UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2678

September Term, 2014

STATE OF MARYLAND

v.

JEFFREY A. DEMERY

Krauser, C.J.,
Hotten,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Krauser, C.J.

Filed: September 29, 2015

Charged with possession of, and possession with intent to distribute, marijuana, Jeffrey Demery, appellee, filed, in the Circuit Court for Prince George's County, a pre-trial motion to suppress the evidence that had been seized by police, claiming that the evidence was the fruit of an unlawful seizure of his person. Specifically, he sought the suppression of two pounds of marijuana that had been recovered from a plastic bag he had tossed from the window of his vehicle, the $120 in cash that, shortly thereafter, was found on his person, and the marijuana, ammunition, and other items that were subsequently found, pursuant to a search warrant, at what was thought to be Demery's residence. The Prince George's County circuit court granted that motion and suppressed all of the foregoing items.

From that ruling, the State noted this appeal, contending that the circuit court had erred in so ruling. We agree and reverse the circuit court's judgment as to the suppression of the marijuana recovered from the plastic bag. But we shall nonetheless remand this case to that court for it to consider whether the evidence recovered from the residence should or should not be suppressed on other grounds raised by Demery but not addressed by the circuit court in rendering its decision.

The Suppression Hearing

The only witnesses to testify, at the hearing on Demery's motion to suppress, were Detective Patrick O'Connell and Sergeant Andrew Logan, of the Prince George's County Police Department. It was their testimony that, on the morning of June 12, 2014, the Narcotics Enforcement Division of the Prince George's County Police Department received information, from the Maryland State Police Interdiction Unit, that a "suspicious parcel" was going to be delivered to a residence located at 2319 Houston Street. After

placing that residence under surveillance, County police officers observed the United States Postal Service deliver, to that address, a parcel, leaving it on the front step of the residence. They then witnessed an individual, later identified as Demery, open the door of the residence and take the parcel inside.

A little while later, they saw Demery leave the residence, carrying a "large plastic bag," and climb into a vehicle. As he drove away, officers in "two or three" unmarked "rental" cars followed.

Detective Patrick O'Connell was positioned, on Shadyside Avenue, up the street from the residence under surveillance. As the "traffic-stop car," his assignment was to follow Demery's vehicle and, upon observing a traffic violation, to pull him over. When the officers, who were following Demery, informed the detective, over the police radio, that Demery was travelling toward him, Detective O'Connell proceeded to drive down Shadyside Avenue. The detective was driving a black "unmarked police car" with tinted windows, a "little antenna sticking out of the trunk," and "emergency lights" inside the visor and the front grill of the car. Although not in uniform, he was wearing a police vest, which had his badge displayed on the front.

One of the surveilling officers, who was following Demery, warned Detective O'Connell, over the radio: "I think [Demery] knows I'm the police." Moments later, Demery pulled off of Shadyside Avenue into a "roundabout," which separated the avenue from a line of townhouses, and stopped his vehicle. The surveillance vehicles then drove past him.

But, when Detective O'Connell, who was driving his car toward Demery, saw Demery's vehicle stopped in the roundabout, he stopped his own car on Shadyside Avenue. The two vehicles, which were separated by a "grass hill" that separated Shadyside Avenue from the roundabout, were then about twenty feet apart. To see Detective O'Connell, Demery had only to "look to the left." As the two men sat in their cars, they made eye contact for a couple of seconds. Although Detective O'Connell sat quietly in his car, it was clear to him that, notwithstanding the fact that he was driving an unmarked police car, Demery "knew [he] was the police."

After the two men had exchanged glances, Demery threw a "pretty big grocery bag" out of the driver's side window of his vehicle. It landed in the grassy area separating the roundabout from the street, a few feet from Demery's car.

Detective O'Connell, based upon his belief that Demery had just committed a "traffic violation,"[1] decided to conduct a traffic stop. To effectuate that stop, the detective began driving his car down Shadyside Avenue and then made a left turn into the roundabout, activating his emergency equipment as he made the turn. Presumably at the

[1] It is not entirely clear, from the testimony presented at the suppression hearing, what the exact traffic violation Demery was believed to have committed was. We presume, based on a comment made by the State, in its closing argument, that Detective O'Connell believed Demery had violated section 21-1111 of the Transportation Article, which prohibits a person from "drop[ping], throw[ing], or plac[ing] on a highway any glass bottle, glass, nails, tacks, wire, cans, or any other substance likely to injure any person, animal, or vehicle on the highway." Md. Code, Transp. § 21-1111 (1977, 2012 Repl. Vol.).

same time the detective started driving,[2] Demery began to drive his own car at a very slow rate of speed, one or two miles per hour, around the roundabout and back onto Shadyside Avenue. Demery did not immediately stop his car once the detective activated the emergency lights. Rather, during the low-speed pursuit that followed the activation of the emergency lights, which lasted approximately twenty seconds, it appeared to Detective O'Connell that Demery was "trying to figure out what to do," but, once Demery realized "there was nowhere for him to go," he stopped his car on Shadyside Avenue.

After exiting his car, Detective O'Connell approached Demery's vehicle and instructed Demery, who was on his cell phone at that moment, to "get out of the car." While this encounter was taking place, the surveillance cars returned to the location of the stop and one of the surveillance officers recovered the plastic bag that Demery had tossed from his vehicle. Finding what appeared to be two pounds of marijuana in that bag, the officer called to Detective O'Connell that the bag "was good," which meant that the bag contained drugs. Detective O'Connell then placed Demery in handcuffs and a subsequent search of Demery's person revealed that he was carrying $120 in cash.

Sergeant Andrew Logan then returned to the address to which the "suspicious parcel" had been delivered earlier that day. He knocked on the door and, after a "couple minutes," a man, who was later identified as John Demery, appellant's brother, answered.

[2] Although Demery's vehicle was in motion at the time Detective O'Connell activated his emergency lights, it is not clear, from the record, whether it was Demery or Detective O'Connell who resumed driving first.

As the sergeant was explaining that he was there to conduct an investigation, he smelled "fresh marijuana."

Sergeant Logan then asked Demery's brother to step outside. When he complied with that request, the sergeant ordered several other police officers to "clear the residence" and, in the sergeant's words, "make sure nobody's inside that so we can secure everything so no evidence can be destroyed to the point where we can get a search warrant." Those officers searched all the rooms in the residence, as well as the basement. During that search, which both sides characterized, below, as a "protective sweep," the officers saw the parcel that had been delivered earlier that day in the basement.

The police then applied for a search warrant for the residence. In the warrant application, they referred to the delivery of the parcel to the residence; the two pounds of marijuana recovered from the bag that Demery had thrown from his car; the smell of marijuana coming from inside the residence; and their observation, during the protective sweep, of the parcel that had been delivered earlier that day. The warrant was issued and the subsequent search of the residence yielded approximately three pounds of additional marijuana, a "handgun magazine," 0.375mm and 0.9mm bullets, a scale, a "heatsealer," packaging material, and mail addressed to Demery at the residence in question.

Demery was subsequently charged with possession of marijuana and possession of marijuana with the intent to distribute. Before trial, he moved to suppress, as the "fruit of the poisonous tree," the $120 recovered from his person, the two pounds of marijuana in the discarded bag, and the items recovered from the search of the residence, asserting that these items were recovered pursuant to an illegal seizure of his person.

The Suppression Court's Ruling

Although, in addition to contending below that he had been illegally seized by the police, Demery further claimed that the officers' warrantless entry into the residence was unlawful and that the search warrant that was subsequently issued for that residence was invalid, the court nonetheless granted Demery's motion to suppress solely on the grounds that the delivery of the parcel did not generate either probable cause or reasonable articulable suspicion to justify his seizure by police. The court began its explanation of its decision by stating that a "seizure for the purposes of the Fourth Amendment occurs 'if, in the view of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). The court then asserted that "[n]either the prosecution nor the testifying witnesses specified why the delivered package was 'suspicious,'" and pointed out that no description or photograph of the parcel had been provided. Moreover, Demery, when seen leaving the residence, was not carrying the parcel at all, but a plastic bag.

The court next opined that, "had a dog specially trained to alert for narcotics done so, had a search warrant for the package been obtained, had they found narcotics in the 'suspicious' package, had they delivered the 'suspicious' package knowing this, there would have been probable cause to search the residence." In short, "were there some clear, articulable suspicion," said the suppression court, "the result would be different." But the court concluded that "all that flows from this merely 'suspicious' package must fall."

Analysis

I.

The State contends that the suppression court erred in suppressing the two pounds of marijuana recovered by police from the bag Demery had tossed out of the window of his vehicle.[3] The State asserts that Demery was not "seized," under the Fourth Amendment, until after he had thrown the bag out of his vehicle, thereby rendering the bag "abandoned" property and thus beyond the protective scope of the Fourth Amendment.

In reviewing the grant of a motion to suppress, we defer to the suppression court's factual findings and we uphold those findings unless they are clearly erroneous. *Holt v. State*, 435 Md. 443, 457 (2013). But we make "our own independent constitutional appraisal, by reviewing the relevant law and applying it to the facts and circumstances of this case." *Id.* at 457–58 (quoting *Lee v. State*, 418 Md. 136, 148–49 (2011)). That is to say, we review the "ultimate question of constitutionality de novo," and make our own "independent constitutional appraisal by reviewing the law and applying it to the facts of the case." *Williamson v. State*, 413 Md. 521, 532 (citing *Bailey v State*, 412 Md. 349, 362 (2010)). Thus, the point at which a person has been "seized" is an "ultimate, conclusionary fact about which we must make our own independent constitutional appraisal." *Partee v. State*, 121 Md. App. 237, 246 (1998) (internal quotation marks and citations omitted).

[3] The State, in its brief to this Court, has focused its argument on the suppression of evidence recovered from the bag that Demery threw from his vehicle. Its only references to the suppression of the evidence seized from the residence are that "since there was no initial Fourth Amendment violation, the court erred in suppressing 'all that flows from this merely suspicious package,'" and that "Demery failed to demonstrate that he had standing to challenge that evidence, much less sustain his burden that the warrant was invalid."

To address the State's contention, we must first determine at what point Demery was "seized." A seizure by police can occur by the use of physical force to restrain a person or by a "show of authority along with submission to the assertion of authority," *Ferris v. State*, 355 Md. 356, 375 (1999) (citing *California v. Hodari D.*, 499 U.S. 621, 625–26 (1991)), which was what Demery claimed occurred in his case. The "test to determine whether a particular encounter constitutes a seizure . . . is whether a reasonable person would have felt free to leave." *Id.* (citing *Mendenhall*, 446 U.S. at 554).

Police conduct that indicates to a reasonable person that he is not free to leave "will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs." *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988). The inquiry is thus "highly fact-specific." *Swift v. State*, 393 Md. 139, 156 (2006). Both the Supreme Court and the Court of Appeals have identified examples of actions taken by police that would communicate, to a reasonable person, that he was not free to leave. The examples given by the Supreme Court include activating a siren or emergency lights, commanding a citizen to halt, displaying any weapons, or operating a police vehicle in an aggressive manner such that it blocks a defendant's path or otherwise controls the direction or speed of his movement. *Chesternut*, 486 U.S. at 575. To that list the Court of Appeals added whether the officers removed the person to a different location or isolated him from others, informed him that he was free to leave, indicated to him that he was suspected of a crime, retained his identification or other documents, or exhibited threatening behavior or physical contact. *Ferris*, 355 Md. at 377. And other considerations to be taken into account are the

time and place of the encounter, the number of officers present, and whether the officers are in uniform. *Id.*

With the foregoing indicia of a "seizure by police" in mind, we return to the instant case to determine when Demery was, in fact, "seized by police," that is, at what point he yielded to a display of police authority, a display that would indicate to a reasonable person, under all of the circumstances surrounding the incident, that he was not free to leave. From the time Demery left the residence until the time he tossed the plastic bag from his car, we are unable to identify, from the facts presented at the suppression hearing, any of the actions by police that would constitute such a show of authority.

While Demery was driving his vehicle on Shadyside Avenue, the police officers in the surveillance vehicles that were following Demery never activated any sirens or emergency lights or signaled, in any other manner, that Demery was to stop his vehicle. When Demery did stop his vehicle in the roundabout, he did so on his own initiative. Detective O'Connell then drove his unmarked police car to where Demery's vehicle was stopped, parked his car about twenty feet away, and looked across the street at Demery. The detective did not get out of his car, did not display a weapon, did not identify himself as a police officer, did not issue any commands to Demery, and did not block or restrict Demery's movements. In sum, there was no show of authority by the police and certainly none to which Demery yielded. Thus, we conclude that Demery was not "seized" under the Fourth Amendment, when he stopped his vehicle, of his own accord, in the roundabout.

Rather, Demery was "seized" by Detective O'Connell after the detective witnessed Demery toss a bag out the driver's side window and begin to drive away. At that time,

Detective O'Connell began to follow Demery's vehicle and activated his emergency lights. Demery then yielded to what was obviously a show of police authority by stopping his vehicle on Shadyside Avenue. Demery's seizure was, at that moment, "justified under the Fourth Amendment," for, as the Court of Appeals has stated, "[c]learly . . . the police have the right to stop and detain the operator of a vehicle when they witness a violation of a traffic law." *Lewis v. State*, 398 Md. 349, 361, 363 (2007) (internal quotation marks and citations omitted).

Nonetheless, Demery asserts that being followed by "two or three surveillance vehicles" constituted a seizure, as it was sufficient to indicate to him, or to a reasonable person, that the officers wanted him to stop. We disagree. In fact, the officers were following him, not to induce him to pull over, but rather to observe his on-going activities. And it appears that Demery stopped to prevent that from occurring and then attempted to dispose of the marijuana before the police stopped him and discovered the marijuana in the bag he had discarded.

In short, Demery was not "seized," for the purposes of the Fourth Amendment, when he chose to stop his car in the roundabout, as he was not submitting to any show of police authority. And, given that conclusion, Demery's contention that his abandonment of the bag was prompted by his unlawful seizure by the police is not persuasive, as he was not seized at the time he threw the bag from his vehicle but was seized after that had occurred. Consequently, by tossing the plastic bag out of the window of his car, prior to any seizure of his person by police, Demery voluntarily abandoned the bag and its contents.

And, in so doing, Demery "relinquishe[d] the legitimate expectation of privacy that triggers Fourth Amendment protection." *Stanberry v. State*, 343 Md. 720, 731 (1996).

Moreover, as abandoned property is "outside of the ambit of Fourth Amendment protection because its owner has forfeited any expectation of privacy that he once had in it," the police are "free to confiscate property that is abandoned by an individual before he is seized by them." *Partee*, 121 Md. App. at 245 (internal citations omitted); *see also Powell v. State*, 139 Md. App. 582, 607 (2001) (noting that, once a defendant abandoned a paper bag by leaving it in the curb area of a public street, "the police were entitled to look inside it"). Thus, because Demery voluntarily discarded the plastic bag before he was seized, the bag was not the fruit of any seizure but was, rather, abandoned property, and the police officers did not violate the Fourth Amendment when they recovered the bag, looked inside, and found the two pounds of marijuana therein.

II.

The State urges that, if we agree that the court erred in suppressing the evidence Demery threw out the window of his vehicle, we must also conclude that "since there was no initial Fourth Amendment violation, the court erred in suppressing 'all that flows from [the] merely suspicious package'" that was delivered to the residence. We are not persuaded that this is necessarily so. To be sure, the officers committed no Fourth Amendment violation when they retrieved the two pounds of marijuana that Demery, prior to any seizure by police, had abandoned. And, as there was no initial Fourth Amendment violation, then it was error to suppress the evidence recovered from the residence on the grounds that it was the fruit of the poisonous tree.

But the parties, at the proceedings below, also raised the issue of whether the evidence recovered from the residence should be suppressed for other reasons, and they specifically disagreed as to whether the officers' warrantless entry into the residence, for the purpose of conducting a "protective sweep," was lawful, and whether the warrant that was subsequently issued was valid. The suppression court, however, made no findings nor drew any conclusions with regard to those contentions. We therefore remand this case, pursuant to Maryland Rule 8-604(d),[4] so that the suppression court may consider whether the evidence recovered from the search of the residence, though not the fruit of an illegal seizure, should nonetheless be suppressed on other grounds the parties raised.[5]

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY REVERSED. CASE REMANDED FOR THE CIRCUIT COURT TO ADDRESS AND RULE ON OTHER ISSUES RAISED BUT NOT DECIDED BY THAT COURT AT THE PROCEEDINGS BELOW. COSTS TO BE PAID BY APPELLEE.

[4] That Rule permits this Court to remand a case to the lower court if we conclude that "the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings." *See also Southern v. State*, 371 Md. 93, 104–06 (2002) (suggesting that a remand, pursuant to Rule 8-604(d), would have been appropriate "where the State introduced sufficient evidence to meet its burden that the initial stop was constitutional, but the trial court failed to rule on the issue"); *Collins v. State*, 138 Md. App. 300, 312–313 (2001) (remanding a case to the circuit court to reconsider a motion to suppress and address the issue of consent to search, where the suppression court originally found that bail bond agents were not State actors and thus had made no findings as to whether the agents' entry into an apartment was supported by consent).

[5] The circuit court may request additional written or oral argument on this issue.