UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2727

September Term, 2015

RICARDO O'NEILL BROOKS

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Wright,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: May 17, 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.

By indictment filed on October 8, 2014, in the Circuit Court for Howard County ("circuit court"), the State of Maryland charged appellant, Ricardo O'Neil Brooks, with armed robbery. On or about October 17, 2014, Brooks filed several motions, including a motion to suppress any evidence taken "as the result of an illegal search and seizure." Following a motions hearing on February 26, 2015, the circuit court denied Brooks's request.

A jury trial was held from January 6-8, 2016, after which Brooks was found guilty. Immediately after the trial, the circuit court sentenced Brooks to ten years' incarceration. On January 15, 2016, Brooks timely appealed, presenting two issues for our review:

1. Did the circuit court err in denying the motion to suppress the evidence found by Howard County police in [Brooks]'s vehicle?

2. Did the [circuit court] err in believing that a ruling by the Circuit Court for Montgomery County procedurally barred it from considering the defense's motion to suppress [Brooks]'s cell phone and evidence derived from it?

We answer "no" to the first question and "yes" to the second. As such, we order a limited remand to the circuit court so that it can hold a suppression hearing on the validity of the search of Brooks's cell phone.

Facts

The State accused Brooks of robbing a CVS store along Centennial Lane in Ellicott City, Maryland, during the early morning hours of September 12, 2014. At the

suppression hearing on February 26, 2015, the parties argued whether the police lawfully seized evidence from a car driven by Brooks on September 12, 2014.

Officer Demetrius Fortson of the Howard County Police Department testified that at around 2:50 a.m. on September 12, 2014, he was on night-shift patrol in Ellicott City when he received a dispatch about an armed robbery at the CVS store located at 3300 Centennial Lane. The dispatch did not identify any motor vehicle involved in the robbery. Ofc. Fortson responded by "getting onto Centennial Lane north to get to the CVS." As he was driving, at about 2:56 a.m., Ofc. Fortson noticed a light colored Toyota Camry "going in the opposite direction, which is southbound, above the posted speed limit." He testified that, "[g]iven the fact that there were no other cars on the road and the robbery call was in progress while [he] was responding, [Ofc. Fortson] turned around the car to see if [he] could make a traffic stop, see what was going on." Upon making a u-turn, Ofc. Fortson lost sight of the vehicle. But, because the road was straight and "you could see a good distance of any cars driving, . . . it was safe to presume that the car went in one . . . development" that is a dead end. Being familiar with the area, Ofc. Fortson waited on Centennial Lane where he thought the car would emerge.

At around 3:03 a.m., Ofc. Fortson saw the vehicle again at the intersection of Centennial Lane and Old Annapolis Road. He noticed that the windshield was cracked and saw that the driver, who was the sole occupant, was using a handheld device. Knowing that the police had a roadblock set up ahead, Ofc. Fortson remained behind the vehicle with his emergency lights and sirens turned off. As they approached the roadblock, made up of about four marked patrol vehicles, Ofc. Fortson activated his

lights and sirens to effect a "felony stop." According to Ofc. Fortson, because he "had information that [the robber] had a gun," "the stop was going to be for the armed robbery."

The stop took place at around 3:07 a.m., at which time a police sergeant ordered the driver exit the vehicle. The driver complied with all orders, was handcuffed, and was escorted to the curb. An immediate pat down conducted by one of the officers yielded no weapons. While at the curb, the driver identified himself to Ofc. Fortson as Ricardo Brooks. Ofc. Fortson testified that Brooks was wearing a "gray and black baseball cap, a white tee-shirt, black shorts with cargo . . . pockets, and high top style black and red athletic foot gear." This contrasted with the description of the armed robber broadcasted by dispatch, which was "a subject, maybe six feet tall, black hoodie, dark clothing." Ofc. Fortson recalled that after Brooks was handcuffed, other officers said that they saw a gun in the car, as well as a black bag with currency sticking out of it.

Officer Chaz Runk, one of the officers who was part of the roadblock, also testified at the suppression hearing. After Brooks was stopped, Ofc. Runk exited his vehicle with his "Glock 22 departmentally issued handgun at below ready position" and recalled that at least two other officers did the same. When Ofc. Runk approached the vehicle, he saw that Brooks had his hands on the steering wheel, and he told Brooks to keep his hands where police could see them. Brooks unfastened his seatbelt, stepped out of the car, and "was detained at that point for investigative purposes." Thereafter, Ofc. Runk approached the driver's side of the vehicle and was about 1-2 feet away when he "observed a black cloth bag containing U.S. currency in plain sight . . . [p]artially

underneath the driver's side of the vehicle." After police confirmed that the robber of the CVS placed money into a black cloth bag, Brooks was placed under arrest.

Sergeant Matthew Robine testified that he drove behind Ofc. Fortson when Brooks was headed towards the roadblock. Sgt. Robine verified that Brooks complied with the demands to exit the vehicle and recalled that Brooks had a cell phone in his hand, which he placed on the roof of the car as instructed. After Brooks was arrested, one of the officers popped the trunk of the car and "saw a dark blue coat with a hood, similar to what was worn by the suspect in the robbery." In addition, police also found a gun underneath the passenger's seat. When asked why Brooks was not released before the black bag was seen, Sgt. Robine stated that they "were still conducting [their] investigation at that point," and that Brooks "was being detained until [they] were able to determine exactly what [they] had." On cross-examination, Sgt. Robine acknowledged that a CVS clerk working at the time of the robbery could not identify the robber and that the clothing worn by Brooks at the time of the stop generally did not match the description given by CVS staff.

The defense called a single witness at the suppression hearing: Detective Corporal Dan Branigan of the Howard County Police. Det. Branigan testified that he responded to the CVS at around 2:50 a.m. on September 12, 2014, in reference to a robbery. Upon his arrival, a CVS worker informed him that the robber was male and provided him with a "basic clothing description." Det. Branigan's police report described the suspect as "being 6 feet tall, with an average build," wearing "a navy blue hooded coat, black pants, black or brown shoes, and wearing black gloves with a black and white bandana covering

his face." Det. Branigan also testified to learning that the money taken from the register was placed in a black cloth or canvas bag.

After hearing argument from the parties, the circuit court denied the motion to suppress, stating in pertinent part:

> It appears to the Court that this was all done in sufficient compliance with the Fourth Amendment and was certainly very reasonable under all the circumstances. The State has relied on *Fairwell v. State*, 150 [Md.] App. 540, a 2003 case and *Williams v. State*, 212 [Md.] App. 396, a 2013 case, to support the *Terry*[1] type stop of this vehicle under all the circumstances at approximately between 2:51 [a.m.] in the morning of September 12, and for 15 or 20 minutes thereafter that stop was produced because of the information that had been received which included the first officer's sighting of the vehicle and his observations at that time . . . .
>
> And at that point the Court believes that there is a sufficient basis under the cases cited by the State to stop and detain the Defendant at that juncture. And the Court does believe that given the circumstances, it was a relatively brief detainment of the suspect and albeit he was put into handcuffs, and sat down on the side of the road, and that is certainly not a pleasant experience, but given the circumstances and the information the police had, I think it was a very reasonable approach and it seems to the Court in compliance with *Fair[]well* and *Williams*.
>
> * * *
>
> So this one vehicle takes on some significance true, it could have been a big mistake . . . . But under the touchstone of the Fourth Amendment which is reasonableness, under these circumstances at this particular situation, I think there was enough reasonable articulable suspicion for a *Terry* type stop as discussed in the *Fairwell* and *Williams* type cases. And I don't see this as being, kind of no matter how you factor it, I don't see this as being particularly lengthy and officers were definitely trying to resolve the situation quickly and they did resolve it quickly.
>
> * * *
>
> And I think the testimony, the most credible testimony is that sort of contemporaneously, they were getting the information that the money had -- that the robber of the CVS had taken, was put into a black bag and that seemed to match up with what the officers were seeing. True, people could

[1] *Terry v. Ohio*, 392 U.S. 1 (1968).

> have a black bags [sic] of money under their driver's seat for reasons that have nothing to do with this particular event, that's perfectly fine.
>
> But the stopping the car and seeing this at that time, certainly gave them the right to continue to detain and to investigate further. I don't see that there's any real Fourth Amendment problems with the stop of the vehicle. That the seizure of the Defendant with the detention for the length of time that was done, for the search of the vehicle to the extent this could be described as a search at that time and the later obtaining of the search warrant on it.

Following a jury trial from January 6-8, 2016, Brooks was found guilty of armed robbery, and the circuit court sentenced him to ten years' incarceration. This appeal followed.

Additional facts will be included as they become relevant to our discussion, below.

Standard of Review

In reviewing the denial of a motion to suppress evidence, appellate review "ordinarily is limited to the record of the suppression hearing." *Crosby v. State*, 408 Md. 490, 505 (2009) (citations omitted). We "do not engage in *de novo* fact-finding" but, instead, we "extend great deference to the findings of the motions court as to first level findings of fact and as to the credibility of witnesse[s]." *Padilla v. State*, 180 Md. App. 210, 218 (2008) (citations omitted). Thus, "we accept the findings of fact made by the circuit court, unless they are clearly erroneous" and otherwise review the record "in the light most favorable to the prevailing party." *Conboy v. State*, 155 Md. App. 353, 361 (2004) (citations omitted). "After giving due regard to the suppression court's findings of fact, we then make our own independent appraisal by reviewing the law and applying it

to the facts of the case." *Christian v. State*, 172 Md. App. 212, 216 (2007) (citing *McMillian v. State*, 325 Md. 272, 281-82 (1992)).

Discussion

I. Suppression Hearing

Brooks first argues that the circuit court erred in denying his motion to suppress. According to Brooks, "police effectively arrested [him] when they used a police roadblock to engage in a 'high felony traffic stop,' drew their weapons, and handcuffed him." Asserting that "police lacked probable cause to arrest [him] *at that point*," Brooks contends that the evidence subsequently found in the car must be suppressed as "fruit of the poisonous tree."

As Brooks aptly states, our inquiry here is as follows: we must determine whether police arrested Brooks or merely detained him for investigative purposes, and if the former, whether police had probable cause to support an arrest. For the following reasons, we conclude that Brooks was stopped and detained for investigative purposes, and not arrested, despite the police's use of a roadblock, drawn weapons, and handcuffs. As such we need not determine whether the police had probable cause.

The Fourth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, *see Mapp v. Ohio*, 367 U.S. 643, 655 (1961), guarantees, *inter alia*, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." U.S. Const. amend. IV. "The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable." *Florida v. Jimeno*, 500 U.S. 248,

250 (1991) (citation omitted). While it is true that a traffic stop, even if brief, constitutes a "seizure" under the Fourth Amendment, *Rowe v. State*, 363 Md. 424, 432 (2001), the Supreme Court has held that a police officer under certain circumstances may stop and briefly detain a person for the purpose of investigating whether that person is engaged in criminal activity, even if the officer lacks probable cause to arrest that person. *Terry v. Ohio*, 392 U.S. 1, 30 (1968); *see also Lewis v. State*, 398 Md. 349, 361-62 (2007) ("A traffic stop is justified under the Fourth Amendment where the police have a reasonable suspicion supported by articulable facts that criminal activity is afoot.") (Citations omitted). "[A]n investigatory stop typically is justified where there is some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *Longshore v. State*, 399 Md. 486, 507 (2007). "Stated differently, if, under the totality of the circumstances, a police officer has a particularized and objective basis for suspecting criminal activity by the person stopped, then the stop and temporary detention is justified." *Id.* at 507-08 (citations omitted).

In this case, the totality of the circumstances supported the officers' reasonable belief that Brooks was the person who had robbed the CVS. Brooks's vehicle was the only car on the road in the early morning hours of 2:56 a.m., five minutes after the robbery was reported. He was driving with some haste from the direction of, and within a half mile of, the CVS. Although there were other possible avenues of escape from the CVS, the fact that his car was seen at a time and location that was consistent with the timing and a possible avenue of escape of the robbery suspect supported reasonable suspicion that its driver was the robber. *See Williams v. State*, 212 Md. App. 396, 410

(2013) (stating that several factors can contribute to the formation of a reasonable suspicion, including "the time of day of the stop [and] the total lack of vehicular and pedestrian traffic in that area").

Brooks contends that the use of force to effect a *Terry* stop for the purpose of investigating minor traffic violations was unreasonable and, therefore, constituted a *de facto* arrest. We reject this contention because it is based on a flawed premise, *i.e.*, the officers stopped him to investigate "minor traffic infractions." As the officers testified, and the circuit court found, police properly stopped Brooks because they reasonably believed that he committed the CVS robbery with a handgun.

As Brooks recognizes, the use of force can constitute an investigative detention, and not an arrest, in "special circumstances." *Longshore*, 399 Md. at 514. Use of force will not necessarily rise to the level of an arrest if police have reasonable suspicion to believe that the suspect poses a risk to officer safety or poses a flight risk. *Id.* at 509, 514-15. *See also Terry*, 392 U.S. at 24, 27 (permitting the use of a frisk where an officer reasonably believes that a person subject to an investigatory stop is armed and dangerous); *In re David S.*, 367 Md. 523, 539 (2002) (permitting officers to draw guns and order suspects to the ground where police reasonably believe that crime had been committed and suspect was armed with a gun).

Here, the officers indicated that Brooks was being stopped because they believed he might have been involved in the CVS robbery in which a gun was used. It was therefore reasonable for the officers to stop Brooks with four to five officers, some of whom had their guns in the low ready position, and to handcuff Brooks to protect

officers' safety while they attempted to confirm or dispel their suspicions about whether Brooks was the robber.

Contrary to Brooks's claims, the circumstances in the instant case are unlike *Longshore* or *Elliott v. State*, 417 Md. 413 (2010). In both of those cases, we determined that there were no special circumstances that would warrant the use of force. Both men were being investigated for drug crimes, and the officer observed no furtive movements to suggest that either Longshore or Elliott posed a flight or safety risk to officers. *Longshore*, 399 Md. at 514 ("no special circumstances existed that justified the police officers placing [Longshore] in handcuffs") (emphasis omitted); *Elliott*, 417 Md. at 431 (there was "no indication that Elliott posed a flight or safety risk in order to justify a hard take-down"). Because the officers here reasonably believed that Brooks was the person who had robbed the CVS with a handgun only minutes earlier, they were reasonable in using a moderate amount of force to effect a *Terry* stop. Thus, the use of force did not constitute a *de facto* arrest.

II. Cell Phone Evidence

Next, Brooks avers that the circuit court erred in holding that it was foreclosed from addressing the validity of the search of his cell phone by the Montgomery County Police Department ("MCPD").[2]

On January 6, 2016, the first day of trial, defense counsel moved to suppress the search of Brooks's phone, pursuant to a search warrant, by the MCPD, which was also

[2] At trial, the State introduced a screenshot from the phone that depicted a map of the CVS that was robbed.

investigating several robberies. Defense counsel acknowledged that the validity of the cell phone search was not challenged at the February 2015 suppression hearing. In response, the State argued that "the legality of that search was litigated in Montgomery County [and] it was determined by the court to be lawful." Therefore, according to the State, "law enforcement has it in its possession reasonably under the Fourth Amendment [and] there's nothing precluding the State from introducing it." The following then ensued:

> [DEFENSE COUNSEL]: . . . I believe that this Court has to make its own determination, looking at the warrant and four corners of the warrant, of whether or not the warrant passes muster under the - -
>
> THE COURT: And when should I do that?
>
> [DEFENSE COUNSEL]: I'm sorry, I can't hear you?
>
> THE COURT: When should I do that, now?
>
> [DEFENSE COUNSEL]: We could do it right now, Your Honor, the argument is very simple.
>
> THE COURT: No, it doesn't make - -
>
> [DEFENSE COUNSEL]: I - -
>
> THE COURT: - - whether it's simple or complex that doesn't - -
>
> [DEFENSE COUNSEL]: No, I think - -
>
> THE COURT: - - make a difference - -
>
> [DEFENSE COUNSEL]: Well, I - -
>
> THE COURT: - - no, just - -
>
> [DEFENSE COUNSEL]: I'm sorry.

> THE COURT: - - and it's your position, Madam State, that a determination by a Montgomery County court, perhaps, a circuit court, I don't know that, circuit court?
>
> [PROSECUTOR]: Yes, Your Honor.
>
> THE COURT: Correct.
>
> A determination by the Montgomery County Circuit Court that found the seizure of a cell phone pursuant to a Montgomery County Circuit Court search warrant was lawful and not subject to suppression should be dispositive for that issue as far as this Court's concerned?
>
> [PROSECUTOR]: Yes, Your Honor.
>
> THE COURT: Alright.
>
> [PROSECUTOR]: Okay.
>
> THE COURT: I believe that's the case.
>
> [DEFENSE COUNSEL]: Okay.
>
> THE COURT: So I'll deny your motion to suppress evidence, physical evidence, the cell phone, or testimonial evidence that a cell phone was seized in Montgomery County.

On appeal, Brooks argues that the trial court erred in concluding that it was bound by the decision of the Circuit Court for Montgomery County because neither the law of the case doctrine nor any other rule of law prevented it from reaching its own determination. In response, the State contends that Brooks waived his right to challenge the admissibility of the cell phone evidence because he did not raise this claim in a timely filed written motion as required by Md. Rule 4-252. We agree with Brooks.

Section 1-501 of Md. Code (1973, 2013 Repl. Vol.), Courts & Judicial Proceedings Article provides:

> The circuit courts are the highest common-law and equity courts of record exercising original jurisdiction within the State. Each has full common-law and equity powers and jurisdiction in all civil and criminal cases *within its county*, and all the additional powers and jurisdiction conferred by the Constitution and by law, except where by law jurisdiction has been limited or conferred exclusively upon another tribunal.

(Emphasis added). Based upon this, Brooks correctly states that the trial court in this case was not prohibited from considering a motion to suppress that had already been ruled upon by a circuit court in another county. Moreover, because the trial court was not acting in an appellate capacity when it denied the motion at issue, the law of the case doctrine had no application to the resolution of Brooks's motion. *See Scott v. State*, 379 Md. 170, 183 (2004) (explaining that "the law of the case doctrine is one of appellate procedure" such that "[u]nder the doctrine, once an appellate court rules upon a question presented on appeal, litigants and lower courts become bound by the ruling, which is considered to be the law of the case") (citations, quotations, and footnote omitted).

We reject the State's contention that a limited remand is not necessary because the motion was waived.[3] Here, the trial court never reached the issue of waiver because it

[3] The State also argues that the trial court never found good cause to excuse Brooks's waiver, noting that "the record reveals that the trial court was disinclined to consider Brooks's motion on the verge of trial given its untimeliness." Although the colloquy excerpted above does indicate that the trial court was not pleased with defense counsel's request for the court "to make its own determination" on the morning of the first day of trial, the trial court never actually denied the motion as untimely, nor did it state that it adopted the Circuit Court for Montgomery County's ruling only as an alternative.

erroneously believed that it was barred from doing so. The Court of Appeals has previously recognized that "[w]hen a court must exercise discretion, failure to do so is error, and ordinarily requires reversal." *Beverly v. State*, 349 Md. 106, 127 (1998) (citations omitted). Thus, we agree with Brooks that it would be patently unfair to now find waiver where the trial court might have been willing to reach the merits had it not incorrectly believed it lacked authority to consider the motion at all.

For the foregoing reasons, we affirm the circuit court's judgment in part and reverse in part. We remand the case for the limited purpose of holding a suppression hearing on the validity of the search of Brooks's cell phone. Although the State correctly points out that pursuant to Md. Rule 4-252, a motion to suppress evidence from an unlawful search or seizure must have been "filed within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court," we note that the court has the discretion to excuse a belated or nonconforming motion if the defendant is able to show "good cause." Md. Rule 4-252(a); *Pugh v. State*, 103 Md. App. 655-56 (1995).

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED IN PART AND REVERSED IN PART. CASE REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED EQUALLY BETWEEN APPELLANT AND HOWARD COUNTY.