UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2677

September Term, 2014

KEVIN EUGENE MACK

v.

STATE OF MARYLAND

Berger,
Reed,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: April 8, 2016

A jury sitting in the Circuit Court for Prince George's County convicted Kevin Eugene Mack on charges of possession of marijuana, possession of cocaine, and possession with intent to distribute cocaine.[1]

In this timely appeal, Mack challenges the trial court's denial of his motion to suppress the drugs seized following his arrest. Discerning neither error nor abuse of discretion, we shall affirm the judgments of the circuit court.

FACTUAL and PROCEDURAL HISTORY

The evidence presented at the April 26, 2013 suppression hearing revealed that, around 7:45 p.m. on October 25, 2012, Officer Timothy Rickert of the Prince George's County Police Department was patrolling the Walker Mill area of Capitol Heights in a marked police cruiser driven by another officer. The officers were tasked with increasing police visibility to deter robberies that had been happening in that area.

As the officers drove by an apartment complex on Rochelle Avenue, Rickert noticed a grey Dodge Avenger double-parked with its engine idling, blocking other automobiles. Rickert got out of the cruiser and approached the driver's side of the double-parked Avenger while his partner sought a place to park. Rickert recognized the two men sitting inside the car. As he approached the driver's open window, he could smell the odor of marijuana, and observed that the driver, Mack, looked "a little startled" when Rickert asked him what they

[1]For possession with intent to distribute cocaine, the court sentenced Mack to serve 20 years in prison, all but six years suspended, to be followed by three years of supervised probation. For possession of marijuana conviction, Mack was sentenced a concurrent one-year sentence. Mack's conviction for possession of cocaine was merged for sentencing.

were doing. Mack told Rickert that he and his passenger were waiting for a friend who was inside the building.

In response to Rickert's request, Mack produced his driver's license and a rental car agreement in another person's name. When his partner joined him at the car, Rickert requested that Mack and the passenger get out of the vehicle. Once the men were out of the car, Rickert could see "marijuana flakes on the floor board" on both sides of the car.

Rickert initiated a pat-down search of Mack. As he was checking the area between Mack's legs, "just past the knee," Mack started "flipping out" and saying "touched my ass, touched my ass." Rickert requested that another officer who had arrived on the scene, PFC Stephen Saraullo, also conduct a pat-down search of Mack, who was placed under arrest, handcuffed, and searched. Again, as Saraullo's hand approached his crotch area, Mack started "going crazy," saying "in my ass." Saraullo reported that he could definitely feel something between Mack's legs. The officers agreed, however, to transport Mack to the county detention center before conducting a more thorough search.

At the detention center, Rickert and Saraullo took Mack into a small bathroom. Because the bathroom was small, the door remained slightly open, but no one could see what the officers were doing. As Saraullo pulled Mack's pants and underwear back and slightly down, Rickert could see a baggie tucked between Mack's buttocks. Wearing gloves, Rickert removed the baggie, which he observed apparently contained a quantity of "crack cocaine."

Prior to trial, defense counsel moved to suppress the marijuana that was found on the floorboards of the car Mack was driving and the baggie of cocaine that was recovered from Mack's person during the search at the detention center. Following a hearing on April 26, 2013, the circuit court denied, in both aspects, the defense motion to suppress. Mack was tried on April 29, 2013, and convicted of possession of marijuana, possession of cocaine, and possession with intent to distribute cocaine.[2]

DISCUSSION

Mack contends that the circuit court erred in two respects by denying his motion to suppress the marijuana and crack cocaine that were recovered by the police. First, as to the flakes of marijuana that were recovered from the floorboards of the car Mack was driving, he submits that the police had no probable cause to arrest him because they had no "'reasonable suspicion'" that he was "'about to commit or ha[d] just committed a crime[.]'" Second, as to the baggie containing crack cocaine that was recovered from his person, Mack asserts that the police did not have sufficient constitutional justification to engage in an invasive "visual body cavity search[.]"[3]

[2]Mack failed to appear at sentencing and a bench warrant was issued for his arrest. He was apprehended in Washington D.C. and, on January 9, 2015, was sentenced as we have noted, *supra.*

[3]As this Court has previously explained, there is a distinction between a body cavity search and a strip search. *State v. Nieves*, 383 Md. 573, 586 (2004). Body cavity searches generally involve "visually inspecting the body cavities or physically probing the body (continued...)

When we review a trial court's ruling on a motion to suppress, we confine our analysis to the evidence that was presented at the suppression hearing, as viewed in the light most favorable to the prevailing party on the motion. *Elliott v. State*, 417 Md. 413, 427–28 (2010). We scrutinize first level findings of fact for clear error. *Wilkes v. State*, 364 Md. 554, 569 (2001). Legal rulings present mixed questions of law and fact and are reviewed *de novo*. *Whiting v. State*, 389 Md. 334, 345 (2005).

The Fourth Amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. It "only prohibits those searches and seizures that are unreasonable under the circumstances." *State v. Nieves*, 383 Md. 573, 583 (2004) (citation omitted). "In determining the reasonableness of a search, each case requires a balancing of the government's need to conduct the search against the invasion of the individual's privacy rights." *Id*. (citing *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)).

First we consider whether, as Mack contends, the police "jumped the gun" and arrested him without probable cause. For Fourth Amendment purposes, there are three levels of interaction between the police and citizens:

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[3](...continued)
cavities[,]" while strip searches require "the removal or rearrangement of some or all clothing to permit the visual inspection of the skin surfaces of the genital areas, breasts, and/or buttocks[.]" *Id*. (citations omitted); *Paulino v. State*, 399 Md. 341, 352-53, *cert. denied*, 552 U.S. 1071 (2007). The record supports a conclusion that Officer Rickert and PFC Saraullo conducted a partial strip search of Mack, rather than a physical body cavity search.

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

Wilson v. State, 409 Md. 415, 440 (2009) (citation omitted).

The initial encounter, when Rickert approached the automobile to inquire why it was double-parked, constituted a mere accosting with no Fourth Amendment implications. *See id*. (defining different levels of police/public interaction). At the time Rickert smelled marijuana, observed that Mack looked "startled" at his approach, and noted that Mack was driving a vehicle that had been rented by another person, who was not present, Rickert had a reasonable suspicion that Mack and/or his passenger had recently committed a crime, justifying a brief investigatory stop and preliminary pat-down search. *See, e.g., Larocca v. State*, 164 Md. App. 460, 488-89 (2005) (holding that the odor of marijuana emanating from a double parked vehicle was sufficient to justify an investigatory stop). In the course of the investigatory stop and search, Mack continued to act suspiciously, "flipping out" when Rickert and Saraullo attempted to conduct a pat down search between his legs. Rickert also

recovered flakes of marijuana from the floorboards of the car Mack had been driving. At that time, Rickert handcuffed Mack and placed him under arrest for possession of marijuana.

Rickert's detection of the odor of marijuana and observation of marijuana flakes in plain view on the floorboards of the automobile afforded probable cause to arrest Mack. *See, e.g., Ford v. State*, 37 Md. App. 373, 379 (1977) ("[K]nowledge gained from the sense of smell alone may be of such character as to give rise to probable cause for a belief that a crime is being committed in the presence of the officer. When such conditions exist a warrantless arrest infringes upon no constitutional right."). We conclude, therefore, that the trial court did not err by denying Mack's motion to suppress the marijuana that was seized by the police from the car he was driving.

We next consider whether the police search at the detention center violated Mack's constitutional rights. While it is clear that "strip searches by their very nature can be degrading and invasive[,]" they are "permitted under the Fourth Amendment in various settings." *Nieves*, 383 Md. at 586–87. "Strip searches commonly have been upheld for two reasons: (1) as a means to maintain the security of the detention facility; and (2) as a search incident to arrest." *Id*. at 587.

Any search inside a suspect's clothing that allows an officer to view private areas may be unreasonable unless reasonableness is determined by reference to four factors: 1) the scope of the particular intrusion; 2) the manner in which it is conducted; 3) the justification

for initiating it, and; 4) the place in which it was conducted. *Allen v. State*, 197 Md. App. 308, 321 (2011) (citing *Bell v. Wolfish*, 441 U.S. 520, 599 (1979)).

The trial court credited Rickert's testimony that Mack's clothing was not removed from his body during the search. The entire search lasted only a few moments. The officers pulled Mack's "drawers" back and down, whereupon they observed a plastic baggie protruding from the cleft between his buttocks. The baggie "wasn't in the orifice" and there was no need for the officer to exert any force in order to remove it from Mack's body. At no time during the search was Mack forced to expose any "cavity" of his body, nor did either officer touch or manipulate his buttocks or genitals in any way. *See Paulino*, 399 Md. at 353-54 (holding that officer's manipulation of the intimate body part of a suspect who was placed prone on the ground in a well-lit public area with other civilians in full view of the search was unreasonable).

The search was conducted in a private bathroom at the detention center, with only Mack, Rickert, and Saraullo present. Although the door of the bathroom was slightly ajar, the court accepted Rickert's testimony that no passersby could see into the room during the search. Thus, the officers took appropriate measures to protect Mack's privacy during the search.

As to justification, Maryland appellate courts have held that a strip search may only be conducted incident to an arrest if the police have a reasonable articulable suspicion that a suspect is concealing drugs on his or her body. *Nieves*, 383 Md. at 596; *Allen*, 197 Md.

App. at 323. It is, however, "'well known in the law enforcement community, and probably to the public at large, that drug traffickers often secrete drugs in body cavities to avoid detection.'" *Allen*, 197 Md. App. at 324 (quoting *Moore v. State*, 195 Md. App. 695, 718 (2010)). When a person is arrested for a drug offense, the "nature of the offense provides reasonable suspicion to believe that the arrestee is concealing drugs on his or her person." *Id*.

Once Rickert smelled marijuana and saw flakes of marijuana on the driver- and passenger-side floorboards of the car, he had probable cause to arrest Mack on at least suspicion of possession of a controlled dangerous substance. *See Ford*, 37 Md. App. at 379 (holding that smell alone may create probable cause). Additionally, Mack's behavior when the officers attempted to pat him down, wildly protesting that the officers had "touched [his] ass," and Saraullo's determination during the pat-down that Mack was concealing something in his "crotch area," provided additional justification for a more invasive search of Mack's person once they reached the detention center.

It is also relevant that the officers conducted the search immediately before Mack was processed into the detention center. The U.S. Supreme Court has opined regarding the importance of pre-detention searches to maintain the safety and security of jails and detention centers, holding that strip searches on arrestees who were to be transferred to the general population were reasonable. *Florence v. Board of Chosen Freeholders of the County of Burlington*, 566 U.S. ___, 132 S. Ct. 1510, 1521 (2012). Thus, in the instant case, the more

intrusive search of Mack's person was also appropriate to prevent the introduction of contraband into the detention center.

On the record before us, we are persuaded that the search was properly limited in scope and duration, involved no unnecessary force, and occurred in an appropriate location and manner to limit the intrusion on Mack's person and privacy. Thus, the scope, manner, and location of the search were not unreasonable under the circumstances. Moreover, we are persuaded that the search was justified given the officers' reasonable belief that Mack had concealed drugs on his body.

The search was reasonable and the circuit court did not err by denying Mack's motion to suppress the drugs collected by the police from his person.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.