Circuit Court for Howard County
Case Nos.: C-13-CR-18-000179
C-13-CR-18-000251

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 3290 & 3291

September Term, 2018

CEDRIC RYAN MURPHY

v.

STATE OF MARYLAND

Graeff,
Beachley,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: August 4, 2020

This case concerns two consolidated appeals from the Circuit Court for Howard County involving appellant, Cedric Ryan Murphy ("Murphy" or "appellant"). In Case Number C-13-CR-18-000179, Murphy was indicted for armed assault, robbery, carjacking and kidnapping of Rinaldo Ayers ("Mr. Ayers"); the crimes were alleged to have occurred on June 4, 2018, near the Comfort Inn Suites Hotel in Elkridge, Maryland. Case Number C-13-CR-18-000251 concerned conduct occurring on the same date, time and place. That indictment alleged that appellant possessed various controlled dangerous substances ("CDS") with the intent to distribute.

Murphy appeared before the circuit court on both cases for a suppression hearing at which he argued that evidence seized from him and statements he made on June 4, 2018 should be suppressed. The court denied the motion.

Subsequently, appellant entered not guilty pleas in both cases but proceeded to trial before a judge based on an agreed statement of facts. The trial judge found Murphy guilty of unauthorized taking of a motor vehicle and possession of cocaine with intent to distribute. Murphy was sentenced to four years imprisonment for unauthorized taking of a motor vehicle and a concurrent fifteen-year term for possession of cocaine with intent to distribute. In this timely appeal, appellant asks: Did the court below err by denying his motion to suppress evidence?

For the following reasons, we shall answer that question in the negative.

I.

THE SUPPRESSION HEARING

A. Testimony of Officer Andrew Saffran

At around 3:45 a.m. on June 4, 2018, Patrolman First Class Andrew Saffran, of the Howard County Police Department, responded to the Comfort Inn Suites in Elkridge, Maryland, in response to a 911 call from a man who reported that his vehicle had been taken by an individual he called "C". When he arrived on the scene, Officer Saffran was "flagged down" by three people who were standing on a "grassy area" between the road and the hotel.

Officer Saffran stopped his vehicle and began speaking with one of those individuals, later identified as appellant. He asked appellant who he was and why he (the officer) had been called to the scene. Appellant replied: "[t]hat he had a . . . 'business disagreement' at the hotel . . . and had taken the other person's keys." Appellant then took the keys out of his pocket and handed them to the officer.

Appellant said, in "a rather excited and quick manner" "that he didn't mean to take the person's vehicle" and that he "just wanted to get his money. And when he didn't get his money then he took the person's car." At around this same time, Officer Saffran asked the other two individuals who were with appellant, why the 911 call had been made. They replied, ambiguously, that they "were just trying to help him find his car." Those two then left. Appellant next said that when he did not get his money from the car owner, he made a "gesture with his hands" that included putting clothing over his finger and pointing it in a manner "imitating a handgun."

Appellant also told Officer Saffran that the vehicle taken was just around the corner, and that he would show him its location. Prior to walking with appellant to the place where the car was located, Officer Saffran decided to perform a pat-down of appellant's outer clothing for weapons, as a "safety measure." While the officer was patting down Murphy, appellant denied that he had any weapons on his person and stated, "you can search me."

Officer Saffran found on appellant's person a small zippered pouch. Inside that pouch he found an assortment of tablets in small baggies that Officer Saffran believed, based on his experience, contained crack cocaine. Office Saffran confiscated the pouch and its contents at that time.

Prior to the pat-down, Corporal Edward Upton joined Officer Saffran as did Officer Jonathan Matthews. The two were also members of the Howard County Police Department. The officers and appellant then walked down a street and found the vehicle appellant had taken, which was a gold colored Pontiac sedan. The car was parked about a quarter mile away from the place where Officer Saffran had been flagged down.

Using the keys provided by appellant, Officer Saffran opened the Pontiac and quickly searched it. He then locked the car and told appellant that they would take him back to the hotel. When they arrived back at Officer Saffran's vehicle, appellant got inside. He was not restrained and was not, according to the officer's testimony, under arrest.

While en route back to the hotel to discuss the matter further with the apparent victim, Rinaldo Ayers, appellant started explaining that he and Mr. Ayers "were engaged in using CDS throughout the day." According to appellant, Mr. Ayers "owed him money from using the CDS that he had provided him." Officer Saffran added that Murphy

explained that he had provided Mr. Ayers with approximately "a hundred and twenty dollars' worth of rock and then, like 12 bags." Officer Saffran then told the suppression court that the word "rock" was "a slang term for cocaine."

Officer Saffran maintained that he had not asked appellant any questions along these lines (i.e., questions about use or sale of CDS) and that appellant "appeared excited and desperate to explain his actions to mitigate . . . his involvement with the suspected carjacking." Appellant also asked the officer to speak to the victim and ask him not to press charges.

Once back at the hotel, Officer Saffran asked appellant to exit the patrol vehicle for a "one-on-one comparison [sic] with the victim." Appellant got out of the car, stood in a well-lit area near the police vehicle, which was parked approximately thirty feet from the hotel entrance where the victim was standing with Corporal Upton. After Corporal Upton advised Officer Saffran that the victim positively identified appellant as the person who had stolen the Pontiac, appellant was placed in handcuffs and his person, as well as a backpack appellant had been wearing, were searched. From the backpack, Officer Saffran recovered various medications and narcotics, including, but not limited to, quantities of Suboxone, Clonazepam, Adderall and suspected "crack cocaine."

Officer Saffran, when cross-examined, clarified that when he first arrived on the scene, appellant "flagged" him down by walking towards his car and making eye contact. Thinking at first that appellant was the victim, the officer asked him "what was going on." Appellant "began to excitedly explain" that he "had a business disagreement and had taken the keys from the other person."

On further cross-examination, the officer was asked what type of questions he asked of appellant. Officer Saffran responded that, "at that point the only things that I said to him were the minimal encouragers such as, and then what? Something like that, to kind of just keep the conversation going."

Officer Saffran agreed that when he told appellant that he would be patting him down, he also asked him if he had any weapons on his person. Officer Saffran reiterated that appellant stated, "You can search me." The officer further testified that appellant was standing up, facing forward during the pat-down and was not under any restraint.

Officer Saffran also said on cross-examination that appellant sat in the rear of the patrol car as he rode back to the hotel, and that the doors were locked. The officer also had appellant's phone at that point. After appellant asked him to "reason with Mr. Ayers," the officer "advised him that we still needed to speak to Mr. Ayers about what had happened." When appellant agreed that there had been "some sort of drug use," the officer asked him a "clarify[ing]" question of some sort, and appellant responded by asking him to speak to Mr. Ayers to get him to not press charges.[1]

When cross-examined about the one-on-one identification back at the hotel, Officer Saffran said that he believed he used the police spotlight from his vehicle or a flashlight to illuminate appellant's face. Officer Saffran stood with appellant, while Corporal Upton and Officer Matthews stood with the victim near the hotel.

[1] Officer Saffran did not recall the exact question he asked at this point during the encounter.

Regarding the subsequent search of the backpack, the officer agreed on cross-examination that the backpack was inside the patrol vehicle but in appellant's possession, when appellant was transported back to the hotel, and that the backpack remained inside the patrol car during the show-up. After appellant was arrested outside the vehicle and both he and his backpack were searched, appellant was placed in the back seat of Officer Saffran's patrol car and transported to the police station and the backpack was placed in the front seat.

B. Suppression Hearing Testimony of Corporal Edward Upton

Corporal Upton, an 18-year veteran of the Howard County Police Department, responded to the Comfort Inn Suites after receiving information that a vehicle had been taken. When he arrived, he saw that Officer Saffran was standing on a road leading to the hotel, speaking to appellant. After he joined Officer Saffran, the two officers had a "normal conversation" with appellant about the reason for the 911 call. Appellant said that he had a "business disagreement" with another individual and explained that he took this individual's keys as a form of payment; appellant then demonstrated how he put a cloth or t-shirt over his finger and told this other individual, the victim, to give him the car keys.

Next, and prior to walking to retrieve the car that appellant had taken, Corporal Upton witnessed Officer Saffran pat appellant down. The two officers and appellant then walked to the car appellant had taken. The keys appellant handed over to Officer Saffran were for that car. The officers then walked back to their patrol vehicles. Because the hotel was still some distance away, Corporal Saffran asked appellant to get into the back of his car "just to drive [appellant] down to the parking lot of the Comfort Inn."

When Corporal Upton drove his patrol car to the hotel, he met and waited with Mr. Ayers, the person who had made the 911 call. Mr. Ayers told Corporal Upton that he picked up appellant, who he identified simply as "C", on an unidentified road in Howard County and took him to the Comfort Inn Suites. There, according to Mr. Ayers, the two men went to a hotel room where they met another man and a female (hereinafter "the couple"). Mr. Ayers recounted that after the couple started engaging in sexual relations of some kind, he left the room and walked towards his car. Prior to reaching his vehicle, appellant confronted Mr. Ayers in the parking lot and told him that he owed him money. Appellant then displayed a handgun and demanded Mr. Ayers's car keys.

According to what Mr. Ayers told Corporal Upton, appellant got into the driver's seat of Mr. Ayers's car and ordered Ayers to get in and sit in the passenger seat. At some point, Ayers jumped from the moving vehicle, ran back to the Comfort Inn Suites, and called the police.

Corporal Upton and Officer Saffran decided to see if Mr. Ayers could identify appellant. In this regard, Corporal Upton testified:

> [W]e brought Mr. Ayers out and Officer Matthews stood with Mr. Ayers on an angle behind this column barrier. At which time we made -- we asked Mr. Murphy to get out of the vehicle. At which time he made, and I can't remember the exact statement -- Officer Matthews would know that - but it was an immediate identification of . . . [appellant].

On cross-examination, Corporal Upton was asked about the initial pat-down; he testified that Officer Saffran informed appellant "we're just going to pat you down for weapons. It's something standard that we always do." Corporal Upton witnessed Officer Saffran pull the zippered pouch, containing suspected crack cocaine, out of appellant's

back pocket. According to Officer Upton, appellant, in his presence, also "admitted to using marijuana" that evening.

C. Testimony of Officer Jonathan Matthews

Appellant called, as his only witness, Officer Jonathan Matthews who was involved in the show-up. Officer Matthews stood with Mr. Ayers when appellant got out of Officer Saffran's vehicle. Officer Matthews was asked what he said to Mr. Ayers prior to the show-up. He answered:

> Yes. I explained that the other officers were going to be bringing someone, a subject they had come into contact with, and they were going to be presenting him in a way that Mr. Ayers would be able to see him. And Mr. Ayers' responsibility was to let me know if that was the subject that he had called the police about.

Mr. Ayers "made an immediate identification of the subject."[2]

D. The Court's Ruling

The suppression hearing judge, in an oral opinion, found that the testimony of the Howard County Police officers was credible. After providing a detailed explanation of his reasons, the judge denied the suppression motion.

II.

DISCUSSION

Appellant challenges the motion court's ruling on several grounds. We shall address them seriatim, but before we do so, we shall set forth the standard of review:

[2] The motions court also heard portions of the recorded 911 call between Mr. Ayers and the police.

> Our review of a circuit court's denial of a motion to suppress evidence is "limited to the record developed at the suppression hearing." *Moats v. State*, 455 Md. 682, 694 (2017). We assess the record "in the light most favorable to the party who prevails on the issue that the defendant raises in the motion to suppress." *Norman v. State*, 452 Md. 373, 386, *cert. denied*, 138 S. Ct. 174 (2017). We accept the trial court's factual findings unless they are clearly erroneous, but we review de novo the "court's application of the law to its findings of fact." *Id*. When a party raises a constitutional challenge to a search or seizure, this Court renders an "'independent constitutional evaluation by reviewing the relevant law and applying it to the unique facts and circumstances of the case.'" *Grant v. State*, 449 Md. 1, 15 (2016) (quoting *State v. Wallace*, 372 Md. 137, 144 (2002)).

Pacheco v. State, 465 Md. 311, 319-20 (2019); *accord Greene v. State*, __ Md. __, No. 7, SEPT. TERM, 2019, 2020 WL 3056365, at *5 (filed June 9, 2020) (concerning standards applicable to extrajudicial identification procedure); *Thomas v. State*, 429 Md. 246, 259 (2012) (same standard under the Fifth Amendment).

1. *The initial encounter was consensual*.

Appellant first contends that the initial stop was unlawful because it was not supported by reasonable articulable suspicion. The only argument set forth in appellant's brief in support of that contention is expressed as follows:

> In this case, based on the testimony of [Officer] Saffran, it appears that he let two people leave and only Mr. Murphy remained or was detained. At that point, there was no information about who had called 911, who the suspect was, or who the victim might have been. The court below erred by ruling that Mr. Murphy "engaged voluntarily" with [Officer] Saffran, and that there was no impermissible stop.

(References to the record extract omitted.)

The State asserts that Officer Saffran's initial encounter with appellant was consensual from its inception because appellant initiated the contact with Officer Saffran.

Therefore, according to the State, there was no need to prove that the encounter was supported by a reasonable articulable suspicion that appellant had committed a crime.

The Fourth Amendment to the Constitution of the United States, made applicable to the States through the Fourteenth Amendment, *Mapp v. Ohio*, 367 U.S. 643, 646 n.4 (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[.]" "[T]he Fourth Amendment guarantees," however, "are not implicated in all circumstances where the police have contact with an individual." *Wilson v. State*, 409 Md. 415, 440 (2009). "[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *State v. Johnson*, 458 Md. 519, 533 (2018) (citation omitted). There are three levels of interaction between the police and citizens:

> The most intrusive encounter is an arrest, which requires probable cause to believe that a person has committed or is committing a crime. The second category is the investigatory stop or detention, known commonly as a *Terry* stop, an encounter considered less intrusive than a formal custodial arrest and one which must be supported by reasonable suspicion that a person has committed or is about to commit a crime and permits an officer to stop and briefly detain an individual. The third contact is considered the least intrusive police-citizen contact, and one which involves no restraint of liberty and elicits an individual's voluntary cooperation with non-coercive police contact. A consensual encounter, or a mere accosting, need not be supported by any suspicion and because an individual is free to leave at any time during such an encounter, the Fourth Amendment is not implicated; thus, an individual is not considered to have been "seized" within the meaning of the Fourth Amendment.

Wilson, 409 Md. at 440 (citing *Swift v. State*, 393 Md. 139, 149-51 (2006)).

We reject appellant's argument that the motions judge erred by failing to find that Officer Saffran made "an impermissible stop." For starters, the officer never stopped

appellant. The uncontradicted evidence demonstrated that appellant was the one who stopped Officer Saffran by flagging him down. And, after appellant stopped the officer, the conversation was initiated by appellant and was, in every respect, voluntary.

2. *There was no custodial interrogation during the initial encounter*.

Appellant next asserts that the "initial statements" he made to Officer Saffran should have been suppressed because appellant was not given the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966). The "initial statements" to which appellant refers are the statements he made between the time he first started talking to Officer Saffran until he got in the patrol car to be driven back to the Comfort Inn Suites. According to appellant, the incriminating statement that should have been suppressed was the admission that he had taken a car from Mr. Ayers while implying to Mr. Ayers that he was armed. The State maintains that appellant was not in custody when he was first questioned by Officer Saffran and therefore *Miranda* warnings were not required.

In a case where a defendant contends that his or her *Miranda* rights were violated, the defendant has the burden of proving that: 1) the police engaged in interrogation; and 2) that at the time of the interrogation, he or she was in custody. *Smith v. State*, 186 Md. App. 498, 518 (2009). The test as to whether a person is in custody, for *Miranda* purposes, is not whether a reasonable person in the defendant's position would feel "free to leave"; instead, the test is whether there is a formal arrest or a restriction of freedom of movement to a degree associated with formal arrest. *Id*. at 529-30. Here, at the time the initial inculpatory statements were made, the undisputed evidence showed that appellant's

movements were not restricted in any manner. Thus, appellant failed to meet his burden of proving that he was "in custody" when he made his initial statement.

3. *The inevitable discovery doctrine justified the denial of appellant's motion to suppress appellant's pouch and its contents.*

Appellant sets forth a three-fold challenge to the pat-down by Officer Saffran that resulted in the seizure of the pouch found in appellant's rear pocket. Appellant asserts that: (a) the pat-down was not supported by reasonable articulable suspicion under *Terry v. Ohio*, 392 U.S. 1 (1968), because there was only the suggestion that he pretended to have a gun; (b) his purported consent, when he said "You can search me," was not freely and voluntarily given; and, (c) the scope of the pat-down exceeded its justification when Officer Saffran opened and looked inside his small zippered pouch. The State responds that there was probable cause to arrest appellant at the point he was "patted down" and therefore any issue with respect to whether this was a lawful *Terry* stop is "beside the point[.]" *See generally, Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) ("Probable cause exists where 'the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed" (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)). The State argues in the alternative, that the search and seizure of appellant's pouch was admissible under the inevitable discovery doctrine. *See generally, Williams v. State*, 372 Md. 386, 415 (2002) ("Evidence obtained as a result of an illegal search is admissible where, absent the illegal

conduct, the evidence inevitably would have been discovered through legal means" (citing *Nix v. Williams*, 467 U.S. 431, 447 (1984)).

The lower court denied the motion to suppress the contents of the pouch based on the inevitable discovery doctrine. That doctrine is an "exception [that] permits the government to cleanse the fruit of poison by demonstrating that the evidence acquired through improper exploitation would have been discovered by law enforcement officials by utilization of legal means independent of the improper method employed." *Stokes v. State*, 289 Md.155, 162-63 (1980) (citations omitted). *Accord Peters v. State*, 224 Md. App. 306, 350, *cert denied*, 445 Md. 127 (2015). In *Williams, supra*, the Court of Appeals said:

> [T]he State has the burden of proving, by a preponderance of the evidence, that the evidence in question inevitably would have been found through lawful means. *See, e.g.*, *Nix*, 467 U.S. at 444; *Oken* [*v. State*], 327 Md. [628], 654 [(1992)]. This standard embodies two ideas — that there was a lawful method for acquiring the evidence and that the evidence inevitability *would* have been discovered. When challenged evidence inevitably would have been discovered lawfully regardless of police misconduct, the deterrence effect of exclusion is minimal, and exclusion of the evidence would put police in a worse position than they would have been without any illegal conduct. *Nix*, 467 U.S. at 444. The inevitable discovery doctrine necessarily involves an analysis of *what would have happened* if a lawful investigation had proceeded, not what actually happened. The analysis of what would have happened had a lawful search proceeded should focus on historical facts capable of easy verification, not on speculation. *Id.* at 444 n.5[.]

Williams, 372 Md. at 417-18.

In this case, appellant confessed to taking the victim's car without permission. He was later positively identified by the victim as the person that carjacked his car. When appellant was arrested after the show-up identification, his person was searched for a

second time. Under these circumstances, the State proved that appellant's arrest was inevitable and a search and seizure of the items on his person (such as the pouch) would have been lawful as a search incident to that arrest. *See Belote v. State*, 411 Md. 104, 113 (2009) ("[T]he fact of a custodial arrest alone is sufficient to permit the police to search the arrestee"). Because we agree with the motions judge that the inevitable discovery doctrine was applicable, we shall not address the State's other arguments as to why the search was legal.

4. *The "interrogation" of appellant when he was being transported back to the hotel was lawful.*

Appellant challenges the court's ruling with respect to the admissibility of statements he made while being transported in Officer Saffran's patrol car back to the hotel on the grounds that he was in custody at that point and had not been given his *Miranda* warnings.

As mentioned earlier, Officer Saffran testified that after confirming that the keys provided by appellant fit the Pontiac, he "told Mr. Murphy we would drive back to the hotel and I placed him in my police vehicle and we drove back to the hotel." Appellant was not restrained nor was he under arrest during that ride. During the approximate quarter mile ride, and without any questions from the officer, appellant "was explaining his actions" about his interactions with the victim, including that the victim owed him money because appellant provided Mr. Ayers with narcotics. Appellant also tried to persuade Officer Saffran to attempt to talk the victim out of pressing charges. Further, Officer Saffran testified that "while [he] was driving him back to the hotel Mr. Murphy appeared

excited and desperate to explain his actions to mitigate the – in my opinion it was to mitigate the, I guess, his involvement with the suspected carjacking."

At the suppression hearing, defense counsel and Officer Saffran engaged in the following colloquy:

> Q. All right. And let's talk about the conversation you had with Mr. Murphy while you were in the car. I believe you testified that Mr. Murphy asked you to sort of I think reason with Mr. Ayers?
>
> A. That's right.
>
> Q. Okay. And when he asked you that what did you tell him?
>
> A. I advised him that we still needed to speak to Mr. Ayers about what had happened.
>
> Q. Okay. And Mr. Murphy also told you that he met Mr. Ayers and indicated that there was some sort of drug use, right?
>
> A. That's right.
>
> Q. And then you asked him to clarify what he meant.
>
> A. That's right.
>
> Q. Okay. So how did you ask that question? Did you say, can you clarify? What did you say? Do you remember?
>
> A. I don't remember specifically what I said.
>
> Q. All right. But so you obviously had asked him some question about that statement.
>
> A. That's right.
>
> Q. Okay. And Mr. Murphy asked you to not press charges, I think was your testimony?
>
> A. That's right.
>
> Q. What did you say in response to that?

A. That we still had to speak to Mr. Ayers to determine what had actually occurred.

With respect to the issue of whether appellant's freedom of movement was restrained to a degree associated with formal arrest, the motions judge, in his oral opinion, said:

> [T]here's no evidence that -- my car and many cars have like a little notch on the back door that you can click down so your child can't open the door from the inside of the car. And if you push the button or little lever down they can't and if you raise it up then anybody can get it and out of the car. There's no testimony that the officer consciously made an effort to make the inside of the car a prison for the defendant as opposed to the car always being like that. And there's no evidence that it wasn't merely an offer to drive him the distance to the hotel.

The suppression court ruled that appellant, while in the police car, was not in custody for *Miranda* purposes. We agree with that conclusion.

> In analyzing whether an individual is in custody for *Miranda* purposes, we ask, under the "totality of the circumstances" of the particular interrogation, "would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Thompson v. Keohane*, 516 U.S. 99, 112 (1995); *see also Owens v. State*, 399 Md. 388, 428 (2007); *Whitfield* [*v. State*], 287 Md. [124,] 141 [(1980)]. The "totality of the circumstances test" requires a court to examine the events and circumstances before, during, and after the interrogation took place. *Owens*, 399 Md. at 428-29; *Whitfield*, 287 Md. at 140-41. A court, however, does not parse out individual aspects so that each circumstance is treated as its own totality in the application of the law. Rather, when doing a constitutional analysis, a court must look at the circumstances as a whole. *Ransome v. State*, 373 Md. 99, 104 (2003) (stating that a court conducting a "totality of the circumstances test" must not "parse out each individual circumstance for separate consideration").

Thomas v. State, 429 Md. 246, 259-60 (2012).

Relevant factors to that inquiry include the length and location of the detention, how many officers were present, what the officers and defendant did, whether the defendant was restrained, whether he was questioned as a suspect or a witness, and how the interrogation started and concluded. *Brown v. State*, 452 Md. 196, 211 (2017).

Almost every one of the above factors favor a finding of non-custody. Only one officer was present. Appellant got in the patrol car voluntarily, did almost all the talking, and the period that appellant was in the patrol car was brief, i.e., the time it takes to drive one-fourth of a mile.

As the Supreme Court observed, "[f]idelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated." *Berkemer v. McCarty*, 468 U.S. 420, 437 (1984); *see generally, State v. Barron*, 16 A.3d 620, 626 (Vt. 2011) (concluding that the defendant was not in custody when he sought the interview with a detective and agreed to its location and then voluntarily entered the detective's vehicle). Here, the interrogation in the patrol car, if there was any, was not the type of situation that raised the concerns that "power[ed] the [*Miranda*] decision[.]" *Berkemer*, 468 U.S. at 437. Although the back door to the patrol car was locked, there was no evidence that appellant knew it was locked or that a reasonable person in appellant's position would have believed that the door was locked. Appellant was not in handcuffs nor was he restrained in any way during the short

ride in the patrol car. Thus, appellant did not meet his burden of proving that at the time he made the incriminating statements in the patrol car, that he was in custody.[3]

5. *The show-up identification was reliable.*

Appellant next asserts that the court erred in not suppressing the extra-judicial identification by Mr. Ayers because the show-up was impermissibly suggestive. The State responds that, even if the procedure was impermissibly suggestive, it was nevertheless reliable. The State gives two reasons: 1) Mr. Ayers surely knew what appellant looked like because the two were together for an appreciable amount of time consuming CDS on the

[3] Even if appellant proved that he was in custody, it is doubtful that Officer Saffran's "clarify[ing] questions" constituted interrogation for *Miranda* purposes. "[N]ot every question posed to a suspect in custody or in a defendant's presence by a law enforcement officer constitutes interrogation." *Smith v. State*, 414 Md. 357, 366 (2010); *see also Fenner v. State*, 381 Md. 1, 17 (2004) (concluding that a "voluntary statement or blurt" made by a suspect in custody is not protected under *Miranda*). In *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980), the Supreme Court said:

> [T]he term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

446 U.S. at 301 (footnotes omitted).

In this case, without any initial inquiry by the officer, appellant started explaining the underlying incident while he was being transported the quarter mile back to the hotel. He had already confessed at that point to carjacking and was trying to mitigate his culpability. After appellant volunteered that he had taken the victim's car, by pretending to have a gun, and after appellant admitted that he and Mr. Ayers had engaged in "drug use," it is not clear that appellant met his burden of proving that a reasonable officer, in Officer Saffran's position, would know that his "clarify[ing] questions" (whatever they were) would elicit an incriminating answer.

date in question; and 2) before the "show-up" appellant admitted that he was the one who had stolen the victim's car.

The motions court agreed with defense counsel that show-up identifications are generally suggestive and that this one, that included appellant being illuminated in front of the hotel by police spotlights, was impermissibly suggestive under the circumstances. But the suppression court nevertheless found that the identification was reliable.

"The admissibility of an extrajudicial identification is determined in a two-step inquiry." *Smiley v. State*, 442 Md. 168, 180 (2015). "'The first question is whether the identification procedure was impermissibly suggestive.'" *Id*. (quoting *Jones v. State*, 310 Md. 569, 577 (1987)). "If the procedure is not impermissibly suggestive, then the inquiry ends." *Id*. "If, however, the procedure is determined to be impermissibly suggestive, then the second step is triggered, and the court must determine 'whether, under the totality of circumstances, the identification was reliable.'" *Id*. (quoting *Jones*, 310 Md. at 577). "If a prima facie showing is made that the identification was impermissibly suggestive, then the burden shifts to the State to show, under a totality of the circumstances, that it was reliable." *Id*.

On the suggestiveness prong, we recognize that a show-up identification may be suggestive because a person in the presence of a police officer who "is singly exhibited to an eyewitness to the crime undoubtedly creates a suggestive situation[.]" *Davis v. State*, 13 Md. App. 394, 402 (1971). Nevertheless, "[a] show-up has always been considered a perfectly permissible procedure in the immediate wake of a crime while the apprehension of the criminals is still turbulently unsettled." *Turner v. State*, 184 Md. App. 175, 185

(2009). In fact, the

> "practice of presenting single suspects to persons for the purpose of identification" may be justified by "the desirable objectives of fresh, accurate identification which in some instances may lead to the immediate release of an innocent suspect and at the same time enable the police to resume the search for the fleeing culprit while the trail is still fresh."

In re: D.M., 228 Md. App. 451, 474 (2016) (quoting *Green v. State*, 79 Md. App. 506, 514–15 (1989)); *see also Foster v. State*, 272 Md. 273, 294 (stating that "prompt confrontations . . . will if anything promote fairness, by assuring reliability" when balancing "all the doubts left by the mysteries of human perception and recognition") (quotation marks and citation omitted), *cert denied*, 419 U.S. 1036 (1974)).

We agree with the motions court that the extra-judicial identification in this case was impermissibly suggestive but conclude, as did the lower court, that the identification was reliable. In making that assessment, we consider:

> "(i) the opportunity of the witness to view the criminal at the time of the crime;
>
> (ii) the witness' degree of attention;
>
> (iii) the accuracy of the witness' prior description of the criminal;
>
> (iv) the level of certainty demonstrated by the witness at the confrontation;
>
> (v) the length of time between the crime and the confrontation."

Jones, 310 Md. at 578 (quoting *Webster v. State*, 299 Md. 581, 607 (1984)); *accord Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) ("[R]eliability is the linchpin in determining the admissibility of identification testimony"); *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972); *State v. Hailes*, 217 Md. App. 212, 266 (2014), *aff'd*, 442 Md. 488 (2015).

Here, both appellant and the victim told the police that they met earlier that evening. From all accounts, the parties were together, consuming drugs for an appreciable period of time prior to the carjacking. The show-up occurred a short time after the police arrived on the scene, and the victim's identification, according to Corporal Upton, was "immediate." In light of the fact that appellant had, prior to the show-up, admitted that he had stolen Mr. Ayers's car, the chance that Mr. Ayers had misidentified appellant as the thief, was zero. The motions court did not err in declining to suppress the identification.

6. *The search of the backpack.*

Finally, appellant argues that his backpack was illegally searched because, prior to it being seized, it was located on the back seat of the patrol car and out of appellant's reach when he was arrested. The State responds that the backpack was still within appellant's reach prior to it being seized and, in any event, was seized incident to appellant's lawful arrest.

"Among the exceptions to the warrant requirement is a search incident to a lawful arrest. The exception derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations." *Scribner v. State*, 219 Md. App. 91, 99 (quotation marks and citation omitted), *cert. denied*, 441 Md. 63 (2014).

> [A] police officer with probable cause to believe that a suspect has or is committing a crime may arrest the suspect without a warrant. *See Brinegar v. United States*, 338 U.S. 160, 176 (1949). . . . Once lawfully arrested, police may search "the person of the arrestee" as well as "the area within the control of the arrestee" to remove any weapons or evidence that could be concealed or destroyed. *United States v. Robinson*, 414 U.S. 218, 224 (1973).

Barrett v. State, 234 Md. App. 653, 664 (2017) (quoting *Conboy v. State*, 155 Md. App. 353, 364 (2004)); *accord Belote, supra*, 411 Md. at 113; *see also Chimel v. California*, 395 U.S. 752 (1969) (searches incident to arrest include search of the arrestee's person and areas within his immediate control); *Ricks v. State*, 322 Md. 183, 191 (1991) (concluding that a bag located nearby on the sidewalk at the time of the arrest, was in an area within defendant's immediate control and could be searched incident to the arrest); *Rosenberg v. State*, 129 Md. App. 221, 243 (1999) (holding that probable cause to arrest entitled police to search a canvas bag located near suspect), *cert denied*, 358 Md. 382 (2000).

Appellant relies on *Arizona v. Gant*, 556 U.S. 332, 351 (2009), in support of his argument that the police had no right to search or seize his backpack when he was arrested. In *Scribner v. State*, 219 Md. App. at 99-100, we discussed *Gant* in detail, *viz.*,

> [T]he United States Supreme Court clarified its holding in *New York v. Belton*, 453 U.S. 454 (1981), regarding warrantless vehicle searches incident to the lawful arrest of the vehicle's occupant. In *Belton*, the Court had held "that when an officer lawfully arrests the 'occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile' and any containers therein." *Gant*, 556 U.S. at 340-41 (quoting *Belton*, 453 U.S. at 460) (footnote omitted in *Gant*). That holding was based on the Court's "assumption 'that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within the area into which an arrestee might reach.'" *Id.* at 341 (quoting *Belton*, 453 U.S. at 460) (some internal quotation marks omitted).
>
> The *Gant* Court acknowledged that *Belton* had been "widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search." *Id.*; *see Briscoe* [*v. State*], 422 Md. [384,] 402 [(2011)] (quoting the foregoing language in *Gant*, explaining that "Maryland courts were no different in this regard," and citing several Maryland appellate cases to that effect). It rejected this broad interpretation of *Belton*, explaining:

> The experience of the 28 years since we decided *Belton* has shown that the generalization underpinning the broad reading of that decision is unfounded. We now know that articles inside the passenger compartment [of an automobile] are rarely "within the area into which an arrestee might reach," and blind adherence to *Belton's* faulty assumption would authorize myriad unconstitutional searches.

Id. at 350-51 (internal citation and some internal quotation marks omitted). Accordingly, the Court held: "Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search *or it is reasonable to believe the vehicle contains evidence of the offense of arrest*." *Id*. at 351 (emphasis added). As to the latter, the Court explained:

> In many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence. But in others, including *Belton* and *Thornton* [*v. United States*, 541 U.S. 615 (2004)], the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein.

556 U.S. at 343-44 (internal citations omitted).

See also Taylor v. State, 448 Md. 242, 248 (2016) (recognizing that a vehicle may be searched incident to arrest when it is "reasonable to believe evidence *relevant to the crime of arrest* might be found in the vehicle") (citing *Gant, supra*, 556 U.S. at 343) (emphasis added), *cert. denied*, 137 S.Ct. 1373 (2017).

Gant concerned the search of a suspect's vehicle, while this case involves the search of a suspect's backpack located in the rear seat of a vehicle appellant had just occupied prior to his arrest. Officer Saffran testified that appellant's backpack was located in the back seat of the patrol car when appellant was transported back to the hotel. The backpack remained on the seat when appellant stood outside of the patrol car for the show-up. The backpack was searched as soon as appellant was arrested. The backpack was moved to the

front seat after appellant was arrested and before appellant was transported to the police station for further processing.

At the point where the backpack was searched, the police had probable cause to believe that the backpack contained illicit drugs. Probable cause for such a belief was based on the fact that appellant had admitted supplying Mr. Ayers with CDS and also admitted that he had attempted to collect payment for the drugs that Mr. Ayers had consumed. Also, the police, based on Mr. Ayers's statement to them, had reason to believe: 1) that during the carjacking appellant had displayed a handgun; and 2) that because appellant had been driven to the hotel by Mr. Ayers, appellant did not have a car nearby in which he could have stored his CDS or handgun. These facts gave the police probable cause to believe that the backpack appellant had been wearing contained a handgun or illegal drugs or both. Therefore, under *Gant*, even if the State failed to prove that the backpack was in appellant's reach when it was seized, both the search and seizure were lawful.

JUDGMENTS AFFIRMED. COSTS TO BE PAID BY APPELLANT.