Circuit Court for Charles County
Case No. C-08-CR-18-000435

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2403

September Term, 2019

MICHAEL MAURICE FORD

v.

STATE OF MARYLAND

Leahy,
Shaw Geter,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: May 10, 2021

A jury in the Circuit Court for Charles County convicted appellant, Michael Maurice Ford, of grossly negligent manslaughter by vehicle, negligent homicide by vehicle while under the influence of alcohol *per se*, and related offenses. The trial court sentenced Ford to a term of ten years in prison, after which he filed a timely notice of appeal.

Ford asks us to consider whether it was error for the suppression court to "allow any evidence, whatsoever, about involuntary field sobriety tests of a person who was already in police custody." For the following reasons, we affirm the trial court's judgments.

FACTS AND LEGAL PROCEEDINGS

Because the sole issue Ford raises on appeal relates to suppression of evidence, we recite only the facts necessary to provide background. On the afternoon of May 7, 2018, Ford, driving a commercial box truck at a high rate of speed, rear-ended two vehicles stopped near an intersection; a two-month-old infant was killed as a result of the collision. As Ford exited his vehicle, multiple witnesses observed beer cans fall from the truck. As Ford ran from the scene, a witness named Lamar Brooks gave chase and held Ford in a "citizen's arrest" until the police arrived and detained him for leaving the scene of an accident.

Maryland State Police Troopers Robert Kreczmer and Kyle Burroughs were the responding officers and smelled alcohol on Ford's person and observed that his eyes were bloodshot and glassy and his speech was slurred. Upon Kreczmer's administration of a

preliminary breath test ("PBT") and field sobriety tests,[1] Ford showed multiple signs of intoxication and was arrested for driving under the influence. A later intoximeter test, to which Ford consented, showed his alcohol concentration to be .24 per 210 liters of breath, three times the statutory limit for driving under the influence of alcohol *per se*.[2]

Prior to trial, Ford filed a written motion to suppress "any and all evidence" obtained after he was "immediately detained, handcuffed, and put inside a police car." In his motion, Ford argued that any statements he made at the scene of the crash were inadmissible at trial because he was subjected to custodial interrogation without first being properly apprised of his *Miranda* rights or waiving those rights.[3] According to Ford, the observations of his physical appearance, "including smell, gait, speech pattern, and the condition of his eyes, were gleaned during the extended custodial interrogation," and the police "directly relied on" those observations in deciding to subject him to the field sobriety tests and breath tests, which were then used to support his arrest. He argued that the results of those tests should have been suppressed as "fruits of the unlawful custodial interrogation" and "involuntary

[1] Field sobriety tests, conducted on the roadside, are "standard tests used by police officers to 'assess promptly the likelihood that a driver is intoxicated.'" *Blasi v. State*, 167 Md. App. 483, 509 (2006) (quoting *State v. Little,* 468 A.2d 615, 617 (Me.1983)). The tests involve "'simple tasks' designed to reveal objective information about the driver's coordination, cognitive abilities, and consumption of alcohol." *Id*.

[2] Pursuant to Md. Code, §10-307(g) of the Courts & Judicial Proceedings Article ("CJP") and §11-174.1(a) of the Transportation Article ("TR"), a person with an alcohol concentration of 0.08 or more is considered to be under the influence of alcohol *per se*.

[3] *See Miranda v. Arizona,* 384 Md. 436 (1966).

statements." The State, in its opposition to Ford's motion, acknowledged that Ford was not advised of his *Miranda* rights at the scene of the collision, but argued that his statements were voluntary and did not run afoul of the Due Process Clause. The State argued the troopers had reasonable, articulable suspicion to believe that Ford was under the influence of alcohol at the scene of the crash, and that the field sobriety and breath tests were constitutionally permissible searches in the absence of *Miranda* warnings because such tests do not create testimonial evidence.

The suppression court heard argument on Ford's motion on January 11, 2019. Defense counsel argued that immediately upon their arrival at the scene, the troopers handcuffed Ford, detained him for leaving the scene of an accident, placed him in a police car, and questioned him as to whether he had been drinking and why he had run. Ford was then removed from the police car and required to perform field sobriety tests involuntarily. In counsel's view, it was the troopers' observations, made during the "unlawful custodial interrogation," that created the suspicion that formed the basis of the field sobriety and breath tests Ford was compelled to perform.

The prosecutor responded that, notwithstanding the State's continued assertion that the testimonial statements Ford made were voluntary, the State did not intend to use any of those statements in its case-in-chief. The failure of the troopers to give Ford his *Miranda* rights, however, did not require suppression of physical evidence from the field sobriety and breath tests, particularly in light of the fact that the troopers' personal observations of evidence of intoxication—in addition to Ford's statements—led to their decision to require the tests.

Trooper Kreczmer testified that on the day of the incident, he had been employed with the Maryland State Police for 11 months and was then still undergoing field training with Trooper Burroughs. When he and Burroughs arrived at the scene of the crash on southbound Route 301, he was approached by a witness, who said the driver of the truck that had rear-ended the two other vehicles had fled behind a nearby muffler business. The troopers went around the building and found Brooks, who said he had seen Ford exit the truck at the scene and dump beer cans, both under the truck and behind the muffler business, at which time he grabbed Ford.

Kreczmer and Burroughs, with weapons holstered the entire time, "detained" Ford "for fleeing the scene of an accident" and placed him in handcuffs because they were unsure if he would try to run again. At that time the troopers did not give Ford his *Miranda* rights. As they questioned Ford, who was compliant with all their requests, about what had happened, the troopers detected "a strong odor" of alcohol on his breath. In addition, Ford appeared disheveled, his eyes were bloodshot and glassy, his speech was slurred, and he had trouble with his balance. Ford told the troopers that the accident was not his fault, and he instead blamed the female driver of one of the cars he hit. He also said he had last had an alcoholic beverage the night before.

When a woman approached accusing Ford of killing her baby, the troopers observed a child's car seat under a tree, with a large crowd forming around it. As some bystanders began making threats, Kreczmer and Burroughs walked Ford to Trooper Matthew Keyser's vehicle, 200 yards away from the scene, for his safety. Burroughs then left the area to provide aid to the baby.

Kreczmer told Ford he would be taken through several field sobriety tests, which Kreczmer was certified to administer. Although Kreczmer acknowledged that "it wasn't a question," he explained that a citizen "always [has] an option of doing it." Ford said that he understood the tests and indicated he had some physical ailments that would impede him from completing them. He also agreed to a PBT, with a result of .38. The tests, as part of the totality of the circumstances, indicated to Kreczmer that Ford had alcohol in his blood. Kreczmer then placed Ford under arrest for driving under the influence of alcohol and read him his DR-15 advisement rights.[4] Ford agreed to submit to an intoximeter test, which was administered at the La Plata police barracks approximately an hour later. The test showed a breath alcohol concentration of .24. At no time at the scene of the collision did Ford ask for an attorney.

In closing, defense counsel argued that the troopers immediately placed Ford in handcuffs and questioned him, without administering *Miranda* rights. Ford was then told

[4] As the Court of Appeals explained in *Motor Vehicle Admin. v. Delawter*, 403 Md. 243, 262 (2008):

> The DR-15 is 'a standardized statement of a detained driver's rights and the adverse administrative consequences,' *Willis v. State*, 302 Md. 363, 368 n. 3, 488 A.2d 171, 174 n. 3 (1985), which, 'in addition to advising individuals of the consequences of a test refusal, sets forth the sanctions for having a blood alcohol concentration in excess of the statutory limit, explains the administrative review process, and advises of the potential disqualification of a suspected drunk driver's Commercial Driver's License for a test refusal.' *MVA v. Atterbeary*, 368 Md. 480, 496, 796 A.2d 75, 85 (2002).

The Court of Appeals has "repeatedly held that due process is satisfied when the motorist reads or is read the DR-15." *Motor Vehicle Admin. v. Barrett*, 467 Md. 61, 70 (2020).

he was going to be subjected to a roadside sobriety tests, which comprised a coerced and involuntary search. Defense counsel argued that the results should be suppressed.

The prosecutor countered that due process voluntariness must be considered by the totality of the circumstances. Here, there was no force or threat of force, display of weapons, or inducements, and the troopers moved Ford away from the angry bystanders for his safety. Ford never asked for an attorney, nor indicated he was injured or in pain. The prosecutor acknowledged that field sobriety tests constitute a search within the meaning of Fourth Amendment protections but averred that *Miranda* warnings were not required because the troopers had reasonable, articulable suspicion that Ford was under the influence of alcohol, as evidenced by the bystanders' observation of beer cans falling from his truck, the odor of alcohol on his breath, his glassy bloodshot eyes, his slurred speech, and his unsteadiness on his feet. All those observations gave rise to the field sobriety tests, which were not testimonial in nature. Then, the PBT was administered, and all the circumstances amounted to probable cause to arrest Ford for driving under the influence. Ford was then required to submit to an intoximeter test, whether he agreed or not, which was further evidence of his impairment and did not require *Miranda* warnings.

The suppression court ruled that even if Ford had "not uttered a word," the troopers would have had probable cause to arrest him for driving under the influence, based on the facts of the collision, the beer cans Ford threw away, the fact that he fled the scene, the odor of alcohol on his breath, his glassy bloodshot eyes, and his slurred speech and trouble keeping his balance. As pertinent to the issue on appeal, the court explained:

THE COURT: All right. Well, the intoximeter is, is certainly the easiest one. Again, there's probable cause for the arrest. Even if you were to pull out the field sobriety—by the way, the written motion doesn't say that. Which is why I didn't address it. But that's fine. The intoximeter, you know—

[DEFENSE COUNSEL]: It doesn't?

THE COURT: I mean, I just read the last one, what the motion says. But the intoximeter, again, there's probable cause for the arrest. This is an arrest with a death. I don't even think he can refuse. I think they could force a blood draw in these situations. And that's really all that's needed here. So, certainly, you know—

[DEFENSE COUNSEL]: Right. Based on (inaudible) ruling if they have reasonable grounds.

THE COURT: Now, to, to suppress the field sobriety, the standardized field sobriety tests, [Defense Counsel], you say that he was forced to take the tests?

[DEFENSE COUNSEL]: Yeah, and that they were, that they are a search that was conducted in custody without any exception or without consent sought.

THE COURT: Okay. Now, the testimony from the officer was that he had the option, that everybody has the option. And then you followed up with, "Well, it wasn't a question." And he said it wasn't a question. I'm not exactly sure that that means he didn't have the option. So, give me the case law that says I should suppress the field sobriety test.

[DEFENSE COUNSEL]: Well, so, the State gave you case law that says it's a search, right?

THE COURT: We know it's a search.

[DEFENSE COUNSEL]: If I do challenge whether a search was legal then the burden goes to the State.

THE COURT: Right. So, give me case law that says it[']s not legal. What's the case that I would look to? It strikes me as legal. But you're telling that it[']s not.

[DEFENSE COUNSEL]: Well—

THE COURT: I want to examine the law that says it[']s not.

[DEFENSE COUNSEL]: All right. I can—

THE COURT: Because it might not be.

The court went on to confirm that it was defense counsel's argument that because Ford was already in custody for fleeing the scene of an accident, the police were only permitted to conduct field sobriety tests if they sought, and Ford offered, consent, even though the tests may have been compulsory had he not been in custody. The suppression court denied the motion to suppress, with the exception of the field sobriety tests, electing to "read a few more cases" on the subject before ruling on that sub-issue.

The suppression court reconvened on January 31, 2019. Defense counsel reiterated that he was challenging the admission of the compulsory field sobriety tests because they constituted a custodial search without the benefit of *Miranda* warnings. The court ruled:

THE COURT: Right. So there you go. So, my understanding on these DUIs, and I reread Blazey [sic] again, it is the officer is really looking for reasonable articulable suspicion to ask someone to submit to the field sobriety test. I don't think that the timing of the events in this case changes that. In other words, if the officers had encountered him—in other words, let's say he never fled the scene of the collision, I think they would be able

to based on the things that the officer said, be able to subject him to a field sobriety test. I don't know—or I don't think I should say, that the fact that they put the cuffs on him means that they have to Mirandize him before performing those tests. The other thing—well, your other arguments really connected in that this is a search but I think we just addressed it. I think in the last hearing in one of our discussions, I may have said a search has to be accompanied or there has to be probable cause present but obviously it's less than that because you'd need probable cause to make the arrest, right? So here it's reasonable articulable suspicion, plenty of that. The easiest thing to point to of course, beer cans being tossed, ex cetera [sic]. So again, this is an unfortunate collision. It happens on 301 in Waldorf, really brings about the death of an infant . . . I mean I guess you could call—all the victim [sic] an infant. Brings about the death of an infant. State Police, Maryland State Police investigating the case under the totality of the circumstances I believe their actions are reasonable and I believe that the search is supported by reasonable articulable suspicion. They have a reasonable ground for the search. So I'm going to deny the Defendant's motion to suppress. I'm going to ask [defense counsel], you have a pretrial of 2/21. You all right?

[DEFENSE COUNSEL]: May I ask just one clarifying question.

THE COURT: Sure, please.

[DEFENSE COUNSEL]: So I—I—I would—and again, this is meant completely respectful . . .

THE COURT: Yeah, it's fine.

[DEFENSE COUNSEL]: . . . respectfully. I completely agree with your analysis in regard to a standard stop . . .

THE COURT: Yeah, sure.

[DEFENSE COUNSEL]: . . . where someone wasn't in custody.

THE COURT: Right.

[DEFENSE COUNSEL]: Does the [c]ourt—it sounds like you're finding that it's the same analysis despite that it's different in that—in that one huge way.

THE COURT: So, let me say this—let me say it this way, fleeing from the scene of a collision which is probably a misdemeanor. Probably a misdemeanor. Unless he knew more than I think he knew. I think he maybe just got into an accident and fled. So he flees from the scene of a collision. Citizens take him into custody. The police get there. My memory is, they thought they were breaking up a fight also. They arrest him. He's the person that fled. They un-cuff him, read him the instructions and he does field sobriety tests. I think the fact that he was in custody, on the scene, right? Doesn't mean—I mean—doesn't mean they surrender their rights to give field sobriety and it doesn't mean that Miranda is now required. Maybe that's—that's a better way to put it. Now let me ask you this, you have a pretrial of 2/21. Do you need a status date or any date before 2/21?

DISCUSSION

Ford contends that the suppression court erred in denying his motion to suppress the results of his "involuntary" field sobriety tests, and the evidence resulting therefrom, because the tests were conducted while he was in police custody but in the absence of *Miranda* warnings. Given "the presumption of coercion," he concludes, "nothing that [he] said or did, under coercion, during the trainee Trooper's involuntary 'field sobriety' testing was admissible evidence."

The State responds that Ford was not in custody prior to the execution of the field sobriety tests and that a police officer may require a driver to perform such tests if the officer has reasonable suspicion that the driver is under the influence, regardless of whether the driver consents. Even if we were to determine that Ford was in custody at the time the tests were administered, the State argues the performance of a field sobriety test is not a testimonial communication that would mandate *Miranda* warnings. And, even if the admission of the results of the field sobriety tests at trial were erroneous, any error was harmless beyond a reasonable doubt, in light of the independent "overwhelming" evidence that Ford was intoxicated when he caused the accident.

Our review of a trial court's denial of a motion to suppress is ordinarily limited to information contained in the record of the suppression hearing and not the record of the trial. *Dashiell v. State*, 374 Md. 85, 93 (2003) (quoting *State v. Collins*, 367 Md. 700, 706–07 (2002)). When, as here, the motion to suppress has been denied, we consider the facts in the light most favorable to the State, as the prevailing party on the motion. *Id*.

We do not engage in *de novo* fact finding. 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 witnesses, unless those findings are clearly erroneous.'" *Padilla v. State*, 180 Md. App. 210, 218 (2008) (quoting *Brown v. State*, 397 Md. 89, 98 (2007)). As to the ultimate conclusion of whether an action taken was proper, "we must make our own independent constitutional appraisal by reviewing the law and applying it to the facts of the case." *Collins*, 367 Md. at 707.

In *Blasi*, we explained that field sobriety tests occur after the driver has already been lawfully detained because the police officer has either "(1) probable cause to believe that a traffic violation has occurred; or (2) reasonable articulable suspicion that criminal activity, such as drunk driving, may be afoot." 167 Md. App. at 509. Although the administration of field sobriety tests does constitute a search within the meaning of the Fourth Amendment, *id*. at 505, the officer may detain the driver "'during the period of time reasonably necessary for the officer to (1) investigate the driver's sobriety and license status, (2) establish that the vehicle has not been reported stolen, and (3) issue a traffic citation.'" *Id*. at 509 (quoting *Pryor v. State*, 122 Md. App. 671, 682 (1998)); *see also Brown v. State*, 171 Md. App. 489, 524 (2006).[5] In the course of an ordinary traffic stop, a suspect who is briefly detained in order to perform field sobriety tests is not "in custody" for purposes of *Miranda*. *Brown*, 171 Md. App. at 526; *McAvoy v. State*, 314 Md. 509, 516–17 (1989); *see also Berkemer v. McCarty*, 468 U.S. 420, 438 (1984) (holding that a suspect temporarily detained during a traffic stop is not in custody, as the "questioning incident to an ordinary traffic stop is quite different from a stationhouse interrogation").

[5] We point out that "Maryland, like all states, has adopted an implied consent statute: '[a]ny person who drives . . . a motor vehicle on a highway . . . is deemed to have consented . . . to take a test if the person should be detained on suspicion of driving or attempting to drive while under the influence of alcohol.' TR § 16-205.1(a)(2). The purpose of Maryland's implied consent statute 'is not to provide procedural protections to drivers who are suspected to be impaired by alcohol . . . instead, [its] purpose is to protect the public by deterring drunk and/or drugged driving.'" *Funes v. State*, 469 Md. 438, 462–63 (2020) (quoting *Motor Vehicle Admin. v. Barrett*, 467 Md. 61, 70 (2020)) (alterations in original; footnote omitted).

Here, Kreczmer had the following reasonable, articulable suspicion of drunk driving prior to requesting that Ford perform the field sobriety tests. First, witnesses observed beer cans falling from Ford's truck after the collision. Second, Ford ran from the scene and disposed of additional beer cans behind the muffler business. Third, Kreczmer and Burroughs smelled alcohol on Ford's breath and observed him to have bloodshot and glassy eyes, slurred speech, and difficulty with his balance. From those observable facts, it is clear that Kreczmer had sufficient reasonable, articulable suspicion that Ford was driving under the influence at the time of the collision. *See, e.g., Ferris v. State,* 355 Md. 356, 391 (1999) (stating that "[b]loodshot eyes, in conjunction with the odor of alcohol emanating from the person, would ordinarily provide the police with reasonable suspicion that a driver was under the influence of alcohol"). Therefore, Kreczmer had sufficient grounds under the Fourth Amendment to detain Ford and administer field sobriety tests following the collision, and Ford does not argue otherwise.

Instead, the crux of Ford's argument appears to be that because he was already in police custody for leaving the scene of an accident when he was required to perform the field sobriety tests, the tests constituted a custodial interrogation for which *Miranda* warnings were required but not given. Indeed, *Miranda* warnings are required if a defendant is interrogated while in custody. *Brown*, 171 Md. App. at 526 (citing *Miranda*, 384 U.S. at 444). In our view, however, Ford was not in custody at the time Kreczmer

administered the field sobriety tests, despite the fact that he had been detained for leaving the scene of an accident.[6]

Kreczmer testified at the suppression hearing that he placed Ford in handcuffs because Ford had run from the scene of the collision, and the troopers were unsure whether he might try to run again. At the time, however, the police did not yet suspect Ford of driving under the influence. It was as the troopers accompanied Ford to the police cruiser for his own safety from the hostile crowd that Kreczmer and Burroughs observed the indicators of drunk driving, thereby providing the reasonable, articulable suspicion that Ford was under the influence so as to administer the field sobriety tests.

The fact that Ford's brief detention to prevent flight and for his safety may have provided that suspicion does not mandate a finding that he was in custody or under arrest for the purposes of *Miranda*. A degree of physical restraint to prevent a suspect from fleeing does not transform an investigative stop to a custodial arrest.

In *Trott v. State*, 138 Md. App. 89 (2001), for example, the defendant claimed that, even if the initial stop was justified, his being handcuffed turned the stop into an arrest that was not supported by probable cause. *Id.* at 118. We disagreed, holding "the handcuffing of [the defendant] was justifiable as a protective and flight preventive measure pursuant to

[6] Although the prosecutor, during the suppression hearing, apparently conceded that Ford was in custody when the field sobriety tests were administered, we are not bound by that concession in our decision. *See Greenstreet v. State*, 392 Md. 652, 667 (2006) ("[A] party may not concede a point of law to the exclusion of appellate review, as necessary and proper to decide the case.").

a lawful stop and did not necessarily transform that stop into an arrest." *Id.* We determined that when considered in their totality, the circumstances justified the police officer's use of handcuffs, which was a "reasonable exercise of police powers during a lawful investigative stop." *Id.* at 120. *See also Chase v. State*, 449 Md. 283, 311 (2016) (concluding the use of handcuffs during an investigative stop does not necessarily elevate a detention into an arrest).

We hold similarly here. The troopers placed Ford in handcuffs and into the police cruiser because he had run from the scene of the collision, and the troopers were unsure if he might try to run again. Then, when the threatening crowd began to move in, Kreczmer moved Ford to another vehicle some distance away, for Ford's own safety. The totality of the circumstances justified Kreczmer's actions, which did not elevate Ford's detention to a custodial arrest requiring *Miranda* warnings. Because we held, in *Brown*, that field sobriety tests ordinarily do not constitute custodial interrogation requiring *Miranda* warnings, we did not address whether the compelled tests were testimonial, 171 Md. App. at 526, and we will not address that issue here, other than to note that Ford cites no authority in support of his contention that the tests are testimonial and to point out that the U.S. Supreme Court has concluded that physical evidence such as "fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, or to make a particular gesture" are not testimonial communications. *Schmerber v. California*, 384 U.S. 757, 764 (1966). *See also McAvoy*, 314 Md. at 518–19 (compulsory breath tests are not testimonial and do not require *Miranda*

warnings); *Morgan v. State*, 79 Md. App. 699, 707 (1989) (compelling a defendant to put on a piece of clothing is not testimonial).

Even if we were to conclude, *arguendo*, that Ford was subjected to custodial interrogation in performing field sobriety tests and that the failure to administer *Miranda* warnings was erroneous, we would find any such error to be harmless beyond a reasonable doubt. *See Dorsey v. State*, 276 Md. 638, 659 (1976) (error is harmless when a reviewing court can declare that the error in no way influenced the verdict). Whether or not Ford was compelled to perform preliminary field sobriety tests at the scene of the collision, in light of the life-threatening injuries sustained by the infant in the collision, the witnesses' statements about beer cans falling from the truck, and the troopers' personal observations of indicators that Ford was under the influence of alcohol, Ford would have been *required* to submit to a more formal intoximeter and/or blood test, pursuant to TR §16-205.1(c), which states, in pertinent part:

> (c)(1) If a person is involved in a motor vehicle accident that results in the death of, or a life threatening injury to, another person and the person is detained by a police officer who has reasonable grounds to believe that the person has been driving or attempting to drive while under the influence of alcohol, while impaired by alcohol, while so far impaired by any drug, any combination of drugs, or a combination of one or more drugs and alcohol that the person could not drive a vehicle safely, while impaired by a controlled dangerous substance, or in violation of § 16-813 of this title, the person *shall be required to submit*, as directed by the officer, to a test of:
>
> (i) The person's breath to determine alcohol concentration;
>
> (ii) One specimen of the person's blood, to determine alcohol concentration or to determine the drug or controlled dangerous substance content of the person's blood; or

> (iii) Both the person's breath under item (i) of this paragraph and one specimen of the person's blood under item (ii) of this paragraph.

(Emphasis added).

The results of the intoximeter test, taken with Ford's consent at the police barracks more than an hour following the collision, established that Ford was under the influence of alcohol *per se*. Even in the absence of admission of evidence of the results of the field sobriety tests, the intoximeter evidence, which Ford does not challenge, was sufficient to sustain his convictions of the charged crimes. Therefore, the error, if any, in failing to suppress the results of the field sobriety tests was harmless beyond a reasonable doubt.

JUDGMENTS OF THE CIRCUIT COURT FOR CHARLES COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.