Circuit Court for Baltimore City
Case No. 122060012

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 2153

September Term, 2022

KEITH LEWIS

v.

STATE OF MARYLAND

Shaw,
Tang,
Woodward, Patrick L.
(Senior Judge, Specially Assigned)
JJ.

Opinion by Shaw, J.

Filed: May 20, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

A jury in the Circuit Court for Baltimore City found Appellant Keith Lewis guilty of illegal possession of a firearm after being convicted of a disqualifying crime and related offenses, wearing/carrying/transporting a loaded handgun, illegal possession of ammunition, and fleeing and eluding. Appellant was sentenced to eleven years' incarceration. He noted this timely appeal, raising three questions for our review.

1. Did the motions court err by denying Appellant's motion to suppress?
2. Did the trial court err by allowing the State to elicit improper lay testimony?
3. Did the trial court err by denying Appellant's request to redact a portion of Detective Galloway's body-worn camera video?

For reasons set forth below, we answer yes to the first question. We, therefore, decline to answer questions two and three. The judgments of the circuit court are reversed.

BACKGROUND

On February 3, 2023, at around 5:45 P.M., Detective Robert Mauri of the Baltimore City Police Department was on patrol, when he spotted a Honda Accord with a driver, later identified as Appellant, not wearing a seatbelt. He followed the vehicle and noticed "the high stopped third brake light was also not working." Detective Mauri activated his lights and siren and pulled the vehicle over in the 1600 block of Barley Avenue. Detective Antione Galloway was also present for the initial stop. Both detectives exited their vehicles and approached the car. Detective Mauri was on the driver's side and Detective Galloway was on the passenger's side. Detective Mauri testified that as he was questioning Appellant, he recognized the odor of marijuana emanating from the passenger compartment. He asked Appellant about the odor and Appellant handed the detective "a

small sample of marijuana from his person[] . . . ." Detective Mauri then called for backup. When backup arrived, Detective Mauri asked Appellant to step out of the car. He asked Appellant if he could conduct a search of him and Appellant replied "No." Detective Mauri then put his hand inside of Appellant's front right jacket pocket and as he reached around Appellant's back, Appellant fled. Detective Mauri stated that he "never felt any object to assume it would be a firearm."

Detectives Mauri, Galloway and another responding detective, McDermott, pursued Appellant. During the chase, Detective Galloway "observed a handgun in the [d]efendant's hand" and watched Appellant as he "discarded [sic] and [] threw it underneath the silver Acura TL." Detective Galloway yelled out "gun -- gun under the car – gun" as the officers chased Appellant. A few seconds later, Appellant stopped running and he was placed under arrest. A nine-millimeter Taurus handgun was retrieved by Detective McDermott from beneath the silver Acura TL.

Appellant was subsequently charged with illegal possession of a firearm after being convicted of a disqualifying crime, wearing/carrying/transporting a loaded handgun, illegal possession of ammunition, and fleeing and eluding. Appellant filed a motion to suppress the gun recovered by the detectives and, on November 2, 2023, the circuit court held a hearing to address Appellant's motion. Appellant argued that he was subjected to an illegal search by police and the unlawful conduct of the police triggered his decision to flee and throw the gun. Appellant contended that, but for the illegal search, the gun would not have been discarded and thus, everything recovered after the search was fruit of the poisonous

tree. Because the handgun was abandoned under a car that did not belong to Appellant, the State argued that Appellant lacked standing, and that Appellant had no reasonable expectation of privacy.

Detective Mauri testified at the motions hearing. When asked by the State, several times, what he either intended to do or actually did when examining Appellant's clothes, he responded that his actions constituted a search. He stated:

> **[Officer Mauri]**: I asked him for a consent search of his person, which I believe he denied the consensure [sic] to his person.
>
> [. . .]
>
> **[State]**: Did you search the Defendant?
>
> **[Officer Mauri]**: At the time when I saw, ***I did search his person*** and took my right hand to his waistband. ***He decided to flee from the search of his person***.
>
> **[State]:** Was you [sic] hand, when you say you took your right hand to his waistband, was your hand in the waistband?
>
> **[Officer Mauri]:** No, it was not. I just – ***I began to search and his person*** and as I started to go to is lower abdomen area, where firearms are typically carried in or amongst their person, he ran from me before I observed any type of weapon on his person.

(Emphasis added). Detective Mauri stated that "[e]ven though he declined that standard for his consent, I still had probable cause to search his person [f]or anymore CDS in or amongst his person."

During Detective Galloway's direct examination, his body-worn camera video was admitted into evidence. In the video, Detective Mauri can be heard asking Appellant whether he can conduct a search of him, to which Appellant replied "No." Detective Mauri can then be seen placing his hand inside Appellant's front jacket pocket before walking

around to the back of Appellant as Detective Galloway grabs Appellant's sleeve. It is at that point that Appellant runs and discards the gun.

Following the arguments of counsel, the court ruled that Appellant had no standing to challenge the suppression of the gun, finding the police action was lawful and that Appellant had abandoned the gun. The court, in pertinent part, stated:

> This court has no issue with the initial stop. […] He made an inquiry regarding the smell of marijuana. At that time the defendant gave a packet . . . believe[d] to be marijuana. […] At that point he was asked out of the car by the police officer, which is reasonable, for officer's safety. […] He had every reason to have that person come out of that car, it may have been a citationable offense, but I still believe that it is a crime to drive under the influence of marijuana.
> . . .
> ***At that time what I could see on the vehicle [sic, likely "video"] was a pat down, which I believe was for officer's safety.***
> . . .
> At that point it appeared to be a pat down . . . for officer's safety. At that point the Defendant fled, and at that point, all of this raised from a, to give chase . . . Galloway indicated that he saw him throw a handgun under the vehicle. […] For all those reasons, I do not believe that he was illegally searched.

STANDARD OF REVIEW

"When reviewing a hearing judge's ruling on a motion to suppress evidence under the Fourth Amendment, we consider only the facts generated by the record of the suppression hearing." *Thorton v. State*, 465 Md. 122, 139 (2019) (quoting *Sizer v. State*, 456 Md. 350, 362 (2017)). We review the evidence and the inferences drawn therefrom in the light most favorable to the prevailing party, in this case the State. *Id.*

Suppression hearing rulings present questions of law and fact. *Swift v. State*, 393 Md. 139, 154 (2006). The "'[hearing] court is in the best position to resolve questions of

fact and to evaluate the credibility of witnesses.'" *Thorton*, 465 Md. at 139 (quoting *Swift*, 393 Md. at 154). "Accordingly, we defer to the hearing court's findings of fact unless they are clearly erroneous." *Thorton*, 465 Md. at 139 (citing *Bailey v. State*, 412 Md. 349, 362 (2010)). A court's findings are clearly erroneous when "there is no competent and material evidence in the record to support it." *Hoang v. Hewitt Ave. Assocs., LLC*, 177 Md. App. 562, 576 (2007). On questions of law, "we review the hearing judge's legal conclusions *de novo*, making our own independent constitutional evaluation as to whether the officer's encounter with the defendant was lawful." *Sizer*, 456 Md. at 362.

DISCUSSION

I. The court erred in denying the motion to suppress.

Standing is the "threshold question of the entitlement to litigate the merits of a search and seizure" under the Fourth Amendment. *White v. State*, 248 Md. App. 67, 88 (2020) (quoting *Bates v. State*, 64 Md. App. 279, 282 (1985)). It "'depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.'" *White*, 248 Md. App. at 88-89 (quoting *Rakas v. Illinois*, 439 U.S. 128, 143 (1978)).

Ordinarily, the question of standing does not answer the question of whether or not an appellant's Fourth Amendment rights were violated. *Id. State v. Savage*, 170 Md. App. 149, 174 (2006). However, there are, occasionally, facts presented where the "merits play a necessary preliminary role in the very determination of applicability." *See Narain v. State*, 79 Md. App. 385, 387 (1989). This can arise when abandonment of property is at

issue. *See Duncan and Smith v. State*, 281 Md. 247, 263 (1977) (quoting *Beale v. State*, 230 Md. 182, 186 (1962)). In such instances, to determine whether the abandonment of the property was voluntary and thus, not protected under the Fourth Amendment, we must first consider whether the search in question was lawful. We, then, examine whether the abandonment was voluntary. There is no reasonable expectation of privacy in a seized item if the abandonment was voluntary. If, however, there was no voluntary abandonment, then the appellant maintains their reasonable expectation of privacy and as a result, has standing. *See Duncan and Smith*, 281 Md. at 263 (1977) (quoting *Beale,* 230 Md. at 186).

"When the justification offered is that the property was abandoned, the State must prove that the evidence was voluntarily abandoned and was not tainted by [the] Fourth Amendment violation." *Partee v. State*, 121 Md. App. 237, 259 (1998) (finding that "'[w]hen an alleged abandonment *follows* a Fourth Amendment violation[,] the issue is whether the abandonment of property was voluntary'") (emphasis added); *see State v. Lemmon*, 318 Md. 365, 380-81 (1990) ("When the abandonment is forced by illegal police conduct, it is not voluntary and its seizure offends the constitutional dictate."). "A suspect's willful relinquishment of evidence following an illegal seizure [or search] of his person can purge the taint of the illegal seizure and render the evidence admissible[.]" *Partee*, 121 Md. App. at 257.

This Court, in *Partee*, adopted the *v*oluntariness test discussed in the United States Supreme Court's case *Brown v. Illinois,* "not only to determine whether a suspect's consent 'was sufficiently an act of free will to purge the primary taint of the unlawful invasion,' []

but also to ascertain whether extrajudicial identification testimony was voluntarily given or was the fruit of an illegal arrest." *Partee*, 121 Md. App. at 258-59; *see McMillian v. State*, 325 Md. 272, 288 (1992); *see also Ferguson v. State*, 301 Md. 542, 549-50 (1984). The test requires an analysis of the totality of the circumstances and entails an examination of: (1) the closeness in time between the Fourth Amendment violation and the alleged voluntary act; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct." *Partee*, 121 Md. App. at 258 ("The criteria for voluntariness set forth in *Brown v. Illinois*[, 422 U.S. 590 (1975)] . . . are equally applicable to determining voluntariness and taint in the context of a post-seizure abandonment. . . .").

In *Partee*, officers initiated a traffic stop after watching the appellant's car exceed the speed limit. 121 Md. App. at 241. When the officers and the appellant exited their vehicles, the appellant "ran away from the officers" with "a small shiny black object in one hand." *Id.* As the officers chased the appellant, one of them shot him in one of his legs. "At [the] precise moment" that officers shot him in the legs, Mr. Partee "threw the black object, staggered, and fell to the ground." *Id.* at 242. This Court found, after examining the *Brown* voluntariness factors, that no rational inference or deduction could be made that the appellant voluntary abandoned the pouch. We held that the seizure and purported abandonment were "contemporaneous" and the circumstances "militating in favor of voluntariness was missing." *Id.* at 261.

We relied, in part, on *United States v. Wilson*, where the Fourth Circuit held that "contraband abandoned by an individual *shortly after* he had been illegally seized in violation of the Fourth Amendment was not voluntarily relinquished and was tainted by the seizure." *Partee*, 121 Md. App. at 256 (emphasis added). Wilson arrived at an airport and was confronted by three federal narcotics agents. *Wilson*, 953 F.2d at 118. They surrounded him and asked him to allow them to question him and to search his carry-on bag and his coat, which was draped over his arm. *Id.* Wilson consented to a limited search of his bag and then refused further cooperation. *Id.* The agents then followed him through the airport, outside the airport, and into a parking lot. *Id.* The agents incessantly asked Wilson questions about why he would not allow them to search the coat "until they backed him into an area of the parking lot that was surrounded by a railing." *Partee*, 121 Md. App. at 256. To escape the agents' unlawful seizure of his person, Wilson jumped over the railing and ran. *Id.* The agents then gave chase. As Wilson ran through the garage, he threw his coat into the air. *Id.* Once the agents captured Wilson, they retrieved his coat. *Id.* "The inside pocket of the coat held a paper bag that contained crack cocaine." *Partee*, 121 Md. App. at 256 (citing *Wilson*, 953 F.2d at 116). The Fourth Circuit ruled that "[b]ecause the coat was discarded *after* the officers unlawfully seized Wilson, [] 'Wilson's action was clearly the direct result of the illegal seizure, and it follows that the recovered drugs were the fruit of the illegality and must be suppressed.'" *Partee*, 121 Md. App. at 256-57 (quoting *Wilson*, 953 F.2d at 127) (emphasis in original).

Based on the *Wilson* analysis, we held in *Partee*, "that when an unlawful seizure or search by the police precedes the abandonment of evidence, the abandonment is not voluntary, and the evidence is thus tainted by the illegality." *Partee*, 121 Md. App. at 257; *see United States v. Coggins,* 986 F.2d 651, 655 (3d Cir. 1993) (abandonment of evidence following illegal seizure was precipitated by seizure; abandonment could not cure taint); *United States v. Brady,* 842 F.2d 1313, 1315, n.7 (D.C. Cir. 1988) ("abandonment [as relinquishment of expectation of privacy] will not be recognized when it is the result of illegal police conduct"); *United States v. Lucci,* 758 F.2d 153, 155 (6th Cir. 1985), *cert. denied*, 474 U.S. 843 (1985); *United States v. Maryland,* 479 F.2d 566, 568 (5th Cir. 1973).

In the video taken by Detective Galloway's body-worn camera, after Detective Mauri ordered Appellant to exit his vehicle, and after Appellant denied consent for the detectives to search his person, Detective Mauri can be seen searching Appellant's front pocket. It was at that point that Appellant fled and discarded the gun. On direct examination, when asked "[d]id you search the Defendant," Detective Mauri stated, "[a]t the time when I saw, I did search his person and I took my right had [sic] to his waistband. He decided to flee from the search of his person." During cross examination, Detective Mauri testified that:

> [APPELLANT'S COUNSEL]: . . . just for clarification, as you wrote in your report, he did not give you consent to search his person, correct?
>
> [DETECTIVE MAURI]: Correct
>
> [APPELLANT'S COUNSEL]: But you were going ahead, as you testified to earlier and you started searching Mr. Lewis, correct?

[DETECTIVE MAURI]: Yes.

[APPELLANT'S COUNSEL]: And it's at that point the Mr. Lewis ran, correct?

[DETECTIVE MAURI]: At some point during the pat down of his person he fled from me, yes.

[APPELLANT'S COUNSEL]: But you were actually, indicated under questioning that you were going to search Mr. Lewis, correct?

[DETECTIVE MAURI]: Yes. He pulled marijuana from his jacket and handed it to me.

[APPELLANT'S COUNSEL]: So you weren't going to do a pat down. You were searching.

[DETECTIVE MAURI]: Yes, for other CDS.

[APPELLANT'S COUNSEL]: And that is the point in time he ran, correct?

[DETECTIVE MAURI]: Yes.

Based on our independent review of the record, that included the body-worn camera video of the encounter, Detective Mauri's testimony, and in light of *Pacheco v. State*, we conclude that Detective Mauri conducted an illegal search of Appellant. We hold that the motions court erred in finding that Detective Mauri's conduct appeared to be "a pat-down for officer's safety."

As articulated by the Supreme Court of Maryland in *Pacheco v. State*, 465 Md. 311 (2019), the smell of marijuana and the presence of a marijuana cigarette in a car does not establish probable cause to conduct a search of a person found inside the vehicle. *See Pacheco*, 465 Md. at 328-28 (citing *Norman v. State*, 452 Md. 373, 411 (2017)). "For such

a search to have been reasonable under the Fourth Amendment, the officers must have possessed, *before* the search, probable cause to believe that Mr. Pacheco was committing a felony or a misdemeanor in their presence." *Id.* at 330-31. The Court found that while the facts presented by the State and credited by the hearing judge were sufficient to establish probable cause to search the vehicle, those same facts and circumstances did not necessarily justify an arrest and search incident thereto. *Id.* at 330-32. The arrest and search of Mr. Pacheco was unreasonable because nothing in the record suggested that possession of a joint and the odor of burnt marijuana gave the police probable cause to believe he was in possession of a criminal amount of that substance. *Id.* at 333. Individuals possess a "heightened expectation of privacy" in "his or her person as compared to the diminished expectation of privacy one has in an automobile." *Id.* at 333-34.

Assuming, *arguendo*, this Court were to agree with the motions court that the detective conducted a frisk of Appellant, we must nevertheless conclude, based on the testimony provided by Officer Mauri, that there was no reasonable articulable suspicion for that pat-down. "To articulate reasonable suspicion, an '*officer must explain* how the observed conduct, when viewed in the context of all other circumstances known to the officer, was indicative of criminal activity.'" *Thornton*, 465 Md. at 147 (quoting *Sizer*, 456 Md at 365) (emphasis added). The record at the suppression hearing revealed no testimony from the officers concerning such observations or concerns for the officers' safety. Rather, Detective Mauri testified that he decided to search Appellant "for other CDS."

Our determination that there was a lack of probable cause to search Appellant and that the police conduct was unlawful does not, however, end our analysis. We next examine whether the abandonment was voluntary, and the *Brown* factors are instructive. We observe that Appellant discarded the gun seconds after being illegally searched by the detective. The temporal nexus between the detective searching his pocket and Appellant throwing the gun mirrors the facts presented to the Fourth Circuit in *United States v. Wilson*, and there were no intervening circumstances. The final factor in the *Brown* voluntariness test asks whether the "connection between the Fourth Amendment violation and the evidence sought to be suppressed is sufficiently attenuated to have 'dissipat[ed] the taint of the . . . illegality." *Partee*, 121 Md. App. at 262 (quoting *Ferguson*, 301 Md. at 548). In other words, was the unlawful police action committed "distinguishable to be purged of the primary taint of illegality." *Partee*, 121 Md. App. at 262 (quoting *Wong v. Sun*, 371 U.S. 471, 488 (1963)). In the present case, we answer no. There was no dissipation between the violation and seizure.

In sum, our independent constitutional review of the record leads us to conclude that Appellant was subjected to an illegal search under the Fourth Amendment, and that he did not voluntarily abandon the gun. Appellant, thus, had standing to suppress the gun evidence. As this Court stated in *State v. Lemmon*, and as affirmed by the Supreme Court of Maryland, "[w]hen the abandonment is forced by illegal police conduct, it is not voluntary and its seizure offends the constitutional dictate." 318 Md. at 381-82 (citing *Beale,* 230 Md. at 186-187).

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED; CASE REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.