the hearing was Officer Robert Hedrick. Officer Hedrick testified that on the evening of June 11, 2016, a concerned citizen called the Howard

County Police Department to notify them that a blue Toyota was driving erratically. At approximately 7:30 p.m., Officer Hedrick and Officer Karen Reyes responded to the location of the vehicle. While the officers were driving to the reported location of the vehicle, dispatch received at least one more call further describing the vehicle as a blue Toyota Prius and identifying the vehicle's license plate number. When the officers arrived, they observed a vehicle pulled off to the side, but still parked halfway in the road. Appellant was walking around the rear of the blue Toyota, looking at the ground, when the officers approached.

Officer Hedrick testified that as he exited his vehicle, appellant turned around to face him, stumbled, and placed his right hand on the blue Toyota. Officer Hedrick introduced himself to appellant, and appellant explained that he had just changed a flat tire. Officer Hedrick asked to see the flat tire, and appellant showed the officer a tire with a hole in its sidewall the size of a golf ball. Based on the location and size of the hole, Officer Hedrick testified that the tire's damage was consistent with hitting or scraping against something, such as a curb.

While speaking with appellant, Officer Hedrick detected the faint odor of alcohol on appellant's breath. Officer Hedrick asked appellant whether he had consumed any alcoholic beverages that day, to which appellant replied that he had one beer with lunch at approximately 2:00 p.m. At this point, Officers Hedrick and Reyes led appellant to the front of appellant's vehicle, in order to conduct field sobriety tests.

Officer Reyes also testified at the suppression hearing. In addition to corroborating Officer Hedrick's testimony, Officer Reyes testified that upon arrival, she saw a pair of glasses underneath the Toyota's rear passenger tire—the same tire appellant had just replaced. The glasses were wedged under the tire in such a way that they could not be retrieved until the vehicle was towed. Finally, Officer Reyes testified that one of the 911 callers who noticed appellant's erratic driving provided identifying information to dispatch.

As stated above, the trial court denied the motion to suppress. The parties proceeded by way of an agreed statement of facts, and the trial court found appellant guilty of driving under the influence of alcohol.

DISCUSSION

I. Reasonable Articulable Suspicion

Appellant first argues that the trial court erred in denying his motion to suppress because there was insufficient reasonable articulable suspicion to justify the request to perform field sobriety tests. The Court of Appeals has stated the proper standard of review for motions to suppress as follows:

> In reviewing a trial court's decision to grant or deny a motion to suppress, an appellate court ordinarily limits its review to the record of the motions hearing. *Trusty v. State*, 308 Md. 658, 669-72, 521 A.2d 749 (1987). The evidence is viewed in the light most favorable to the prevailing party, and the trial court's fact findings are accepted unless clearly erroneous. *Williamson v. State*, 413 Md. 521, 531, 993 A.2d 626 (2010). "The ultimate determination of whether there was a constitutional violation, however, is an independent determination that is made by the appellate court alone, applying the law to the facts found in each particular case." *Belote v. State*, 411 Md.

> 104, 120, 981 A.2d 1247 (2009) (citations omitted); *see also Carter v. State*, 367 Md. 447, 457, 788 A.2d 646 (2002).

Sinclair v. State, 444 Md. 16, 27 (2015).

In his brief, appellant concedes that Officer Hedrick needed only reasonable articulable suspicion in order to conduct field sobriety tests. *See Blasi v. State*, 167 Md. App. 483, 510 (2006). Appellant claims, however, that Officer Hedrick did not have reasonable articulable suspicion to require appellant to perform field sobriety tests.

To determine whether reasonable articulable suspicion exists, "[t]he test is the totality of the circumstances, viewed through the eyes of a reasonable, prudent, police officer." *Sellman v. State*, 449 Md. 526, 542 (2016) (internal quotation marks omitted) (quoting *Bost v. State*, 406 Md. 341, 356 (2008)). In *Sellman*, the Court of Appeals explained that,

> reasonable suspicion is a common sense, nontechnical conception that considers factual and practical aspects of daily life and how reasonable and prudent people act. While the level of required suspicion is less than that required by the probable cause standard, reasonable suspicion nevertheless embraces something more than an inchoate and unparticularized suspicion or hunch. Second, a court's determination of whether a law enforcement officer acted with reasonable suspicion must be based on the totality of the circumstances. Thus, the court must . . . not parse out each individual circumstance for separate consideration. . . . In making its assessment, the court should give due deference to the training and experience of the law enforcement officer who engaged the stop at issue. Such deference allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person. To be sure, [a] factor that, by itself, may be entirely neutral and innocent, can, when viewed in combination with other circumstances, raise a legitimate suspicion in the mind of an experienced officer.

Id. at 543 (quoting *Crosby v. State*, 408 Md. 490, 507-08 (2009)). Here, the trial court made the following findings of fact in determining that Officers Hedrick and Reyes possessed reasonable articulable suspicion to administer field sobriety tests:

- A 911 caller who provided her identifying information called to report appellant's erratic driving.
- When the police arrived, appellant's car was parked in such a way as to create a hazard to traffic.
- Officers observed a hole in appellant's tire consistent with hitting a curb.
- Appellant stumbled, used his car for support, and appeared confused.
- Appellant emitted an odor of alcohol and admitted to having consumed alcohol earlier that day.
- Officers saw appellant's glasses lodged under his tire.

We conclude that, based on the totality of these circumstances, the officers had sufficient reasonable articulable suspicion to administer field sobriety tests to appellant.

II. *Miranda v. Arizona*, 384 U.S. 436 (1966) and Field Sobriety Tests

Appellant's second argument is that the officers should have provided him with *Miranda* warnings prior to conducting the field sobriety tests. In his brief, appellant argues that,

> there are three elements to deciding whether a law enforcement officer must provide *Miranda* warnings to a suspect. The first is whether the suspect was in custody at the time of the statement. The second is whether the statement was generated by an interrogation. The third is whether the statement was "testimonial."

According to appellant, he "was plainly in the custody of two uniformed police officers."

In *McAvoy v. State*, 314 Md. 509, 510-11 (1989), McAvoy made a right turn at an intersection while facing a red light, and in so doing, forced a police officer off the road. The officer then followed McAvoy for three-fourths of a mile before initiating a traffic

stop. *Id*. at 511. At the stop, the officer asked why McAvoy had made a right turn at the red light when a traffic sign expressly prohibited such a maneuver. *Id*. McAvoy replied that there was no traffic sign, but agreed to return to the intersection with the officer to verify the traffic sign's existence. *Id*. McAvoy and the officer returned to a lighted parking lot near the intersection and saw the traffic sign that prohibited making a right turn on red. *Id*. While in the parking lot, the officer noticed for the first time McAvoy's watery and bloodshot eyes, flushed face, and the odor of alcohol. *Id*. The officer asked McAvoy to recite the alphabet and to perform a finger-to-nose test. *Id*. When McAvoy failed to successfully perform both of these tasks, the officer placed him under arrest. *Id*.

On appeal, McAvoy argued that the police officer performed field sobriety tests after placing him in police custody, thus triggering his *Miranda* protections. *Id*. at 514. The Court of Appeals concluded that McAvoy was not in custody within the meaning of *Miranda* when the officer conducted field sobriety tests. In reaching its decision, the Court relied on *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984), where the United States Supreme Court stated:

> [A] single police officer asked respondent a modest number of questions and requested him to perform a simple balancing test at a location visible to passing motorists. Treatment of this sort cannot fairly be characterized as the functional equivalent of formal arrest.

Here, Officer Hedrick testified that he and Officer Reyes were both in uniform and wearing badges when they spoke with appellant. Based on reasonable articulable suspicion, Officer Hedrick led appellant to the front of appellant's vehicle and told appellant that he wanted

to conduct field sobriety tests. Comparing the facts in *McAvoy* with the sparse record in this case, we fail to see how appellant was "in custody" for purposes of *Miranda*.

"[W]ithout custody, the question of whether [field sobriety] tests constituted interrogation or its functional equivalent need not be answered." *Brown v. State*, 171 Md. App. 489, 527 (2006). "Because [appellant] was not in custody when [the officer] performed the field sobriety tests, the protections afforded under *Miranda* simply do not apply." *Id*. In our view, *McAvoy* and *Brown* adequately resolve appellant's *Miranda* claim—unfavorably to appellant.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.