UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2695

September Term, 2012

KEVIN HUTCHINS

v.

STATE OF MARYLAND

Meredith,
Graeff,
Leahy,

JJ.

Opinion by Meredith, J.

Filed: June 18, 2015

Kevin Hutchins, appellant, was indicted in the Circuit Court for Prince George's County, Maryland, and charged with possession of cocaine with intent to distribute and related offenses. After his motion to suppress physical evidence was denied, and a motion to suppress statements was granted in part and denied in part, appellant entered into a conditional plea agreement as to possession with intent to distribute, and the court sentenced him to twenty years, with all but five suspended. As permitted by the conditional plea agreement, appellant timely appealed, and he presents the following question for our review:

Did the motions court err in denying Hutchins's motion to suppress?

For the following reasons, we shall affirm.

BACKGROUND

At approximately 12:14 a.m., on July 14, 2012, Officer Lando Norris, of the United States Park Police, was patrolling Suitland Parkway in Prince George's County, Maryland. Using a radar gun, he clocked a black Dodge Charger traveling 70 miles per hour in a zone where the speed limit was 50 miles per hour. Officer Norris stopped the vehicle, noticed that there was a driver and a passenger (a "young lady") inside, and then approached the driver. Norris testified that, "[b]efore I made contact with the driver, I had [sic] a faint odor of marijuana emanating from the vehicle."

After the officer asked the driver for his license and registration, the driver, later identified as appellant, produced an identification card that belonged to someone else. Officer Norris asked appellant who the vehicle belonged to, and the driver knew the owner only as "Spider." Appellant was unable to produce a license at this time (although his Maryland driver's license was eventually found inside the vehicle).

Officer Norris asked appellant to exit the vehicle, and noticed that the odor of marijuana became more prominent. Officer Norris described the events that led to the discovery of the cocaine on appellant's person as follows:

> I asked him whose vehicle it was, and he couldn't give me the name of the person. He said he knew him as — I believe he said Spider.
>
> After that, I went ahead and asked him about his license, and he acted as if he couldn't find his license at the time. I stepped him out of the vehicle and walked him to the back of the vehicle, and asked him if he had anything on his person I needed to know about, because I had the odor of the marijuana. I didn't advise him I had the marijuana because he wasn't in handcuffs yet.
>
> He told me he didn't have anything on his person. I asked him could I check. He told me to go ahead. I did a pat-down of him. When I got to the front area, I felt an object. As I pushed up against it, you could feel it was separated object. You could also feel multiple small rock-like substances there.
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> * * *
>
> . . . There was multiple rock-like substances, but it was in two separate compartments, like two separate things.
>
> * * *
>
> Q. And, Officer, at the time you felt these objects, what did you believe them to be at that time?
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> A. I believed it to be narcotics, crack cocaine, because it was small rock-like substance.
>
> Q. On how many occasions before this arrest — I should say, do you have any training in the detection of this sort of substance?
>
> A. I have a lot of — we're trained to notice or know what objects are and what to feel for. Also, through my experience as a patrol officer, working in both Southwest and Northwest, Washington, D.C., as well as Southeast Washington, D.C., I've encountered it quite a few times.

* * *

Q. And, Officer, how many arrests have you made, approximately, for crack cocaine?

A. For crack cocaine, I would say more than 75.

On cross, examination, Officer Norris reiterated that appellant consented to a search, stating:

After I told him, does he have anything on his person that I need to know about, he said no. I said, "May I check?" He said, "Go ahead."

Officer Norris also gave the following testimony on redirect:

Q. You asked the defendant, "Do you mind if I check?" Correct?

A. Correct.

Q. To which he said yes?

A. He did say yes.

Q. Had you made any threats against him? Did you say anything like, I'm going to check you anyway, or make any threats against him if he refused to allow you to check his person?

A. No, but there was also an odor of marijuana which was also probable cause of the search as well.

On redirect, Officer Norris testified that he recognized the object he felt as crack cocaine:

Q. Officer Norris, once you felt the object in the defendant's groin area, how long did it take you to recognize that as crack cocaine?

A. Almost immediately.

When appellant testified at the suppression hearing, he gave this description of the officer's request to conduct a pat down:

Q. Once you gave the officer the registration to the vehicle, what happened?

A. He said he noticed a miniature on the floor, and he asked me to step out of the car. **So I, of course, cooperated with the officer.** I stepped out of the car. I walked to the back of the vehicle with him. He told me he was going to pat me down for weapons.

Q. All right. And once the officer told you he was going to pat you down, what, if anything, did you say in response to him?

A. **I said okay.**

Q. Did the officer ever ask you your permission to search you for weapons?

A. No, he never asked me.

Q. And once you two had that conversation – after you two had that conversation, what happened?

A. After we had that conversation he went on and patted me down.

(Emphasis added.) On cross-examination, appellant again described his response to the officer's pat down:

Q. When the officer said he was going to do a pat-down, you said okay. Is that what you testified to?

A. I cooperated with him. I didn't have any weapons on me. So I thought he was just going to pat me down for weapons. I had no idea he was going to go into my underwear.

After appellant was placed under arrest for possession with intent to distribute crack cocaine, nothing further was recovered from appellant's vehicle.

While appellant was being transported to the police station, and prior to being advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), appellant initiated a

conversation and asked why Officer Norris had wanted to search him. Officer Norris described that conversation as follows:

> Q. And during that transporting to the station, how long would you say that trip takes?
>
> A. To transport from Meadow View to where the South Capitol Street bridge is, I would say seven or eight minutes.
>
> Q. And during that time, did the defendant make any communications with you?
>
> A. Yes. He asked me what was the reason I wanted to search him.
>
> Q. And who initiated this conversation?
>
> A. The defendant.
>
> Q. How long into the car ride, would you say, the defendant began to speak?
>
> A. I would say right past Southern Avenue. So I would give it three minutes in.
>
> Q. And at any point during this conversation, did you make any promises or threats to the defendant to get him to make this statement?
>
> A. No.
>
> Q. And what were the subsequent — can you relate to the Court what the statements of the defendant were?
>
> A. While I was driving, he asked me what made me want to search him. I advised him because [he had] an odor of marijuana coming from his person. He then said, "That's probably just because I had just finished smoking at the house."
>
> Then he sat back for a second. I would say roughly about 30 seconds or 45 seconds. Then he said, "Thanks for ruining my life." I then advised him I'm not the one that forced him to commit a crime.

After hearing argument, the suppression court denied the motion to suppress the physical evidence, finding:

> I think the search and seizure is a reasonable search and seizure. **It's really justifiable under several different theories or Fourth Amendment exceptions**.
>
> First of all, I believe the testimony of Officer Norris. And to the extent the testimony of Mr. Hutchins differed, I believed Officer Norris and not Mr. Hutchins. Officer Norris was merely on duty, doing his job.
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> He sees a car on Suitland Parkway. He believes the car is speeding and that the car is going about 70 miles an hour. He verifies the speed. He pulls the vehicle over. As he wrote in his Statement of Charges, as he approaches the vehicle, he does detect a faint odor of marijuana.
>
> He asks Mr. Hutchins, who was the driver of the vehicle, to exit. It then is clear to him that the faint odor of marijuana is emanating from the person of Mr. Hutchins. He asks Mr. Hutchins, "Do you have anything on you?" Mr. Hutchins says, "No." **He says, "Do you mind if I check?" Mr. Hutchins says, "No."**
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> **So, number one, he consents to the search. Number two, because he does smell marijuana and the presence of drugs, I think he does have the ability to do more than the *Terry* frisk.** He knows that marijuana had been present. However, I do not think this violates the scope of a Terry frisk.
>
> I mean, put very simply, that rule requires that if an item is immediately apparent, without further manipulation, or a search, as contraband. [sic] **I don't see what happened in this case as manipulating the item, or trying to move the item around to get a better feel of it.** What he said is he placed his hands there. He could feel it. As he touched the item, it pushed up against the stomach. And at that point, **it was immediately apparent to him to be contraband**.
>
> So for all of those reasons, I think the seizure of the drugs does not violate the Fourth Amendment, and I'm going to deny the motion to suppress the search.

(Emphasis added.)

The court also addressed the motion to suppress appellant's statements that were made during the ride to the police station. The court agreed to suppress all statements made after Officer Norris commented he had not forced appellant to commit a crime. The court explained:

> There is no dispute that Miranda was not given. Mr. Hutchins asked him "Why did you want to search him?" The officer answers and says, "Because I could smell the marijuana."
>
> I don't think that that is the functional equivalent of questioning. His response is then, "I just smoked marijuana." I don't think the statement of saying, "I smelled marijuana" is a question that is designed to elicit a response, or a statement that's more like a question.
>
> I have a little bit of an issue with the next one when Mr. Hutchins says, "Thanks for ruining my life," and the officer then says, "Well, I didn't make you commit a crime." That's a little closer to me. That is almost like asking, you know, why did this happen?
>
> And I think the second comment of, I need to feed my girlfriend or kid or whatever, I am going to suppress that last statement. But everything before is admissible. But I think the last statement, that comment, I think, is designed to elicit a response.
>
> All right. So the motion to suppress the seizure of the evidence is denied.
>
> The motion to suppress the statement is granted in part and denied in part. And the defendant's statement that I had to sell the drugs to support my wife or kid, or whatever, the last statement is suppressed.

In lieu of a trial on the merits, appellant entered into a conditional plea agreement in order to preserve his appellate rights. The statement of facts in support of that agreement indicated that Officer Norris had found, concealed in appellant's underwear, a clear zip lock bag containing two knotted sandwich bags. One knotted bag contained eight pink zip lock

bags and five clear zip lock bags containing rock-like substances. The other knotted bag contained ten pink zip lock bags and one clear zip lock bag, containing rock-like substances. The substances were analyzed and determined to be approximately 46.6 grams (*i.e.*, 1.6 ounces) of cocaine. An expert would have testified that the quantity of cocaine together with the packaging and the manner of concealment indicated that appellant intended to distribute the cocaine.

DISCUSSION

Conceding the legality of the traffic stop, as well as the fact that the odor of marijuana may have provided reasonable articulable suspicion to conduct a stop pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968), appellant contends the search of his person was unlawful because: (1) there was no reason to believe that he was armed; and (2) the intrusiveness of the search was excessive. The State responds that appellant consented to the search, and, under the plain feel doctrine, the officer's retrieval of the contraband was lawful under the Fourth Amendment. Moreover, the State argues that the odor of marijuana further justified the pat down for weapons in this case. We agree with the State.

Our standard of review had been summarized as follows by the Court of Appeals:

> "In reviewing a circuit court's grant or denial of a motion to suppress evidence, we ordinarily consider only the evidence contained in the record of the suppression hearing. The factual findings of the suppression court and its conclusions regarding the credibility of testimony are accepted unless clearly erroneous. We review the evidence and the inferences that may be reasonably drawn in the light most favorable to the prevailing party. We undertake our own constitutional appraisal of the record by reviewing the law and applying it to the facts of the present case."

McFarlin v. State, 409 Md. 391, 403 (2009) (quoting *Rush v. State*, 403 Md. 68, 82 (2008)).

We note that the motions judge ruled, in the alternative, that Officer Norris "ha[d] the ability to do *more than* the *Terry* frisk" (emphasis added), which we interpret as an alternative finding of probable cause based upon the odor of marijuana. But, even if we were to conclude that probable cause to arrest was lacking in this case, the motions court found that appellant consented to the search. Consensual searches are permitted because it is reasonable for the police to conduct a search once they have been given permission to do so. *Florida v. Jimeno*, 500 U.S. 248, 250-51 (1991). Consent may be given expressly, impliedly, or by gesture. *Turner v. State*, 133 Md. App. 192, 207 (2000). Further, "[t]he determination of whether consent is valid is a question of fact, to be decided based upon a consideration of the totality of the circumstances." *Jones v. State*, 407 Md. 33, 52 (2008) (citation omitted). Considering the testimony in the light most favorable to the State, the motions court was not clearly erroneous in concluding that the appellant consented to the search of his person.

Moreover, we disagree with appellant's argument that the scope of the search to which appellant consented was exceeded. Officer Norris did indicate at one point during his testimony that he was concerned that appellant may have had weapons on his person: on cross-examination, the officer testified that he began his pat down at the top of appellant's body because "[t]here is no point in me going to the ankles. He could have a weapon up there waiting while I'm bent over." The possibility that appellant — who smelled of marijuana — was armed was a reasonable concern justifying a pat down in this case. *See Stokeling v. State*, 189 Md. App. 653, 667 (2009) (concluding that, based in part on K-9 alert

to the presence of narcotics in a vehicle, as well as the recognized connection between drugs and guns, police had reasonable articulable suspicion to frisk a passenger in the vehicle); *see also Hicks v. State*, 189 Md. App. 112, 124 (2009) ("We have often recognized the inherent dangers of drug enforcement, and an investigatory stop based upon a reasonable suspicion that a suspect is engaged in drug dealing, can justify a frisk for weapons"); *Burns v. State*, 149 Md. App. 526, 542 (2003) ("The intimate connection between guns and narcotics is notorious").

Moreover, we agree with the motions court that, under the "plain feel" doctrine, the search of appellant was lawful under the Fourth Amendment. The Supreme Court has stated:

> If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.

Minnesota v. Dickerson, 508 U.S. 366, 375-76 (1993); *accord McCracken v. State*, 429 Md. 507, 510-11 (2012).

Further, our Court of Appeals has stated:

> "'Immediately apparent,' however, does not mean that the officer must be nearly certain as to the criminal nature of the item. Instead, 'immediately apparent' means that an officer must have probable cause to associate the object with criminal activity."

In re David S., 367 Md. 523, 545-46 (2002) (quoting *Wengert v. State*, 364 Md. 76, 89 (2001)).

Here, Officer Norris testified that, based on his training and experience, when he felt the object in appellant's waistband area, he recognized it as suspected crack cocaine "almost immediately." Viewing this testimony in the light most favorable to the State, the evidence supports the motions court's finding that the contraband nature of the concealed objects was immediately apparent to the officer, and that the seizure of the contraband was lawful.

As noted above, the motions court ruled, in the alternative, that the officer's detection of the odor of marijuana emanating from appellant's person gave Officer Norris the justification to "do more than the *Terry* frisk." For the reasons discussed above, we agree with the motion court's conclusion that the officer did not exceed the permitted scope of a *Terry* frisk. But, we also observe that, at the time of this traffic stop, before any decriminalization of marijuana possession, our prior cases had held that the odor not only gave reasonable articulable suspicion to search appellant, but also probable cause to place him under arrest. In *Ford v. State*, 37 Md. App. 373 (1977), we discussed whether the smell of marijuana furnishes probable cause to arrest the driver of a vehicle, and to conduct a search of that vehicle. In that case, a police officer pulled over a vehicle for speeding. *Ford*, 37 Md. App. at 374. The driver, Grant Cole Smith, exited the vehicle, and shut the door behind him. *Id.* at 374-75. The officer testified that he smelled the odor of marijuana "coming from the clothes of the subject, and also from the interior of the vehicle which he was operating . . . ." *Id.* at 375. The driver was then placed under arrest. *Id.* Thereafter, after being advised of his rights, at the officer's request, the driver reached back into the vehicle and removed a brown paper bag from near where Ford, the passenger, was seated. *Id.* at 375-

76. After the officer determined that the bag contained suspected marijuana, Ford was ordered out of the vehicle and also arrested. *Id.* at 376.

On appeal, Ford argued that the smell of marijuana, standing alone, did not provide probable cause to arrest driver Smith. *Ford*, 37 Md. App. at 376. Therefore, Ford asserted, the ensuing search of the vehicle was also unlawful. *Id.*

We ultimately upheld the arrest of the driver, Smith, based on the smell of marijuana coming from his person as well as the interior of the vehicle he was operating. *Ford*, 37 Md. App. at 375, 380. We also concluded that the search of the vehicle Smith was driving was justified under either the search incident to arrest rationale, or the automobile exception under the *Carroll* Doctrine. *Ford*, 37 Md. App. at 380-81. In reaching these holdings, we stated:

> **We have no doubt, accordingly, that knowledge gained from the sense of smell alone may be of such character as to give rise to probable cause for a belief that a crime is being committed in the presence of the officer.** When such conditions exist a warrantless arrest infringes upon no constitutional right.

Ford, 37 Md. App. at 379 (emphasis added). *See also Bailey v. State*, 412 Md. 349, 376 (2010) ("It is well-established that odor is a valid consideration in the probable cause analysis.") (citation omitted); *Gorman v. State*, 168 Md. App. 412, 431 (2006) (affirming motion court's ruling that smell of burning marijuana provided exigent circumstances justifying warrantless entry of apartment); *State v. Harding*, 166 Md. App. 230, 299-40 (2005) ("odor of marijuana alone can provide a police officer probable cause to search a vehicle"); *Johnson v. State*, 8 Md. App. 187, 191 (1969) (recognizing that whether a crime

has been committed in the officer's "presence," includes in the presence of the officer's visual, auditory or olfactory senses). Accordingly, we would agree with the officer's comment that the search and seizure in this case was supported by probable cause.

Finally, with respect to the appellant's statement which the court did not suppress — *viz.*, "That's probably just because I had just finished smoking at the house" — appellant's sole argument on appeal is that the statement was obtained as the fruit of an unlawful search. Having concluded that the search and seizure (and subsequent arrest) was lawful, we also conclude the court's denial of the motion to suppress this statement was correct under the Fourth Amendment.

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