UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2031

September Term, 2016

STATE OF MARYLAND

v.

GARRED STEPHEN MATTHEWS

Krauser, C.J.,
Graeff,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: March 17, 2017

On August 4, 2016, Garred Stephen Matthews, appellee, was indicted in the Circuit Court for Prince George's County on charges of possession with intent to distribute and related offenses. On October 14, 2016, the circuit court granted appellee's motion to suppress the drug evidence found in his car.

The State filed this interlocutory appeal,[1] presenting the following question for this Court's review:

> Did the circuit court err in granting appellee's motion to suppress where appellee's sudden, furtive movements provided Officer Wood reasonable suspicion to believe that appellee was armed, and where the officer had probable cause to search the whole vehicle, including the trunk?

For the reasons set forth below, we shall reverse the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On October 14, 2016, the circuit court held a hearing on appellee's motion to suppress. The State's sole witness was Officer Lindsey Wood, a member of the Prince George's County Police Department.

Officer Wood testified that, on April 10, 2016, at approximately 12:00 a.m., she responded to a "call for service for an alarm" at the Lowe's store in New Carrolton,

[1] The State filed this interlocutory appeal pursuant to Maryland Code (2016 Supp.) § 12-302(c)(4) of the Courts and Judicial Proceedings Article ("CJP"), which permits the State to appeal, in some circumstances in a criminal case, decisions that exclude evidence. Pursuant to CJP § 12-302(c)(4)(iii), the "appeal shall be heard and the decision rendered within 120 days of the time that the record on appeal is filed in the appellate court." Here, the record was filed in this Court on December 22, 2016, and therefore, our decision must be filed by April 21, 2017.

Maryland.[2] Upon arrival at the store, Officer Wood encountered an employee in the parking lot who advised that she was the last person to leave the store for the night, and she had "just locked up" the store without issue. The employee noted that she had observed a vehicle in the parking lot, but she was not "sure if it was occupied." The employee pointed to the car, which was parked approximately 80 to 100 feet away from where they were standing.

Officer Wood drove over to the vehicle. Her headlights illuminated the interior of the car. The driver's seat was "all the way back," and she could not tell whether someone was in it. Officer Wood circled around and parked her police vehicle behind the car. She approached the vehicle, which was not running, and she observed appellee in the driver's seat. He "appeared to be sleeping or not conscious." Officer Wood knocked on the window several times, "very loudly," announcing that she was with the Prince George's County Police and asking appellee to wake up. Officer Wood testified that "eventually he did wake up," and the following occurred:

> He looked over at me for a brief second, and then he made an immediate turn to his right towards the center console area in the middle seat belt area, the little gap there. Not knowing what he reached for, I attempted to open the door. It was unlocked, so it did open. I told him to put his hands on the steering wheel immediately, which he did do.
>
> At that point I did smell the strong odor of raw marijuana. And I told him that, and he said, "Ain't no weed in here." That being said, my hand

[2] Officer Wood testified that alarm calls typically come from the alarm company, and this particular call did not include any description of a suspect. Rather, it "was just an alarm from the building."

> was still on the opened driver's door. His hands were on the steer[ing] wheel at the point. He was compliant.
>
> I saw in the driver's doorjamb[3] that there was a plastic baggy with a -- it was kind of whitish, pinkish in the light, substance, which I thought, from my training and experience, was MDMA.[4]

On cross-examination, Officer Wood explained that her "biggest concern" was that appellee would "turn and face [her] with a weapon of any sort." She further explained that, when she opened the door:

> his whole body and both of his hands turned and went into an area that I couldn't see whether it was the center console area, which one he had had on the wheel, I could see the console was closed and not been opened, but there is also an area where a lot of things, to include a gun can be shoved, kind of where the seat meets the center console.

Officer Wood then removed appellee from the vehicle and conducted a search of both his person and the interior of the vehicle. From the "doorjamb area," she recovered the whitish/pinkish substance that she suspected was MDMA.[5] Officer Wood also recovered paper money that was organized in "folds," a common way for drug dealers to organize money into separate denominations to quickly make change without drawing unwanted attention. She then searched the trunk, in which she found a duffle bag

[3] Officer Wood described the "doorjamb" as the "part of the door, when you go to close your vehicle, you usually stick your fingers in there to grab the door and pull it shut."

[4] "MDMA" is an acronym for "3, 4-methylenedioxymethamphetamine." *See* Md. Code (2015 Supp.) § 5-402(d)(1)(xviii) of the Criminal Law Article.

[5] At the hearing, defense counsel indicated that the substance that Officer Wood recovered from the "doorjamb" was "bath salts," "Dibutylone," a controlled dangerous substance.

containing two ounces of marijuana stored in two mason jars, a scale, a marijuana grinder, and packaging materials. Officer Wood did not find any weapon during her search. Appellee subsequently was arrested and charged.

The State argued below that Officer Wood's actions were lawful for two reasons. First, it contended that Officer Wood was acting under "exigent circumstances," given that a commercial alarm was going off, there were no other vehicles in the parking lot, she potentially was investigating a commercial burglary, and the car could have contained the lookout for the burglary. It asserted that the officer "would be failing to do her due diligence as a police officer if she just said, you know what, never mind, I'm not going to go over there and investigate what this employee has pointed out to me or something that is suspici[ous]." It contended that Officer Wood "was simply doing her due diligence" by "investigating the commercial burglary."

Second, the State argued that Officer Wood was acting in a community caretaking function, noting that Officer Wood saw "somebody in the vehicle who either appear[ed] to be sleeping or unconscious," and when he woke up, he "turned over real quick and hid what he was doing." At that moment, Officer Wood "had no idea if there was something dangerous in the car, as she said, like a gun or something of that nature, and that's when she opened the door."

Defense counsel argued that Officer Wood was engaging in a "fishing expedition," arguing that, when the officer approached the car, appellee was asleep, and when he woke up, he was compliant. Counsel also disputed the State's assertion that there were exigent

circumstances, noting that appellee's car was parked very far away from the entrance of the store, and the officer did not testify that she approached to investigate the alarm. Defense counsel also argued that, even if Officer Wood's initial search of the passenger compartment of appellee's vehicle was lawful, the subsequent search of the trunk was illegal because the trunk was not in appellee's "immediate control."

At the conclusion of the suppression hearing, the circuit court noted that the officer went to the area in response to an alarm going off at Lowe's and saw appellee's vehicle a "significant distance" away. When she knocked on the window of appellee's vehicle, he "went to the side." The court continued:

> She at that time grabbed the door and opened the door, and then smelled marijuana. She said she didn't -- she did it for officer safety, which the [c]ourt can understand.
>
> But, her action of grabbing that door and opening it without any consent and then smelling marijuana, that was unlawful. She didn't have the consent to open the door. I understand why she did open the door, but she also could have retreated. Wasn't until that time she allegedly smelled the odor of marijuana in the case, although no marijuana was found in the vehicle separate -- secondly, the [c]ourt finds that her search of the trunk was unlocked and this is unlawful. And I think defense counsel tried to determine whether this was a vehicle, it was like [an] opened trunk, all one compartment inside the vehicle.
>
> But if you look at the vehicle, the Chevrolet, it's a totally -- the trunk is totally separate from the interior compartment of vehicle. And so the subsequent search of that separate compartment of the vehicle, when nothing was found in the interior of the vehicle, and I am looking at the photographs and State's Exhibit Number 5, she said she saw a pink substance wrapped in the door with money and a cell phone. That's what she found in the interior of the compartment.
>
> It was unlawful for her to search the separate compartment of the vehicle. At that time the defendant was not going anywhere. His hands were on the steer[ing] wheel. She -- I don't think the officer realized, but there

> were no keys in the ignition. And from the photograph of number one you can see that the vehicle is a significant distance away from the Lowe's parking lot. I actually kind of see some other vehicles. I don't know, maybe I see. But anyway.
>
> So I don't think there are exigent circumstances. I don't find an exception as a community care taking function, the officer grabbing the handle of the door and opening it up was unlawful without the consent of the defendant and the subsequent search of the compartment. The trunk was also unavailable.
>
> So for those reasons the [c]ourt is going to suppress the drugs.

STANDARD OF REVIEW

In *State v. Andrews*, 227 Md. App. 350, 371 (2016), the Court set forth the standard of review applicable to a circuit court's grant of a motion to suppress:

> We review the grant of a motion to suppress based on the record of the suppression hearing, and we view the facts in the light most favorable to the prevailing party. *State v. Donaldson*, 221 Md. App. 134, 138 (citing *Holt v. State*, 435 Md. 443, 457 (2013)), *cert. denied*, 442 Md. 745 (2015). Further, "we extend 'great deference' to the factual findings and credibility determinations of the circuit court, and review those findings only for clear error." *Id.* (citing *Brown v. State*, 397 Md. 89, 98 (2007)). But we make an independent, *de novo*, appraisal of whether a constitutional right has been violated by applying the law to facts presented in a particular case. *Williams v. State*, 372 Md. 386, 401 (2002) (citations omitted); *see also Brown*, 397 Md. at 98 ("[W]e review the court's legal conclusions *de novo* and exercise our independent judgment as to whether an officer's encounter with a criminal defendant was lawful." (Citation omitted)).

(parallel citations omitted). *Accord Robinson v. State*, ___ Md. ___, Nos. 37, 39 & 46, Sept. Term. 2016, slip op. at 14 (filed Jan. 20, 2017).

DISCUSSION

The State argues that the circuit court erred in granting appellees' motion to suppress the drugs found in his vehicle. It contends that the court erred in ruling that the officer's

action in opening appellee's car door without his consent was unlawful, asserting that Officer Wood's action in this regard was reasonable under the Fourth Amendment.[6]

Appellee contends that court properly granted his motion to suppress. He argues that Officer Wood engaged in an unlawful search when she opened his car door for the purpose of conducting a pat down of his person and a search of his car. This is so, he asserts, for the following two reasons: (1) a valid *Terry* stop is a prerequisite to a valid frisk, and there had been no stop prior to opening the car door; and (2) Officer Wood lacked reasonable suspicion to believe that appellee was armed and dangerous.

The Fourth Amendment to the United States Constitution protects against "unreasonable searches and seizures." U.S. CONST. amend. IV. The Supreme Court has made clear that the Fourth Amendment does not bar all searches and seizures, but only "unreasonable" searches and seizures. *Terry v. Ohio*, 392 U.S. 1, 23, 39 (1968). Whether a police action is reasonable "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware v. Prouse*, 440 U.S. 648, 654 (1979). *Accord Plumoff v. Rickard*, 134 S. Ct.

[6] The State also argues that the court erred in suppressing the evidence on the ground that Officer Wood could not legally search the trunk of appellee's car. It asserts that, by the time Officer Wood searched the trunk, she had probable cause "to search the entire car, including the trunk." Appellee did not address this argument his brief, but at oral argument, counsel conceded that, if we held that Officer Wood's initial act of opening appellee's car door was lawful under the Fourth Amendment, her subsequent search of appellee's trunk also would be lawful. We agree. *See Wilson v. State*, 174 Md. App. 434 (odor of burnt marijuana emanating from vehicle's passenger compartment gave officer probable cause to search vehicle's trunk), *cert. denied*, 400 Md. 649 (2007), *cert. denied*, 552 U.S. 1191 (2008). Thus, the only issue we must address is the lawfulness of Officer Wood's action in opening the door.

2012, 2020 (2014) (reasonableness requires a "'balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake'") (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)). Thus, our analysis here turns on whether Officer Wood's actions were reasonable.

Our first task is to determine at what point there was a Fourth Amendment search or seizure. Appellee concedes, appropriately, that Officer Wood's initial encounter, in approaching appellee's car and knocking on the window, did not constitute a seizure or implicate the Fourth Amendment. We agree. *See Commonwealth v. Stephens*, 885 N.E.2d 785, 795-96 (Mass. 2008) (officers' initial approach to defendant's vehicle, without blocking him in, did not constitute a stop, and therefore, did not implicate the Fourth Amendment); *United States v. Ortiz-Monroy*, 332 F.3d 525, 528 (8th Cir. 2003) (no stop occurred where officer approached parked car and knocked on window).[7]

A Fourth Amendment intrusion occurred, however, at the point that Officer Wood opened the door to appellee's car. An officer's act of opening the door of an occupied vehicle is a search because it permits the officer to see or smell things that could not be seen or smelled from outside the vehicle. *See McHam v. State*, 746 S.E.2d 41, 49 (S.C. 2013) ("[T]he opening of the door of an occupied vehicle is an intrusion, however slight,

[7] Appellee agrees that, given the circumstances, with the alarm going off at midnight, and appellee's vehicle sitting in the parking lot, it was reasonable for Officer Wood to approach the vehicle. Indeed, the officer would have been derelict in her duties if she had not investigated the presence of appellant's vehicle under these circumstances. And once Officer Wood observed appellee alone and unresponsive in his vehicle, it was reasonable for her to ascertain if he was in need of assistance.

that generally constitutes a search for purposes of the Fourth Amendment."); *Stephens*, 885 N.E.2d at 796 ("Stephens was stopped 'at the point where the police officers approached the vehicle *and* opened the doors.'"). Indeed, in this case, it was Officer Wood's action in opening the door that enabled her to smell the odor of marijuana and see the suspected controlled dangerous substance inside the car.

The State does not dispute that the Fourth Amendment was implicated when Officer Wood opened the car door and ordered appellee to put his hands on the steering wheel. It argues, however, that Officer Wood's action was reasonable under the Fourth Amendment for two reasons. First, it contends, noting that the Fourth Amendment's concern is reasonableness, that "[t]he minimal intrusion of opening [appellee's] car door is reasonable when weighed against the government's interest in officer safety." Second, it asserts that, under the circumstances, which included that Officer Wood was responding to a burglar alarm going off at midnight, a store employee stated that she was the only one there and had locked the store without a problem, and appellee was lying in a car 100 feet away, unresponsive until he jolted awake and appeared to reach for something in the vehicle, Officer Wood had reasonable suspicion that appellee was involved in a burglary and armed.

Appellee disagrees. He argues that the circuit court properly granted his motion to suppress because the search was unreasonable for either of two reasons. First, he asserts that "a *Terry* frisk . . . is permitted only if a valid stop precedes it," and because he was not stopped prior to the opening of the door, "Officer Wood was not authorized to frisk either [him] or his car." Second, he contends that, even if "a valid stop is not a prerequisite to a

valid frisk, Officer Wood[] lacked reasonable suspicion to believe that [appellee] was armed and dangerous," and therefore, "the Fourth Amendment did not permit Officer Wood[] to open the car door."

We begin with appellee's suggestion that the encounter began as a consensual one, and because there was no valid Fourth Amendment seizure, Officer Wood could not conduct a valid frisk. To be sure, in *Ames v. State*, ___ Md. App. ___, No. 534, Sept. Term, 2016, slip op. at 13 (filed Feb. 3, 2017), we stated that, because there was no reasonable suspicion that a crime occurred, and a *Terry* frisk must be supported by a lawful *Terry* stop to be constitutionally valid, the frisk was unlawful. *Id.* at 10. *Accord Graham v. State*, 146 Md. App. 327, 362 (2002) ("[A] reasonable *Terry*-stop is a condition precedent to a reasonable *Terry*-frisk.").

Here, however, the action at issue was not a bodily frisk, which has been described as a "serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and [are] not to be undertaken lightly." *Terry*, 392 U.S. at 17. Rather, the action at issue was opening appellee's car door. Although that qualifies as a search, it has been viewed by other courts as a minimally invasive intrusion. *See McHam*, 746 S.E.2d at 49 (opening of the door of an occupied vehicle is an intrusion, however slight, that constitutes a search); *Commonwealth v. Leonard*, 663 N.E.2d 828, 831 (Mass.) (officer's act of opening the door of a parked car to check on a potentially ill person was a "minimally intrusive response to one of the myriad and uncategorizable events that may alert an officer that his assistance may be required"), *cert. denied*, 519 U.S. 877 (1996).

See also People v. Funderbunk, 997 N.Y.S.2d 63, 64 (N.Y. App. Div. 2014) (opening a door is a minimally intrusive safety precaution, incident to a valid traffic stop), *leave to appeal denied*, 25 N.Y.3d (N.Y. 2015).

In *Doering v. State*, 313 Md. 384, 397 (1988), the Court of Appeals, acknowledging that reasonableness is the foundation of the Fourth Amendment, explained that, "[w]here the intrusion is minimal, it may be justified by the general knowledge that police officers are statistically at risk in certain situations." And one of the recognized risky situations for police officers is approaching an occupant in a vehicle. *See Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977) (recognizing the "inordinate risk confronting an officer as he approaches a person seated in an automobile").

Here, Officer Wood testified that she opened the door because she was concerned that appellee was reaching for a gun. This concern for her safety was reasonable given the circumstances, i.e., Officer Wood was alone in a parking lot, at midnight, in response to an alarm, and when appellee saw her, he reached toward the center console. At that point, Officer Wood "'had no more than a few seconds in which to assess the extent, if any, of the danger, and to ascertain the most effective and least intrusive means of protecting [her]self.'" *Commonwealth v. Tompert*, 544 N.E.2d 226, 229 (Mass. App. Ct. 1989) (quoting *Commonwealth v. Sumerlin*, 469 N.E.2d 826, 828 (1984)).

Other courts have held that an officer's action, in taking the limited action of opening a car door in response to a concern for officer safety, was reasonable. In *Tompert*, 544 N.E.2d at 229, the court held that a lone officer checking on a vehicle in a rest area at

night acted reasonably pursuant to the Fourth Amendment in opening the door to the truck he approached after the occupants made furtive movements. In *McHam*, 746 S.E.2d at 50, the Supreme Court of South Carolina, noting that "[g]overnmental interest in officer safety has been recognized to be a substantial one," held "as a general principle that officer safety can justify the opening of a door to an occupied vehicle under reasonable circumstances."

We agree with this reasoning. Accordingly, we hold that Officer Wood's action in opening appellee's car door, in response to appellee suddenly turning toward the center console, potentially reaching for a weapon, was reasonable under the circumstances.[8] The circuit court erred in granting appellee's motion to suppress.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY REVERSED. CASE REMANDED FOR FURTHER PROCEEDINGS. COSTS TO BE PAID BY APPELLEE.

[8] As indicated, there is no suggestion that Officer Wood's actions after that point, when she smelled marijuana, were unreasonable.