

Circuit Court for Baltimore City
Case Nos. 117013017

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 777

September Term, 2017

DEWAYNE BOYER

v.

STATE OF MARYLAND

Meredith,
Leahy,
Sharer, J., Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: March 13, 2019

*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.

Following denial of his motion to suppress evidence seized (a handgun) at the time of his arrest, Dewayne Boyer, entered into a conditional guilty plea to possession of a firearm by a disqualified person.¹ Thus, the sole question before us, as posed by Boyer, is: Did the trial court err in denying his motion to suppress?

Finding no errors in the suppression court’s findings of fact or conclusions of law, we shall affirm.

BACKGROUND

Boyer came to the attention of Baltimore City police officers at about 10:30 p.m. on December 19, 2016, at the Mondawmin Mall in Baltimore City. According to police, he was seated in the driver’s seat of a car, with the motor running, and his sneakers off. As the Mall had closed 30 minutes earlier, and the area known to police as a high crime area, police approached the vehicle to speak with the driver. In all, there were six police officers present in two police cars – one marked and one unmarked. Officer Leon Riley, the first officer to approach the car, and accompanied by his Sergeant, detected the odor of marijuana. Based on that odor, he requested that Boyer get out of the car.

The officers testified that Boyer “stalled” in response to the request, but conceded that when approached, Boyer did not have shoes on. They further testified that Boyer

¹ Boyer had previously been convicted of second-degree assault in 2013. *See* Md. Code (2002, 2012 Repl. Vol.), § 3-203 of the Criminal Law Article. His plea in this case was conditional on the outcome of this appeal. He was sentenced to the mandatory minimum of five years without parole, with a referral to the Patuxent Institution youthful offender program.

contorted his body in an unusual manner, keeping his right side turned away from them. Throughout, he did not make eye-contact with the officers.

Both Riley and Officer Nelson Flores were qualified by the court as experts. As to Riley, the court ruled, without objection:

The Court will accept [Officer Riley] as an expert, with regard to the motion only at this time, in the characteristics and identification of persons who may be in possession of a handgun. And also will be able to express opinions. But he better [] have some facts with regard to the area of expertise.

As to Flores, the court ruled, over Boyer's objection: "He's an expert in the field of characteristics of an armed person."

Riley testified that, as a result of Boyer's actions, "it became clear to me that he possibly had a gun on his person." Flores testified similarly. As Boyer got out of the car, Riley asked him, "Mind if I check you out?" In response, Boyer raised only his left arm. A pat-down of Boyer's right side pocket followed, resulting in the discovery of a handgun.

At the suppression hearing, Boyer, through counsel, took the position that he was arrested at the scene without probable cause, arguing that the officer's body camera video belied their testimony of furtive movement.² The State argued that the initial approach to Boyer's car was a *Terry* stop "based on reasonable articulable suspicion that criminal activity was afoot, given the totality of the circumstances," and that "Boyer's continuing behavior, concealing his right side, avoiding eye contact with police, and stalling as he got out of his car, gave rise to an additional basis to conduct a frisk." (Citations omitted).

² Boyer did not testify at the suppression hearing, nor did he offer any other evidence.

On appeal, Boyer asserts that he “was seized when the police used two cars to block him in, shined a spotlight into his car, and when five police officers in tactical vests approached [his] car, surrounded it, and then ordered [him] out of the car.” (Internal citation omitted).

The Motions Court Ruling

The motions court made thorough and extensive findings of fact and ruled as follows:

The Court thanks both parties for presenting their cases in the manner in which they did. Pursuant to the testimony and the evidence that the Court heard and the argument of Counsel, we will go back to the non-technical concept of probable cause as defined in Collin v. State, 322 Md. 765.

The Court of Appeals explained that probable cause, as it’s frequently stated, is a non-technical conception of a reasonable ground for belief of guilt. A finding of probable cause requires less evidence than is necessary to sustain a conviction but more evidence than would merely arouse suspicion.

And the Court’s determination of non-technical common sense evaluation of the totality of the circumstances in a given situation in light of the facts found to be credible. Probable cause as a whole would lead a reasonably cautious person to believe that a crime had been or is being committed by the person arrested.

And to justify the arrest, the police must point to a [sic] specific facts which taken together with rational inferences therefrom, reasonably would warrant the intrusion in this case. Additionally, probable cause may, quote, be based on information within the collective knowledge of police, end quote. As to Ott v. State, 325 Md. 206, a 1992 case. And pursuant to Parker v. State, 66 Md. App. 1, probable cause is not to be evaluated from a remote vantage point of a library, courtroom, but rather from the viewpoint of prudent and cautious police officer on the scene at the time of the arrest.

And in some respects, I guess luckily, there’s State’s Exhibit No. 1 in this case for everyone to evaluate from their particular sides. In the case of Johnson v. State, which was recently decided, it was held that the odor of

drugs -- in this case on the front -- in that case, on the front passenger's breath and drugs being recovered from front passenger's waist band alone did not provide probable cause to go into the trunk of that vehicle.

And as to Norman v. State, which I believe was written by Judge Watts this [past] late spring early -- late winter early spring held that the odor of marijuana alone does not provide reasonable articulable suspicion to frisk one of multiple occupants of a vehicle from which the odor emanates.

In other words, the Court of Appeals held that where odor of marijuana emanates from vehicle with multiple occupants, law enforcement officers may frisk, that is, pat down the occupant of the vehicle if additional circumstance or circumstances give rise to reasonable articulable suspicion that the occupant is armed and dangerous.

Otherwise stated, the Court of Appeals held that for law enforcement officers to have reasonable articulable suspicion, to frisk one of multiple occupants of a vehicle -- in this particular case, the case before the Court, we have one occupant of the vehicle -- from which the odor of marijuana is emanating. The totality of circumstances must indicate that the occupant in question is armed and dangerous.

That is, again, the odor of marijuana alone emanating from the vehicle -- and this officer -- I think the first officer said it was from the vehicle and the Defendant -- does not give rise to reasonable articulable suspicion that the occupants are armed and dangerous without some other facts and/or reasonably articulated facts coming into play. And although decriminalized, marijuana possession is still illegal. And decriminalization is not synonymous with legalization.

The Norman case, as indicated by the Court, goes to multiple occupants of a vehicle. Here, we have one occupant of the vehicle. So the analysis gets a little narrower. Having smelled the marijuana, the Defendant having stepped out of the vehicle, we now analyze what the justification of any intrusion upon his person. And what is this permitted scope.

Per Judge [Moylan] in State v. Ames, 231 Md. App. 662, he has indicated that the Supreme Court in Terry v. Ohio, 392 Md. U.S. 168, quote, extended to the police a broad investigative prerogative along with a concomitant self-protective measure permitting for the fist [sic] time official intrusion into the privacy of a citizen on predicates less substantial than probable cause.

Here we have an item within the zone of protected privacy, presumably the vehicle in this case. And normally the permitted scope of any searches whatever is necessary to serve the purpose of that search and nothing more. Therefore, the justification for a Terry stop is based on the reasonable articulable particular rise [sic] suspicion of the crime has been committed, is at the moment being committed, or seems likely to be committed in the near future.

And the justification for a Terry frisk is reasonable articulable particular rise [sic] suspicion that the stopee, the Defendant, is armed and dangerous. And it is limited in the scope to the pat down of the exterior of the clothing surface. These officers went to the car, indicated they smelled an odor of marijuana from both the -- or the first officer said, from both the vehicle and the Defendant.

The Defendant was parked at Mondawmin Mall 30 minutes after closing, wherein they have indicated they've had calls for lots of guns, lots of fights, and they want to make sure that the mall was safe. He was sitting in the vehicle, as the officer indicated, keeping the right side of his body close to the center console.

For the most part, I don't know how much closer you can get because the vehicle is already close in this proximity. But be that as it may, Defendant was the only occupant of the vehicle, seated in the driver's seat, and according to the officer he was blading or favoring his right side. When he stepped out of the vehicle he put his left arm up and kept his right arm close to or, as described by the officer, clutched to his right jacket pocket exhibiting characteristics of an armed person pursuant to the officer's testimony. And officer -- suspicions of a weapon.

[The] Police officer at the time that the Defendant alighted from the vehicle, put his left arm up and his right arm to his side. The police officer went to the area on the right side where Defendant had clutched, and he says he feels an L shaped object that he knew to be a gun, as Defendant kept favoring his right side.

Prior to that, he did not invade the defendant's person beyond any surface outside -- strike that, prior to that he did not invade the defendant's person beyond any outer surfaces of the defendant's clothes. These things were happening simultaneously. He did not previously conduct any exploratory search for whatever evidence of criminal activity he might find.

The pat down was minimal because the intrusion led to an immediate discovery of the gun. So you have to look at this case as it stands right now, that the Defendant and the police officer's objectivity exhibited the characteristics of someone who may be armed.

Such as upon exiting the vehicle and an otherwise inexplicable clutching of one jacket pocket while the other arm was raised. Movement, quote, as Judge [] has indicated, consistent with the adjustment of a concealed firearm, end quote.

That being an out of ordinary movement manifesting an apparent effort to conceal something. This immediate pat down that lasted a second or two led to an immediate detection of an obvious concealed weapon pursuant to the defend -- strike that, the officer's testimony.

These scope limitations are placed upon these police officers and they must abide by and pay for their broad investigative prerogative. The police officers limited their scope in this case, and they've articulated their reasons for their stop and their frisk.

Upon the Court's review of the testimonies, State's Exhibit 1, the body camera, leads this Court to deny the motion based on the totality of these circumstances. The motion to suppress, therefore, is denied.

Standard of Review

We review a denial of a motion to suppress based only on the record developed at the suppression hearing. *Ferris v. State*, 355 Md. 356, 368 (1999) (citing *In re Tariq A–R–Y*, 347 Md. 484, 488 (1997)). Our review presents a mixed question of law and fact. *Smith v. State*, 182 Md. App. 444, 455 (2008). The Court of Appeals has recently summarized that:

“In reviewing a trial court's ruling on a motion to suppress, an appellate court reviews for clear error the trial court's findings fact, and reviews without deference the trial court's application of the law to its findings of fact. The appellate court views the trial court's findings of fact, the evidence, and the inferences that may be drawn therefrom 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 (2017) (quoting *Varriale v. State*, 444 Md. 400, 410 (2015)).

Thus, we undertake an “independent appellate review of [the trial court’s] ultimate determinations of reasonable suspicion and probable cause[.]” *Ray v. State*, 206 Md. App. 309, 332 (2012) (quoting *Ornelas v. United States*, 517 U.S. 690, 697 (1996)). In doing so, we defer to the first-level findings of fact made by the suppression court judge, accepting those findings unless they are clearly erroneous. *Hailes v. State*, 442 Md. 488, 499 (2015) (citing *Raynor v. State*, 440 Md. 71, 81 (2014)).

A finding of fact is clearly erroneous, not when “its evidentiary predicate was weak, shaky, [or] improbable,” but only when it has “no evidentiary basis whatsoever.” *State v. Brooks*, 148 Md. App. 374, 399 (2002). As Judge Moylan continued in *Morris v. State*, 153 Md. App. 480 (2003), the court

will fully credit the prevailing party’s witnesses and discredit the losing party’s witnesses. It will give maximum weight to the prevailing party’s evidence and little or no weight to the losing party’s evidence. It will resolve ambiguities and draw inferences in favor of the prevailing party and against the losing party.

153 Md. App. at 489-90.

Finally, when the facts are determined, whether they rise to reasonable suspicion and probable cause is reviewed *de novo* without deference to the trial court. *Bowling v. State*, 227 Md. App. 460, 467 (quoting *Taylor v. State*, 224 Md. App. 476, 487 (2015)), *cert. denied*, 448 Md. 724 (2016).

DISCUSSION

In ruling, the motions court turned to *Ames v. State*, 231 Md. App. 662 (2017), wherein Judge Moylan wrote that *Terry* “extended to the police a broad new investigative prerogative, along with a concomitant self-protective measure, permitting for the first time official intrusion into the privacy of citizens on predicates less substantial than probable cause.” 231 Md. App. at 664. Noting the odor of marijuana, Boyer’s unusual movements, the brevity of the pat-down and the totality of the circumstances, the court observed that “[t]he police officers limited their scope in this case, and they’ve articulated their reasons for their stop and their frisk.”

In this appeal, Boyer essentially asks us to conclude that the suppression court’s findings of fact did not support its conclusion that the officers did, in fact, have a reasonable suspicion to approach him as he sat, alone, in his car, at 10:30 at night, in the parking lot of a shopping mall that had been closed for 30 minutes. Boyer further argues that the State’s evidence that the officers noted the odor of marijuana from his car does not support the police request that he get out of the car. He further argues that, all of that being apparent to the officers, the testimony about his furtive movements was not reliable and did not support the brief frisk that revealed a handgun in his pocket. We are not persuaded.

Boyer takes great pains to detail the evidence before the suppression court and asks us to conclude that the evidence does not support the trial court’s findings, pointing out discrepancies, nuances, and suggestions that the officers’ testimony was belied in several aspects by the film taken from their body cameras. Resolution of such differences or ambiguities is for the trial court having, in addition to the testimony and documentary evidence, the ability to make credibility determinations. *See DeGrange v. State*, 221 Md.

App. 415, 422 (2015) (recognizing that “[i]t is ‘axiomatic that weighing the credibility of witnesses and resolving any conflicts in the evidence are tasks properly assigned to the factfinder’” (quoting *Marlin v. State*, 192 Md. App. 134, 153 (2010))). On this record, having considered the State’s evidence, and fully crediting the witness testimony offered by the State as the prevailing party below, we cannot find, by any definition, that the trial court’s factual findings were clearly erroneous.

Boyer asserts that he was arrested when “the police boxed [his] car in with two police cars, shined a spotlight into his car, and then all five police officers exited their vehicles and approached and surrounded [his] car.” The suppression court found to the contrary – that the initial contact by the police was in the nature of a *Terry* stop and that the officers “limited their scope ... and they’ve articulated their reasons for their stop and their frisk.” The arrest did not occur, on those facts, until the weapon was detected by the brief frisk.

Terry stops are not limited to persons, but include vehicles. *Carter v. State*, 143 Md. App. 670, 677-82 (2002) (concluding that there was reasonable suspicion to conduct a *Terry* stop of a van parked at an elementary school on a Sunday night following an anonymous call, when police arrived, observing two pedestrians run and the van attempt to leave). We have said:

A *Terry* stop is distinguishable from an arrest in three important respects: the length of the detention, the investigative activities that occur during the detention, and the question of whether the suspect is removed from the place of the stop to another location. In determining whether an investigatory stop is in actuality an arrest requiring probable cause, courts consider the totality of the circumstances. Under the totality of circumstances, no one factor is dispositive.

Johnson v. State, 154 Md. App. 286, 297 (2003) (Internal quotations and citations omitted).

As we consider the totality of the circumstances of the events from the evening of December 19, 2016, the conduct of the police and Boyer's conduct, we agree with the trial court that there existed a reasonable basis for the investigatory inquiry. The evidentiary predicate was not "weak, shaky, [or] improbable." *Brooks*, 148 Md. App. at 399. Likewise, discovery of the handgun provided probable cause for his arrest. We find no error in the court's denial of the motion to suppress.

**JUDGMENT OF THE CIRCUIT COURT
FOR BALTIMORE CITY AFFIRMED;
CASE REMANDED TO THAT COURT
FOR SUCH FURTHER PROCEEDINGS AS
ARE APPROPRIATE; COSTS ASSESSED
TO APPELLANT.**