Circuit Court for Anne Arundel County
Case No. 02-K-15-000657

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 400

September Term, 2016

MARKUS MARTAVIAN MILLER

v.

STATE OF MARYLAND

Woodward, C.J.,
Kehoe,
Zarnoch, Robert A.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: February 12, 2018

In the Circuit Court for Anne Arundel County, Markus Miller was charged with possession of cocaine. Before trial, he moved to suppress evidence of the cocaine as having been obtained in violation of his Fourth Amendment rights. The circuit court denied the motion.

The parties proceeded with a bench trial, on an agreed statement of facts. The court convicted Miller of possession of cocaine and sentenced Miller to four years' imprisonment, all but time served suspended, and three years of probation.

In this appeal, Miller asks whether the circuit court erred in denying his motion to suppress. We conclude that his contention is not preserved for appellate review, and, in any event, is not persuasive. Accordingly, we will affirm the judgment of the circuit court.

FACTS

As our review is limited to the circuit court's ruling on the motion to suppress, we recite only the facts adduced at the suppression hearing on May 29, 2015. The only evidence presented at that hearing was the testimony of Officer James Teare of the Anne Arundel County Police Department.

Officer Teare stated that on May 4, 2014, at approximately 3:00 a.m., he was on uniformed patrol near Spencer Road and Marley Neck Boulevard, which he described as "a known CDS [controlled dangerous substance] open air drug market[.]" He observed a vehicle, occupied by three individuals, parked on the opposite side of the street, with the

engine running. The officer made a U-turn, drove up to the rear of the vehicle," and parked behind it, in a manner that would not prevent the vehicle from driving away.

As he approached the vehicle, Officer Teare "observed three people inside of it, driver, front seat passenger and a rear seat passenger." He testified that he did not notice anything else about the vehicle as he approached it. Officer Teare then spoke to the female driver. Miller was in the front passenger seat, and was "acting like he was asleep." Officer Teare did not recall whether the driver's window was already down or if he asked her to roll it down. He asked the driver "what she was doing there" and "what was going on." The driver responded that she was waiting for her cousin, and pointed to a house which was known to Officer Teare because there had been "a few search warrants done in relation to CDS" there. While Officer Teare was talking to the driver, he asked her for identification. The driver responded that she did not have a driver's license or any identification on her.

Officer Teare smelled a "strong odor of marijuana" coming from within the vehicle. He told the driver that he could smell marijuana, and asked if there was any "contraband or marijuana" in the vehicle. The driver admitted that "they had smoked earlier," and stated that she "[did not] think that there was any left in the vehicle."

At that point, according to the officer, "[he] smelled the odor of marijuana emitting from the vehicle, so everybody inside the vehicle was being detained." He waited for a backup officer to arrive, and then "began to search the persons and the vehicle." He searched the driver and rear seat passenger first, and found no contraband. The officer

then searched Miller, and found suspected crack cocaine in Miller's sock. Miller was placed under arrest. The vehicle was then searched, and alprazolam pills, a controlled dangerous substance, were found in the glove box.[1]

At the conclusion of Officer Teare's testimony, defense counsel argued that the crack cocaine found in Miller's sock should be suppressed, stating that "the question here is whether [Officer Teare] had probable cause[to believe] that a crime was occurring." In support of her position, she presented three contentions to the circuit court. She elaborated on the first two and mentioned the third only in passing.

First, defense counsel argued that Officer Teare did not have probable cause to believe that a crime was being committed, because the General Assembly had decriminalized possession of ten grams or less of marijuana prior to Miller's arrest, and there was no evidence establishing that more than ten grams was present. Therefore, according to defense counsel, "[a]t the time the officer searched [Miller] he had still not discovered evidence that a crime was occurring[,]" but, "at most," there was evidence of a civil offense only.[2]

[1] Miller was not charged with possession of the alprazolam.

[2] Miller does not present this argument on appeal. Had he done so, we would not have found it to be persuasive. *See Barrett v. State*, ___ Md. App. ___, No. 530, 2017 WL 5900113, Sept. Term 2016 (filed November 29, 2017), *petition for certiorari pending*, slip. op. at 15-16 (Westlaw at *8) ("[A] police officer who has reason to believe that an individual is in possession of marijuana has probable cause to effectuate an arrest," and conduct a search incident to that arrest, "even if the officer is unable to identify whether the amount possessed is more than 9.99 grams.").

Second, counsel stated:

> [T]he officer never established anything individualized to Mr. Miller to suggest that he's in possession of any amount of marijuana. He doesn't say his clothing smells like it. Mr. Miller never made any statements. He's either sleeping or pretending to sleep quietly in the car. And at the point that Mr. Miller is searched he is detained.

Finally, counsel stated:

> I would also argue that just because Mr. Miller doesn't try to leave doesn't make it no longer an unlawful detention. There's been a recent case about that where an officer approaches a parked vehicle and the Court of Special Appeals says that's not a consensual encounter even if the car was moving anywhere before it happened. And that's *Pyon v. State*, 222 Md. App. 412 [(2015)].

For its part, the State asserted that, where police have probable cause to believe marijuana is present, there is "probable cause to believe there is more than ten grams[.]" The State argued that there was probable cause to believe Miller was committing a crime, and to search Miller incident to arrest, based on Miller's presence in a vehicle that was parked in an open air drug market and smelled of marijuana, coupled with the fact that Officer Teare was "familiar with the residence" that "the car [Miller] was in was waiting around for[.]"[3]

[3] The State argued, alternatively, that the odor of marijuana provided probable cause to search the vehicle, which would have led to the "inevitable discovery" of the alprazolam in the glove box. At that point, according to the State, the police would have had probable cause to arrest the occupants of the vehicle and search them incident to arrest, "and inevitably still discover" the crack cocaine in appellant's sock.

The court orally announced its ruling from the bench, stating:

> So, preliminarily, the evidence persuades the Court that the area was an open drug market - - open air drug market. That the officer did smell the pot.
>
> As I indicated, the police officer approaches the car, smells a strong odor of alcohol [sic].[4] The driver apparently does - - the driver indicates that she does not have a license; therefore, the automobile was not free to go. And the officer questioned the occupants further and relied upon the location of the car, the smell of marijuana, to conduct a search of the occupants and including the [Miller]. At which time the officer discovered marijuana - - I'm sorry, discovered drugs, a prescription in the glove box, and crack in the defendant's sock[.][5]
>
> . . .
>
> I'm just not persuaded that the law would require an officer to somehow discern through odor that the - - the amount involved or the amount being possessed by somebody in a car or that place was more than ten [grams]. It just strains logic. So, it seem to me that the State has satisfied its burden so as to justify the officer to, for want of a better term, follow his nose and to conduct a search.
>
> It being reasonable for an officer in the circumstances he found himself, open air drug market - - folks who - - who indicate that, at least one of them did, that they had been smoking[,] … and the odor being present. So I'll deny the motion to suppress.

[4] The court apparently meant to say that the officer smelled a strong odor of marijuana, not alcohol.

[5] The court subsequently noted that, because appellant had not been charged with possession of the alprazolam in the glove box, the motion to suppress was concerned only with the crack cocaine found in appellant's sock.

Analysis

In reviewing the grant or denial of a motion to suppress, "'we must rely solely upon the record developed at the suppression hearing.'" *Grimm v. State*, 232 Md. App. 382, 396 (2017) (quoting *Briscoe v. State*, 422 Md. 384, 396 (2011)), *cert. granted*, 456 Md. 54 (2017). We view the evidence presented at the suppression hearing and any inferences that may be drawn therefrom "in the light most favorable to the party who prevails on the motion," which, in this case, is the State. *Id.* Moreover, we "'accept the suppression court's factual findings unless they are shown to be clearly erroneous.'" *Id.* at 397 (quoting *Raynor v. State*, 440 Md. 71, 81 (2014)). However, appellate courts make their "own independent constitutional appraisal of the suppression court's ruling, by applying the law to the facts found by that court." *Raynor*, 440 Md. at 81.

Fourth Amendment guarantees against unreasonable searches and seizures "'are not implicated in every situation where the police have contact with an individual.'" *Swift v. State*, 393 Md. 139, 149 (2006) (quoting *U.S. v Mendenhall*, 446 U.S. 544, 554 (1980)).[6] In the context of the Fourth Amendment's guarantee against unreasonable searches, courts have identified three levels of interaction between the police and an individual:

> 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

[6] 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, 655 (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."

> 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 v. State, 409 Md. 415, 440 (2009).

On appeal, Miller makes essentially two arguments.

The first is that a *Terry* stop, albeit a bad one, occurred when Officer Teare "changed directions and parked behind the suspects' vehicle," because, under the totality of the circumstances, no reasonable person would have felt free to leave the scene. In support of this contention, he points following: (1) Officer Teare was in uniform; (2) he made a U-turn in order to pull up behind the vehicle in which Miller was sitting; (3) the encounter occurred in the early morning hours; (4) Officer Teare was a male, and the driver of the vehicle a female; (5) that Officer Teare made a "peremptory and confrontational request for identification" for the driver's identification; (6) that the officer failed to inform the driver of her right to leave the scene; and (7) Officer Teare made a "show of authority" because, even if the front driver's window had not been rolled down when he approached the vehicle, he would have "had her roll it down."

Second, Miller contends that the stop was illegal because, at the time Officer Teare made the U-turn and approached the vehicle, he lacked reasonable articulable suspicion that the occupants of the vehicle were engaged in criminal activity. Miller argues that information obtained by Officer Teare during the "bad *Terry*-stop" cannot be used to justify the warrantless search of his person.

There is a significant disconnect between Miller's appellate contentions and the theories presented by defense counsel at the suppression hearing. As we have explained, these were that: (1) the mere odor of marijuana was not a legally sufficient basis for conducting a *Terry* stop because the possession of small amount of that substance had been decriminalized by the time the stop took place; (2) Officer Teare had no separate basis to suspect Miller himself of criminal activity; and (3) Officer Teare detained the occupants of the vehicle by the mere act of approaching it on foot. Miller did not argue in the circuit court, as he now does on appeal, that, *under the totality of the circumstances*, he was seized for Fourth Amendment purposes from the moment that Officer Teare parked his patrol vehicle and walked up to speak with the driver, or that there was no legally justifiable basis for the officer to approach the vehicle in the first place.

"[T]he failure to argue a specific theory in support of a motion to suppress evidence constitutes waiver of that argument on appeal." *Evans v. State*, 174 Md. App. 549, 557, *cert. denied*, 400 Md. 648 (2007); *accord Turkes v. State*, 199 Md. App. 96, 114 (2011). *See also Williams v. State*, 188 Md. App. 691, 702 (2009) (claim not raised in motion to

suppress was not preserved for appellate review), *aff'd*, 417 Md. 479 (2011), *cert. denied*, 565 U.S. 815 (2011). Consequently, because Miller did not argue at the suppression hearing that, under the totality of the circumstances, the initial encounter was a seizure that was unsupported by reasonable articulable suspicion of criminal activity, he has waived that argument for purposes of appellate review.

Assuming, for purposes of analysis, that Miller's contentions are properly before us, we are not persuaded by them. We agree with the State that the encounter between Officer Teare and the occupants of the vehicle began as a "mere accosting," and that the information obtained during the accosting gave rise to probable cause to arrest Miller for possession of marijuana, and to search him incident to that arrest. We explain.

"Ordinarily, approaching a parked vehicle to question occupants about their identity and actions is a mere accosting and not a seizure." *Lawson v. State*, 120 Md. App. 610, 614 (1998) (citations omitted). Such an approach becomes a seizure that requires justification "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 615. (citation omitted). Factors that are probative of whether a reasonable person would have felt free to leave 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.

Pyon v. State, 222 Md. App. 412, 447 (2015) (quoting *Ferris v. State*, 355 Md. 356, 377 (1999) (emphasis in *Pyon* deleted).

In determining whether a particular encounter is a seizure, "a court must apply the totality-of-the-circumstances approach, with no single factor dictating whether a seizure has occurred." *Ferris*, 355 Md. at 376 (citations omitted).

Miller relies primarily on *Pyon* in support of his claim that Officer Teare's initial approach was not an accosting, but a seizure. In that case, we concluded that an encounter between police and a passenger in a parked car was a seizure, and not a consensual encounter, where (1) the officer positioned her cruiser cater-corner to the rear of the vehicle, thereby partially blocking its egress, *id* at 448; (2) the officer called for backup as soon as she noticed there was a passenger in the vehicle, and waited for backup to arrive before engaging in conversation with the occupants of the vehicle, *id.* at 456; (3) the officer immediately approached the driver as he was exiting his vehicle and asked him to produce his driver's license, *id.* at 450 (4) the incident took place shortly after midnight on a lonely residential street, *id*. at 450; and (5) two uniformed officers were on the scene, *id*. Central to our holding in *Pyon* was the observation that "[e]very action taken by Officer Kimmett in this case indicated that she was following routine police procedures for the conduct of a traffic stop or other investigative stop." *Id.* at 452.

The facts are different in the present case. Although the initial encounter between Officer Teare and Miller also occurred on a residential street after midnight, the facts are otherwise distinguishable from those in *Pyon*. Officer Teare did not exhibit "threatening behavior or physical contact," but merely parked his patrol cruiser behind the vehicle in which Miller was sitting, in a manner that did not block the path of the vehicle. Officer Teare approached the vehicle alone and engaged in conversation with the driver, without waiting for another officer to arrive. He immediately noticed the odor of burnt marijuana and learned from the driver that she was waiting for her cousin, who was in a nearby house associated with drug trafficking. At some point, he also asked for her identification. Although the exact sequence is unclear, there is nothing in the record to support Miller's claim that the officer initiated the conversation with a "peremptory request for identification."

In sum, the evidence at the suppression hearing, viewed in the light most favorable to the State, was that the initial encounter between Officer Teare and the occupants of the vehicle was an accosting. During this initial phase, Officer Teare became aware of information that provided probable cause to arrest Miller for possession of marijuana, and to search him incident to that arrest. *See Barrett v. State*, ___ Md. App. ___, No. 530, 2017 WL 5900113, Sept. Term 2016 (filed November 29, 2017), slip. op. at 15-16 (Westlaw at *8) ("[A] police officer who has reason to believe that an individual is in possession of marijuana has probable cause to effectuate an arrest," and conduct a search incident to that arrest, "even if the officer is unable to identify whether the amount

possessed is more than 9.99 grams."). As long as the search and the arrest were "'essentially contemporaneous,'" both survive constitutional scrutiny. *Id.*, slip op. at 17, (Westlaw at *9) (quoting *Wilson v. State*, 150 Md. App. 658, 673 (2003)).

THE JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY IS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.