Circuit Court for Queen Anne's County
Case No. C-17-CR-20-000344

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 99

September Term, 2021

STATE OF MARYLAND

v.

TROY SOMERVILLE

Berger,
Shaw Geter,
Wells,

JJ.

Opinion by Berger, J.

Filed: September 3, 2021

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This case is before us on the State's appeal of the Circuit Court for Queen Anne's County's order granting a motion to suppress evidence filed by Troy Somerville, appellee. The trial court granted Somerville's motion to suppress evidence recovered during a search incident to his arrest. The State raises the following single issue for our consideration on appeal, which we restate verbatim:

> Did the circuit court err in concluding that Trooper Thomas lacked probable cause to believe that Somerville was guilty of an impaired driving offense at the time of arrest?

For the reasons explained herein, we shall answer this question in the affirmative. Accordingly, we shall reverse the judgment of the circuit court granting the motion to suppress and remand for further proceedings.

FACTS AND PROCEEDINGS

Our recitation of the factual background is drawn from the testimony of Trooper Thomas at the hearing on Somerville's motion to suppress. *See Ferris v. State*, 355 Md. 356, 368 (1999) (explaining that appellate review of a circuit court's ruling on a "motion to suppress under the Fourth Amendment is based solely upon the record of the suppression hearing"). At approximately 12:20 a.m. on August 23, 2020, Trooper First Class Corey Thomas was on duty performing road patrol in the area of Route 213, south of the Chestertown Bridge in Queen Anne's County. There were businesses along the sides of the roadway, but the businesses were closed and it was dark. Trooper Thomas observed a vehicle in the parking lot of CJ's Automotive. The vehicle was "not in any parking space" and "was pulled off towards the middle of the parking lot." Both the driver and front

passenger doors were open, and a woman was standing outside of the vehicle speaking with the occupant of the driver's seat. Somerville was later identified as the occupant of the driver's seat. Trooper Thomas "observed that it was suspicious" due to "the time, being midnight and the business being closed and the female out talking to the driver," so he "wanted to conduct a welfare check" in order "to make sure everybody was okay."

Trooper Thomas had already passed the parking lot, so he conducted a U-turn and returned to the parking lot. Trooper Thomas was driving an unmarked vehicle and did not activate any emergency lights or siren. He pulled in behind the vehicle and "observed the female to bent over the person . . . sitting in the driver's seat." Trooper Thomas asked the female standing outside of the vehicle and the man sitting in the passenger seat "if everything was okay," and they "advised that [when] they were coming across the Chestertown Bridge, the driver was smoking a cigarette" that "blew out of his hand into the car." They pulled into the parking lot "to look for the cigarette because it was a rental car and they didn't want [the cigarette] to burn the seats." While he was speaking to the occupants, he observed an open can of "Truly," an alcoholic beverage, in the center console area of the vehicle. Trooper Thomas also saw a glass smoking device that he recognized as a device typically used to smoke marijuana in the center console of the vehicle.

While Trooper Thomas was speaking to the occupants, Somerville exited the vehicle and continued speaking with Trooper Thomas outside of the vehicle.[1] Trooper

[1] On cross-examination, Trooper Thomas testified that he did not recall whether he could see the can of Truly before Somerville exited the vehicle or whether he only saw the can after Somerville exited the vehicle.

Thomas "smelled a strong odor of an alcoholic beverage coming from [Somerville's] breath and person" and he "observed [Somerville] to have bloodshot glassy eyes." On cross-examination, Trooper Thomas acknowledged that "late hours and lack of sleep" could cause bloodshot eyes. Trooper Thomas did not tell the occupants of the vehicle that they were not free to leave, nor did he speak to them in an aggressive manner. Trooper Thomas was wearing his uniform and sidearm but was not wearing his police-issued Stetson hat. The dash camera in Trooper Thomas's vehicle was not functioning at the time.

Based upon his "training, knowledge, and experience," Trooper Thomas believed that Somerville had been drinking alcohol. He asked Somerville "if he had anything to drink and he said he did not." Trooper Thomas asked Somerville if he would submit to field sobriety tests, at which point the passenger interjected that Somerville "was drunk, but wasn't too drunk." Trooper Thomas administered two field sobriety tests, the Horizontal Gaze Nystagmus ("HGN") test and the walk-and-turn test. The HGN test checks for "involuntary jerking of the eye" which can indicate alcohol impairment. In each of Somerville's eyes, Trooper Thomas observed "lack of smooth pursuit, distinct and sustained nystagmus at maximum deviation, and onset of nystagmus prior to 45 degrees." These were "all six clues" that can be observed during the HGN test.

Trooper Thomas administered the walk-and-turn test, which requires a test subject to take a specified number of steps while touching heel-to-toe, turn around, and walk back in the same manner. Trooper Thomas explained the process and demonstrated how to perform the test. Somerville "missed heal to toe, raised his arms, stepped off line, walked

the incorrect number of steps and stopped walking." Prior to starting the field sobriety tests, Trooper Thomas asked Somerville if he had any medical conditions, and Somerville answered in the negative. After being placed in the starting position for the walk-and-turn test, Somerville stated that he had a medical condition with his feet that he had forgotten to disclose earlier, specifically, plantar warts. Finally, Trooper Thomas administered the "one-leg stand test," which requires a test subject to stand with one foot six inches off the ground while counting. Thomas observed "four out of four clues" during this test. Specifically, Trooper Thomas observed that Somerville "placed his foot down," "swayed," "hopped," and "raised his arm over six inches, attempting to maintain balance." Somerville told Trooper Thomas that he was unable to complete the one-leg stand test due to foot pain. After concluding the field sobriety tests, Trooper Thomas concluded that Somerville was under the influence of alcohol and placed Somerville under arrest.

At the hearing on Somerville's motion to suppress evidence recovered during a search incident to arrest, Trooper Thomas acknowledged on cross-examination that he had not received calls, complaints, or reports of a suspicious vehicle in the area prior to approaching the vehicle, nor did he observe any sort of altercation occurring between Somerville and the female passenger before he approached them. Trooper Thomas further testified that he did not observe any illegal activity before approaching them. Trooper Thomas explained that he found the situation to be "suspicious just based off the time of the day and the business being closed" so he decided to conduct a welfare check. Defense counsel asked Trooper Thomas why he needed to talk to the vehicle occupants "if they

were obviously okay." Trooper Thomas explained that the situation was "just weird" because "the driver's door [was] open," the female passenger was "bent over the driver" and "the vehicle [was] in the closed business parking lot."

While speaking with Somerville and the passenger, Trooper Thomas asked them for their identification. Trooper Thomas explained that he attempted to identify the occupants of the vehicle because that is a typical practice "when we do suspicious vehicle checks" so that "if there are any thefts or anything that comes out of it the next day or whatever or the business has any complaints, then we have their information on the card."

Trooper Thomas maintained that he did not at any time instruct Somerville to exit the vehicle but that Somerville exited the vehicle of his own volition. Trooper Thomas acknowledged that Somerville did not have any difficulty producing his license, did not fumble for any documents, and had no issues exiting the vehicle or walking around the vehicle to the location where Trooper Thomas conducted the field sobriety tests. Somerville told Trooper Thomas that he had been driving but denied having consumed alcohol.

Trooper Thomas testified on cross-examination that he asked Somerville if he had any medical conditions that would prevent him from doing simple tasks, such as walking and turning. The following exchange occurred:

> [DEFENSE COUNSEL]: Prior to doing the Horizontal Gaze Nystagmus, there are foundational questions that you are required to ask. What are the required foundational questions for Horizontal Gaze Nystagmus for you to accurately determine whether or not the nystagmus is related to alcohol or some other issue?

[TROOPER THOMAS]: I'm required to ask whether he has any medical -- head injuries or whether he wears glasses or not.

[DEFENSE COUNSEL]: Okay. Did you ask that?

[TROOPER THOMAS]: I don't recall. I don't have it stated in my report.

[DEFENSE COUNSEL]: Well, I asked you what you ask[ed] before field sobriety tests and the only question you've relayed to the [c]ourt now on direct and on cross, is that you said do you have medical conditions that would prevent you from doing simple tasks like walking and turning. Was that your answer?

[TROOPER THOMAS]: Yes, ma'am.

[DEFENSE COUNSEL]: So you did not ask whether or not he had any head injuries or whether or not he wore glasses or contacts, correct?

[TROOPER THOMAS]: No, ma'am.

[DEFENSE COUNSEL]: You also did not ask him whether or not he takes any prescription medication, is that correct?

[TROOPER THOMAS]: Yes, ma'am.

[DEFENSE COUNSEL]: Are you familiar with all the other factors that you learned during your training for field sobriety tests regarding the [e]ffects of medication and eye conditions on nystagmus?

[TROOPER THOMAS]: Fairly, yes ma'am.

[DEFENSE COUNSEL]: So you're not able to exclude any of those because you did not ask the proper questions, correct?

[TROOPER THOMAS]: Yes, ma'am.

[DEFENSE COUNSEL]: Again, that evening, do you know whether or not he had glasses on or not?

[TROOPER THOMAS]: I believe he did, ma'am, yes.

> [DEFENSE COUNSEL]: Did you ask him to remove his glasses?
>
> [TROOPER THOMAS]: I believe I did, yes, ma'am.
>
> [DEFENSE COUNSEL]: Then what did you do with his glasses, once you had him take them off?
>
> [TROOPER THOMAS]: I believe he placed them on the hood of my car.
>
> [DEFENSE COUNSEL]: You actually didn't give them back to him, did you?
>
> [TROOPER THOMAS]: I don't recall.

Thereafter, defense counsel showed Trooper Thomas a photograph of Somerville that Trooper Thomas had taken at the barrack following Somerville's arrest. Somerville was not wearing glasses in the photograph. Trooper Thomas acknowledged that he did not ask Somerville how bad his eyesight was and that he did not know how well Somerville would have been able to see Trooper Thomas's demonstration for the field sobriety tests. Defense counsel inquired as to whether Trooper Thomas administered any field sobriety tests that were less physically focused, "such as finger dexterity, counting backwards, [and] the alphabet test," but Trooper Thomas acknowledged that he did not perform any of those tests.[2]

[2] On redirect examination, the prosecutor asked Trooper Thomas, "Did you offer him any other test?" Trooper Thomas responded that he offered Somerville the preliminary breath test at the scene, but Somerville declined to take the test. Defense counsel objected to the question, but the trial court found that defense counsel had opened the door to this line of questioning by inquiring as to whether Trooper Thomas had offered Somerville any other tests in addition to or instead of those administered. *But see* Md. Code (1977, 2020 Repl. Vol.), § 16-205.2 of the Transportation Article, "[t]he taking of or refusal to submit to a preliminary breath test is not admissible in evidence in any court action."

The trial judge asked Trooper Thomas to confirm he had Somerville remove his glasses for the HGN test, and Trooper Thomas responded that he had. The following exchange occurred:

> THE COURT: And you said you placed them on the hood of your car?
>
> [TROOPER THOMAS]: Yes, ma'am, I believe they were on the hood of my car.
>
> THE COURT: At any time did you give them back to him?
>
> [TROOPER THOMAS]: I don't recall where his glasses went after they were removed.
>
> THE COURT: So when he did the walk-and-turn and the one-leg stand, you don't know if he had his glasses on or off?
>
> [TROOPER THOMAS]: I don't believe he had them on, but he did state that he understood the test as it was explained.

When arguing before the trial court, the prosecutor emphasized that there was no stop that occurred because "the defendant's car ha[d] come to a stop on its own" and there was "no pulling over" and "no order to stop." The prosecutor further emphasized that there was "no showing of authority whatsoever" given that Trooper Thomas was operating "an unmarked car" with "no police insignia on it whatsoever." The prosecutor argued that there was, therefore, no seizure. The prosecutor further emphasized that the vehicle was running and Somerville was sitting in the driver's seat when Trooper Thomas observed the open alcoholic beverage in the center console, noticed Somerville's glassy and bloodshot eyes, and perceived a strong odor of alcohol emanating from Somerville's person.

The prosecutor asserted that the observations made by Trooper Thomas went "well beyond the minimum requirements" to justify a request that Somerville participate in field sobriety tests. With respect to the field sobriety tests, the prosecutor emphasized that this was "not the guilt or innocence stage." Instead, the prosecutor asserted that the appropriate determination was whether there was sufficient evidence of impairment "for [Trooper Thomas] to effect an arrest" and there was "absolutely . . . more than enough, in order to place [Somerville] under arrest." Accordingly, the prosecutor asked the circuit court to deny the motion to suppress.

Defense counsel asserted that there was a mere "hunch" supporting Trooper Thomas's decision to approach the vehicle and emphasized that there were streetlights in the area, which was "very well lit." Defense counsel further argued that Trooper Thomas "[did]n't need to go in and interfere" and that the "interference [was] unwarranted." Defense counsel acknowledged that law enforcement can approach and talk to anyone, but argued that "it's different when you're in a car and it's different when you walk up to someone and effectively at that point, start asking interrogating questions of where you coming from, where are you going, what are your IDs, you know, why are you here." Defense counsel further argued that after confirming that Somerville and the passenger were not in danger, Trooper Thomas should have permitted them to "[be] on their way because there were no other observations." Defense counsel further asserted that there was no reasonable articulable suspicion for field sobriety tests because Trooper Thomas had not observed any weaving or other indication of impaired driving.

In addition to arguing that there was no reasonable suspicion to support the administration of field sobriety tests, defense counsel asserted there was no probable cause to arrest because the field sobriety tests were not administered properly. Defense counsel argued that Trooper Thomas failed to ask specific foundational questions about medications and head injuries. Defense counsel asserted that it was difficult for Somerville to balance and do field sobriety tests without wearing his glasses and that Somerville's challenges with the walk-and-turn and one-leg stand test were attributable to his difficulty seeing without his glasses and/or his painful plantar warts.

Ultimately, the circuit court commented that the court did not "even know if it was a seizure," but that if there was a seizure, it was lawful. The court further determined that the officer "had reasonable articulable suspicion for the field sobriety tests with the can of Truly [and] the statement made by [the female passenger]." Nonetheless, the trial court granted the motion to suppress anything seized incident to the arrest on the grounds that "there was no probable cause of the arrest because the field sobriety tests fail on behalf of the trooper. Not on the behalf of Mr. Somerville, but on behalf of the trooper." The State's timely appeal followed.

DISCUSSION

In this appeal, the State asserts that the trial court erred by granting Somerville's motion to suppress evidence recovered incident to his arrest on August 23, 2020. Specifically, the State contends that a proper application of constitutional principles

demonstrates that Trooper Thomas had probable cause to believe that Somerville had committed an impaired driving offense. As we shall explain, we agree with the State.

A. Applicable Legal Framework and Standard of Review

The Court of Appeals has described the standard of review to be applied in motions to suppress:

> When we review a trial court's grant or denial of a motion to suppress evidence alleged to have been seized in contravention of the Fourth Amendment, we view the evidence adduced at the suppression hearing, and the inferences fairly deducible therefrom, in the light most favorable to the party that prevailed on the motion. We defer to the trial court's fact-finding at the suppression hearing, unless the trial court's findings were clearly erroneous. Nevertheless, we review the ultimate question of constitutionality *de novo* and must make our own independent constitutional appraisal by reviewing the law and applying it to the facts of the case.

Corbin v. State, 428 Md. 488, 497-98 (2012) (citations and internal quotations omitted).

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" U.S. Const. amend. IV. The Fourth Amendment, applicable to the States through the Due Process Clause of the Fourteenth Amendment, protects against unreasonable government searches and seizures. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

"Fourth Amendment guarantees are not implicated in every situation where the police have contact with an individual." *Swift v. State*, 393 Md. 139, 149 (2006). The Court of Appeals has described three tiers of interaction between an individual and law

enforcement that have different implications for Fourth Amendment protections: (1) an arrest; (2) an investigatory stop or detention; and (3) a consensual encounter. *Id.* at 149-51.

An arrest is the most intrusive of the three types of encounters and "requires probable cause to believe that [the individual] has committed or is committing a crime." *Id.* at 150. The second type of encounter, an investigatory stop or detention, permits the police to briefly detain an individual, but the stop "must be supported by reasonable suspicion that [the individual] has committed or is about to commit a crime[.]" *Id.* Both an arrest and an investigatory stop or detention involve some restraint on an individual's liberty, and, accordingly, the Fourth Amendment is implicated for each. The arresting or detaining officer must have the necessary foundation, either probable cause or reasonable suspicion, to justify the stop. *Id.*

"Reasonable doubt" and "probable cause" are "nontechnical conceptions that deal with the factual and practical considerations of everyday life on which reasonable and prudent [people], not legal technicians, act." *Ornelas v. United States*, 517 U.S. 690, 695 (1996) (quotation and citation omitted). Indeed, the Court explained that "[a]rticulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible." *Id.* "The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause." *Id.* at 696.

Probable cause is a "fluid concept" that "exist[s] where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found." *State v. Johnson*, 458 Md. 519, 535 (2018) (quotations and citations omitted). The probable cause standard is "incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003). "[P]robable cause means something less than 'more likely than not.'" *Freeman v. State*, 249 Md. App. 269, 301 (2021). Indeed, the Court of Appeals has observed that "[t]he *quanta* of proof appropriate in ordinary judicial proceedings are inapplicable to the probable cause determination; consequently, finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the probable cause determination. In short, probable cause is not a high bar." *Johnson*, *supra*, 458 Md. at 535.

The Court of Appeals recently described the reasonable suspicion standard as follows:

> "There is no standardized litmus test that governs the 'reasonable suspicion' standard," and we have recognized that "any effort to compose one would undoubtedly be futile." *Cartnail* v. State, 359 Md. 272, 286, 753 A.2d 519 (2000) (citing *Ornelas v. United States*, 517 U.S. 690, 695, 116 S. Ct. 1657, 134 L.Ed.2d 911 (1996) (explaining that it would be impossible to articulate, with precision, what "reasonable suspicion" means)). The futility in attempting to create such a standard arises from the "myriad factual situations that arise." [*United States v.*] *Cortez*, 449 U.S. [411,] 417, 101 S. Ct. 690 [(1981)]. Like probable cause, the standard for "reasonable suspicion" is intentionally fluid because it "is not readily, or

> even usefully, reduced to a neat set of legal rules." [*United States v.*] *Sokolow*, 490 U.S. [1,] 7, 109 S Ct. 1581 [(1989)] (citation and internal quotations omitted). Distilled to its essence, we consider the "totality of the circumstances -- the whole picture --" to determine whether "the detaining officers . . . have a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Cortez*, 449 U.S. at 417–18, 101 S. Ct. 690. The reasonable suspicion standard "is a common sense, nontechnical conception that considers factual and practical aspects of daily life and how reasonable and prudent people act." *Cartnail*, 359 Md. at 286, 753 A.2d 519 (citing *Ornelas*, 517 U.S. at 695-96, 116 S. Ct. 1657). In *Sizer* [*v. State*, 465 Md. 350 (2017)], we explained that "[t]he reasonable suspicion standard does not allow a law enforcement official to simply assert that innocent conduct was suspicious to him or her. Rather, the officer must explain how the observed conduct, when viewed in the context of all of the other circumstances known to the officer, was indicative of criminal activity." 456 Md. at 365, 174 A.3d 326 (internal citations and quotations omitted) (cleaned up). Although reasonable suspicion "requires some minimal level of objective justification for making the stop that amounts to something more than an 'inchoate and unparticularized suspicion or hunch', it does not require proof of wrongdoing by a preponderance of the evidence." *Sokolow*, 490 U.S. at 7, 109 S. Ct. 1581 (cleaned up). Accordingly, we have stated that a stop may be upheld based on "a series of acts which could appear naturally innocent if viewed separately" but that "collectively warrant further investigation[.]" *Cartnail*, 359 Md. at 290, 753 A.2d 519 (citation omitted); *see also United States v. Arvizu*, 534 U.S. 266, 277, 122 S. Ct. 744, 151 L.Ed.2d 740 (2002) ("A determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct.").

Trott v. State, 473 Md. 245, 256-57 (2021).

The third type of interaction between an individual and law enforcement is a consensual encounter, which requires neither probable cause nor reasonable suspicion. A consensual encounter "involves no restraint of liberty and elicits an individual's voluntary

cooperation with non-coercive police contact." *Swift*, *supra*, 393 Md. at 151. "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 to not answer and walk away." *Id.* Because the person is free to end the encounter at any time, the Fourth Amendment is not implicated. Consensual encounters "need not be supported by any suspicion . . . [as] an individual is not considered to have been 'seized' within the meaning of the Fourth Amendment." *Id.*

Encounters that begin as consensual can sometimes evolve to raise Fourth Amendment implications. "An encounter has been described as a fluid situation, and one which begins as a consensual encounter may lose its consensual nature and become an investigatory detention or an arrest once a person's liberty has been restrained and the person would not feel free to leave." *Id.* at 152. An interaction that initially began as a consensual encounter becomes a seizure when an officer "by means of physical force or show of authority has in some way restrained the liberty of a citizen[.]" *Id* at 152. (citations and quotations omitted).

The Court of Appeals has identified several factors to be considered when determining whether a reasonable person would feel free to leave. The factors include "the activation of a siren or flashers, commanding a citizen to halt, display of weapons, and operation of a car in an aggressive manner to block a defendant's course or otherwise control the direction or speed of a defendant's movement." *Id.* at 153. Other factors the Court has found noteworthy include the time and place of the encounter, the number of

officers present and whether they were uniformed, whether the police moved or isolated the person, whether the person was told that he was free to leave or suspected of a crime, and whether the police exhibited threatening behavior or physical contact. *Id.* "[T]he inquiry is a highly fact-specific one" that requires a "totality of the circumstances approach, with no single factor dictating whether a seizure has occurred." *Ferris v. State*, 355 Md. 356, 376-77 (1999).

B. Analysis

The State asserts that the motions court was correct when it determined that the encounter between Trooper Thomas and Somerville began as a consensual encounter. The State further asserts that the motions court was correct when it determined that there was reasonable suspicion to support Trooper Thomas's administration of field sobriety tests. The State takes issue, however, with the motions court's ultimate ruling granting Somerville's motion to suppress on the grounds that there was no probable cause to support the arrest "because the field sobriety tests fail on behalf of the trooper." As we shall explain, we agree with the State that Somerville's motion to suppress should have been denied.

1. The initial interaction between Trooper Thomas and Somerville was not a seizure.

When Trooper Thomas initially began interacting with Somerville and the female passenger, the vehicle was stationary while parked in a parking lot. Trooper Thomas approached Somerville's vehicle in an unmarked vehicle for a welfare check. Trooper Thomas did not draw his weapon, did not activate his light or sirens, and did not order

either Somerville or the passenger to do anything. Instead, Trooper Thomas asked them "if everything was okay."

Based upon the evidence presented at the suppression hearing, we hold that the initial interaction between Trooper Thomas and the occupants of the vehicle was a consensual encounter that does not implicate Fourth Amendment protections. Trooper Thomas "merely approach[ed]" Somerville "in a public place, engage[d] [Somerville in conversation, [and] request[ed] information." *Swift*, *supra*, 393 Md. at 151.[3] Based upon our objective analysis of the circumstances as considered within the applicable legal framework, which presupposes a reasonable innocent person and "does not include those who are contemplating, engaged in, or have completed a criminal act," *Trott v. State*, 138 Md. App. 89, 100 (2001) (citing *Florida v. Bostick*, 501 U.S. 439, 438 (1991)), we hold that a reasonable person in Somerville's situation would have felt free to terminate the encounter. Because the initial interaction "involve[d] no restraint of liberty" and elicited Somerville's "voluntary cooperation with non-coercive police contact," the Fourth Amendment was not initially implicated.

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[3] We are not persuaded by Somerville's argument that Somerville was seized when Trooper Thomas asked for and received Somerville's identification. "Merely asking for identification does not create a seizure." *Swift*, *supra*, 393 Md. at 157; *see also Stanberry v. State*, 343 Md. 720, 730, 684 A.2d 823, 828 (1996) (quoting *Florida v. Bostick*, 501 U.S. 429, 434-35 (1991)) ("[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual, ask to examine the individual's identification, and request consent to search his or her luggage as long as the police do not convey a message that compliance with their requests is required.").

2. The field sobriety tests were supported by reasonable suspicion.

As we explained *supra*, encounters that begin as consensual can sometimes evolve to raise Fourth Amendment implications. *Swift*, *supra*, 393 Md. at 152 ("An encounter has been described as a fluid situation, and one which begins as a consensual encounter may lose its consensual nature and become an investigatory detention or an arrest once a person's liberty has been restrained and the person would not feel free to leave."). Accordingly, although the initial interaction between Trooper Thomas and Somerville did not implicate the Fourth Amendment, our analysis does not end there. We must next consider whether there was sufficient reasonable suspicion to support Trooper Thomas's administration of field sobriety tests. *See Blasi v. State*, 167 Md. App. 483, 505, 511 (2006) (explaining that "the administration of field sobriety tests . . . constitutes a search within the meaning of the Fourth Amendment" but that the administration of field sobriety tests "is constitutionally permissible when the officer has reasonable articulable suspicion that the driver is under the influence of alcohol.").

The evidence presented at the suppression hearing supports the trial court's conclusion that Trooper Thomas "had reasonable articulable suspicion for the field sobriety tests." During the initial consensual encounter between Trooper Thomas and Somerville, Trooper Thomas observed an open can of the alcoholic beverage "Truly" in the center console of the vehicle and also "smelled a strong odor of an alcoholic beverage coming from [Somerville's] breath and person." Trooper Thomas further observed a glass smoking device consistent with marijuana use located in the center console and observed that

Somerville's eyes were "glassy" and "bloodshot." Furthermore, Somerville's passenger specifically stated that Somerville "was drunk, but wasn't too drunk." This evidence was more than sufficient to provide Trooper Thomas with reasonable suspicion that Somerville was driving while impaired by alcohol or drugs. *See*, *e.g.*, *Blasi*, *supra*, 167 Md. App. at 511-12 (explaining that there was "more than reasonable articulable suspicion that [an individual] was driving under the influence of alcohol" when an officer "detected an odor of alcohol from within [a] vehicle," detected a strong odor of an alcoholic beverage emanating from [an individual's] breath and person," the individual's "eyes were bloodshot and glassy" and his speech was "slurred," and the individual admitted that "he had 'just a few' drinks.'").

3. The circuit court erred by concluding that Trooper Thomas lacked probable cause to arrest Somerville for impaired driving.

Finally, we address the circuit court's conclusion that there was no probable cause for Somerville's arrest. The circuit court found "that there was no probable cause for the arrest because the field sobriety tests fail on behalf of the trooper. Not on behalf of Mr. Somerville, but on behalf of the trooper." As such, the trial court ordered that anything seized incident to Somerville's arrest be suppressed. As we shall explain, in our view, the evidence presented at the motions hearing demonstrates that Trooper Thomas had probable cause to believe that Somerville was guilty of an impaired driving offense at the time of the arrest. *See*, *e.g.*, *Bailey v. State*, 412 Md. 349, 375 (2010) ("In the case of a search incident to arrest, the State must show that probable cause supported a lawful arrest before the officer conducted the search.").

Before the motions court and on appeal before this Court, Somerville's challenge focused primarily upon what he alleges are deficiencies in Trooper Thomas's administration of the field sobriety tests. Specifically, Somerville argued that Trooper Thomas failed to properly inquire as to whether Somerville had injuries or medical conditions that would impair his performance on field sobriety tests, failed to consider whether Somerville's plantar warts may have impacted his performance on certain tests, and failed to return Somerville's glasses prior to administering the walk-and-turn and one-leg stand tests. Presumably, the trial court was referring to these alleged deficiencies in the administration of the field sobriety tests when the court found that the tests "fail on behalf of the trooper."[4]

The State asserts that even if the motions court's finding that "the field sobriety tests fail on behalf of the trooper" constitutes a factual finding that the results of the field sobriety test were unreliable, the motions court nonetheless erred by treating that factor as dispositive instead of considering the field sobriety tests within the larger probable cause analysis.[5] Whether or not Trooper Thomas had probable cause to arrest Somerville for an impaired driving offense does not turn on Somerville's performance during field sobriety tests alone. Indeed, as we explained *supra*, probable cause "is 'a fluid concept,' 'incapable

[4] At the conclusion of the motions hearing after delivering an oral ruling, the court stated, "I will do a written opinion." No such opinion appears in the record.

[5] The State does not challenge the motions court's finding that "the field sobriety tests fail on behalf of the trooper." We "extend great deference to the motion court's finding of fact, unless clearly erroneous." *McCormick v. State*, 211 Md. App. 261, 269 (2013).

of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances.'" *McCracken v. State*, 429 Md. 507, 519-20 (2012) (quoting *Pringle*, *supra*, 540 U.S. at 370-71). "To determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause." *Pringle*, *supra*, 540 U.S. at 371 (quotation and citation omitted). Although a finding of probable cause requires more than that which would merely arouse suspicion, it nevertheless "is not a high bar." *Johnson*, *supra*, 458 Md. at 535 (quotation and citation omitted).

Field sobriety tests are one tool among many that a law enforcement officer may use to determine the likelihood that a vehicle operator is impaired by alcohol. Even if we set aside Somerville's performance on the field sobriety tests, there was more sufficient additional evidence to support Trooper Thomas's probable cause determination:

- Trooper Thomas observed an alcoholic beverage container in the center console of the vehicle Somerville had been driving before pulling over after crossing the Chestertown bridge;
- Trooper Thomas testified that he detected a strong odor of alcohol emanating from Somerville's breath and person;
- Trooper Thomas testified that he observed that Somerville's eyes were bloodshot and glassy; and
- Somerville's passenger volunteered to Trooper Thomas that Somerville "was drunk, but he wasn't too drunk."

In our view, the totality of the circumstances, even setting aside the field sobriety tests, established probable cause for Somerville's arrest. In other words, the circumstances

known at the time of Somerville's arrest were sufficient for a "reasonably prudent" police officer to believe that there was a "fair probability" that Somerville was guilty of an impaired driving offense. *Pacheco v. State*, 465 Md. 311, 324 (2019). Because Trooper Thomas's arrest was supported by probable cause, the motions court erred by granting Somerville's motion to suppress evidence recovered incident to his arrest. Accordingly, we reverse the judgment of the Circuit Court for Queen Anne's County and remand this case for further proceedings consistent with our opinion.

JUDGMENT OF THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY REVERSED. ORDER GRANTING MOTION TO SUPPRESS VACATED. CASE REMANDED TO THE CIRCUIT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.

The correction notice(s) for this opinion(s) can be found here:

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