UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2068

September Term, 2015

TIMOTHY LEE MERCER

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Kehoe,
Shaw Geter,

JJ.

Opinion by Shaw Geter, J.

Filed: September 27, 2016

This is an appeal from Timothy Lee Mercer's 2015 conviction, in the Circuit Court for Howard County, for driving while under the influence of alcohol. He contends that the trial court erred when it did not suppress evidence that the State obtained through an unlawful traffic stop. Following the suppression hearing, Mercer pled not guilty and submitted his case on an agreed statement of facts. The court found him guilty and sentenced him to one year in prison, with all but two weekends suspended. We are tasked with determining whether "the trial court err[ed] in denying appellant's motion to suppress?" We answer the question in the negative and affirm the circuit court's decision.

BACKGROUND

On Christmas Day, 2014, at around 8:30 p.m., Howard County 911 dispatch received a call from an unidentified woman who was following a vehicle in the area of the Glenelg Country School. She reported that a "black four-door" Acura with Maryland tag number 20955CF was driving "all over the road." As she followed the car, the caller provided updates on the vehicle's movements stating, "he keeps swerving toward the center" going at a speed of about "five miles per hour." The caller also gave her phone number to Dispatch, as well as the color, make, and model of her car.[1] She advised that she would continue to follow the vehicle.

[1] The caller was driving a gray Toyota Highlander.

Dispatch next received a call from another driver in the area. The second caller reported that he was behind a "small dark car" on Folly Quarter Road that was "all over the road" and "all over the place" traveling at about "20 miles per hour."

With the information received from the first 911 call, Dispatch radioed Officer Bryan Borowski of the Howard Country Police Department, who was patrolling the area. Dispatch advised Borowski of a possible intoxicated driver, traveling west on Folly Quarter Road. He was told that the black four-door car, with Maryland license plate 20955CF was being driven "erratically" going "two miles per hour," "crossing the line," and was "being followed" by the first caller.

As the first caller continued to follow the vehicle, she reported that the Acura was stopping at a High's Dairy Store. When Borowski arrived at High's, he spotted a vehicle that matched the description of the suspect vehicle provided by Dispatch. The car was parked next to a gas pump and another officer's patrol vehicle was parked directly behind it. With his rear lights[2] activated, Borowski pulled in directly behind the other patrol car. He exited his car and approached Mercer, who was seated in the driver's seat. Borowski asked Mercer where he was coming from and requested his license and registration. Mercer provided the requested documents and informed the officer that he was coming from a Christmas party.

Borowski testified that he detected "a strong odor of an alcoholic beverage" on Mercer's breath. Mercer's eyes were bloodshot, watery, and glassy. He also noticed that

[2] The rear lights are located on the top of the police vehicle.

Mercer's speech was "at times incoherent." Mercer talked slowly and appeared confused. Based on these observations, Borowski asked Mercer to exit the car and performed a field sobriety test. The results, led to Mercer's arrest for driving while under the influence.

During the encounter, two other officers were present at the scene. The first officer on the scene was Officer Brian Phillips and Officer Ronald Mabe arrived later during the investigation. All of the officers, including Borowski were in marked patrol vehicles and full police uniforms. The other two officers were standing outside their vehicles while Borowski spoke with Mercer.

Prior to trial, Mercer moved to suppress the evidence obtained from the traffic stop, arguing that the stop was illegal. He claimed that Borowski did not have reasonable suspicion to detain him because he was not aware of enough facts to form that level of suspicion. Mercer argued that the officer had only been informed by Dispatch that "an anonymous reporting party observed a black, four-door Acura" that was swerving and traveling two miles per hour. The State countered that the encounter was a "mere accosting" which did not require any level of suspicion. In the alternative, the State argued that the officer had reasonable suspicion based on the information provided to Dispatch.

At the hearing, the State's evidence included the testimony of Borowski, an audio recording of the 911 calls, and the communications between the 911 dispatchers and the two responding police officers.

Following argument, the circuit court denied appellant's motion. It first held that the police had reasonable suspicion to justify the stop. The court noted that "police can rely

upon a good citizen's report of criminal activity that they're observing especially when it comes out in this kind of detail. It's being described as it's happening. The citizen stays and awaits the police arrival." The court further reasoned that Borowski had reasonable suspicion to justify the stop because he was informed that the suspect was driving erratically and was provided the tag number and color of the vehicle.

The court ruled, alternatively, that the encounter was a "mere accosting by virtue of the fact that the defendant could have driven away, he wasn't blocked in." The court concluded that Borowski had reasonable suspicion once he engaged Mercer in conversation, his bloodshot eyes, odor of alcohol on his breath and incoherent speech gave him probable cause to continue his investigation and continue to detain Mercer.

We shall recite additional facts as necessary to our discussion of the issues.

DISCUSSION

I. Standard of Review

In reviewing the denial of a motion to suppress, we must rely solely on the record developed at the suppression hearing. *Barnes v. State*, 437 Md. 375, 389 (2014) (citing *Briscoe v. State,* 422 Md. 384, 396 (2011)). We view the evidence and inferences that may be drawn therefrom in the light most favorable to the prevailing party. *Id.* Here, that party is the State. We accept the suppression court's factual findings and uphold them unless they are clearly erroneous, giving due regard to that court's opportunity to assess the credibility of witnesses. *Lawson v. State*, 120 Md.App. 610, 614 (1998). "We, however, make our own independent constitutional appraisal, by reviewing the relevant law and

applying it to the facts and circumstances of this case." *Barnes v. State*, 437 Md. 375, 389 (2014) (quoting *Lee v. State,* 418 Md. 136, 148–49 (2011)).

In the case *sub judice*, none of the evidence pertinent to the issues raised in this appeal are in dispute. The suppression court's ruling reflects the court's having credited the testimony of Borowski concerning the encounter. We therefore accept the officers' version of events as we analyze the parties' legal arguments.

II. The nature of the encounter between Borowski and Mercer

Mercer contends that his encounter with Borowski was an investigatory stop, which required reasonable suspicion in order to be lawful. He argues that he was seized "the moment Borowski stopped behind the first police [car] that was directly behind appellant's vehicle." The State argues that the encounter was a "mere accosting" which did not require any Fourth Amendment justification. Alternatively, the State argues that if the encounter was an investigatory stop, it was supported by reasonable suspicion. The circuit court agreed with the State and concluded that the encounter was a mere accosting. The court held that if the encounter was an investigatory stop, it was supported by reasonable suspicion.

The Fourth Amendment to the United States Constitution guarantees that "[t]he right of the people to be secure in their persons,…against unreasonable…seizures, shall not be violated...." Any non-consensual detention is a "seizure" of the person within the meaning of the Fourth Amendment. *Barnes*, 437 Md. at 390 (2014). The Court of Appeals explained:

> It is well established that the Fourth Amendment guarantees are not implicated in every situation where the police have contact with an individual....Many Courts have analyzed the applicability of the Fourth Amendment in terms of three tiers of interaction between a citizen and the police....The most intrusive encounter, an arrest, requires probable cause to believe that a person has committed or is committing a crime....The second category, the investigatory stop, is less intrusive than a formal custodial arrest and 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.
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> The least intrusive police-citizen contact, a consensual encounter,…involves no restraint of liberty and elicits an individual's voluntary cooperation with non-coercive police contact.

Swift v. State, 393 Md. 139, 149–51 (2006)(citations omitted). In this case, our initial concern is with the lower two levels of police-citizen encounters, the investigative stop and the consensual encounter.

The investigatory stop, known commonly as the *Terry* stop, is lawful if the officer has reasonable articulable suspicion. The Court of Appeals described the *Terry* stop:

> A Terry stop is limited in duration and purpose and can only last as long as it takes a police officer to confirm or to dispel his suspicions. A person is seized under this category when, in view of all the circumstances surrounding the incident, by means of physical force or show of authority a reasonable person would have believed that he was not free to leave or is compelled to respond to questions.

Id. at 150 (citations omitted). A consensual encounter (also known as a mere accosting), on the other hand, is beneath the Fourth Amendment radar and does not require any level of suspicion *Pyon v. State*, 222 Md. App. 412, 421 (2015).

> Encounters are consensual where the police merely approach a person in a public place, engage the person in conversation, request information, and the person is free not to answer and walk away. The guarantees of the Fourth

> Amendment are not implicated in such an encounter unless the police officer has by either physical force or show of authority restrained the person's liberty so that a reasonable person would not feel free to decline the officer's requests or otherwise terminate the encounter.

Swift, 393 Md. at 151. As long as it stays within its strict boundaries, a mere accosting does not require any Fourth Amendment justification. *Pyon*, 222 Md.App. at 422.

The line between an investigative stop and a mere accosting can be factually ambiguous. *Id.* at 423. The litmus test is indisputably whether a reasonable person during the critical time period would or would not have felt free to leave. The Court of Appeals has identified the following factors as probative:

> These factors include: the time and place of the encounter, the number of officers present and whether they were uniformed, whether the police removed the person to a different location or isolated him or her from others, whether the person was informed that he or she was free to leave, whether the police indicated that the person was suspected of a crime, whether the police retained the person's documents, and whether the police exhibited threatening behavior or physical contact that would suggest to a reasonable person that he or she was not free to leave."

Ferris v. State, 355 Md. 356, 377 (1999).

Given the facts in the present case, we need not address whether the encounter was a mere accosting or an investigatory stop because assuming, *arguendo*, that the traffic stop was an investigatory stop, the stop was based on reasonable suspicion.

III. The stop complied with the Fourth Amendment because Borowski had reasonable suspicion that Mercer had been driving while intoxicated.

Appellant argues that Borowski lacked reasonable suspicion to stop Mercer. He contends that reasonable suspicion can be based only on the information conveyed to Borowski and that the information so conveyed was insufficient. The State asserts two

counter arguments. The State argues that the information conveyed to Dispatch is a part of the collective knowledge of the police, and is therefore considered known by Borowski when assessing reasonable suspicion. Alternatively, the State contends that the information Dispatch relayed to Borowski was sufficient to constitute reasonable suspicion. We agree with the State's second argument and therefore, decline to address its first argument. As such, we hold that Borowski had reasonable suspicion to stop Mercer because of the information conveyed directly to him by Dispatch.

A brief investigative stop is valid when an officer has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *See Navarette v. California*, 134 S.Ct. 1683, 1687 (2014) (quoting *United States v. Cortez*, 449 U.S. 411, 417–18 (1981)). The reasonable suspicion necessary to justify such a stop depends upon both the content of information possessed by police and its degree of reliability. *Id.* Ultimately the Court must look to the "totality of the circumstances—the whole picture," when evaluating whether there is reasonable suspicion. *Cartnail v. State*, 359 Md. 272, 287 (2000) (quoting *Alabama v. White*, 496 U.S. 325, 330 (1990)).

In the present case, the record shows that Dispatch informed Borowski of the following:

> Motor vehicle violation being followed in the area of the Glenelg Country School…12793 Folly Quarter Road off of Maryvale Court…have a vehicle 20955CF driving erratically, two miles an hour, slowly, crossing the line, being followed.
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> It's going to be a black car, four door, possibly a Lexus.

This highly detailed information, although succinct, was enough to provide Borowski with reasonable suspicion to stop Mercer for driving while under the influence of alcohol.

Dispatch made Borowski aware of the identifying characteristics of Mercer's vehicle—a black, four-door car with the license plate 20955CF. He was given information about the driver's general location—in the area of the Glenelg Country School located at 12793 Folly Quarter Road off of Maryvale Court. Borowski was also informed that the car proceeded to the High's Dairy Store.

In addition, the driver of the vehicle was described as driving erratically, crossing the middle line, and moving slowly at a rate of two miles per hour. These reported activities are strongly correlated with drunk driving. *See Navarette v. California*, 134 S.Ct. 1683, 1691 (2014). Specifically, "crossing over the center line," is among the driving behaviors the Supreme Court has considered as "sound indicia of drunk driving." *Id.* Accordingly, the above referenced dangerous behavior would justify a traffic stop on suspicion of drunk driving. *Id.*

Further, the information provided to Borowski had sufficient indicia of reliability. It was contemporaneous, specific, and based on personal observations. The information relayed was especially reliable as the caller was not any anonymous tipster. Rather, as the trial court stated, she was "just a good citizen" who observed erratic driving and called the police.

In sum, based on the totality of the circumstances, in the present case, Borowski was aware of facts sufficient to reasonably suspect that Mercer was in violation of the traffic

laws. As the encounter progressed, that suspicion ripened into probable cause to arrest Mercer for driving while intoxicated.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.