Circuit Court for Baltimore County
Case No. 03-K-18-001402

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2435

September Term, 2018

KENNARD WHITLEY

v.

STATE OF MARYLAND

Meredith,
Kehoe,
Reed,

JJ.

Opinion by Reed, J.

Filed: February 25, 2020

Kennard Whitley ("Appellant") was charged by indictment with possession with the intent to distribute cocaine and related charges. Appellant appeared before the Circuit Court of Baltimore County and litigated a motion to suppress evidence in the underlying case. The circuit court denied the motion, however, Appellant proceeded by entering a conditional guilty plea to possession of cocaine with intent to distribute under Maryland Rule 4-242(d) in order to preserve the suppression issues for appeal. Under the conditional plea agreement, the State agreed to nolle prosequi Appellant's remaining related charges. On August 23, 2018, Appellant was found guilty based on the State's proffer of facts and was sentenced to six years imprisonment.

Appellant timely filed this appeal and presents the following question for our review, which we rephrased:[1]

I. Did the court err in denying Appellant's motion to suppress?

For the following reasons, we answer in the negative and affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

In April 2018, Appellant was charged by indictment with the aforementioned offense. The following month, Appellant, through counsel, filed a motion in which he contended that police "had no right to detain and search [him] absent reasonable suspicion

[1] Did the lower court err in denying Appellant's Motion to Suppress the fruits of an unreasonable search and seizure where police officers lacked reasonable suspicion to seize Appellant?

that he was engaged in criminal activity," and requested that the court "suppress all evidence flowing from [his] illegal detention."

In August 2018, the court held a hearing on the motion. The State called Baltimore County Police Sergeant Robert Marley, who testified that he had worked for the Baltimore County Police Department for over thirty years and was "the Sergeant of the West Squad for the Vice Narcotics Unit Major Case Squad." Sergeant Marley had spent approximately twelve to thirteen years of his career in the Narcotics Unit and had made over one hundred arrests related to narcotics.

At approximately 6:49 p.m. on the evening of March 8, 2018, Sergeant Marley was on routine patrol near a McDonald's on Frederick Road in Catonsville. The sergeant knew the parking lot of the McDonald's as a "high drug area" where "a lot of individuals stop and either sell or use drugs," because the police department's "street level unit has made several . . . arrests there," and the sergeant's unit "has also made arrests in that area." Sergeant Marley saw on the "back lot" of the McDonald's a black Honda Civic "kind of parked off by itself . . . , away from all other cars." The sergeant testified:

> [The Honda] was not parked to the doors, near the entrance, where there was obviously many spots that could have been parked closer to the doors. It was parked out back, there was a dumpster there, kind of like a, not secluded, but kind of away from it so as I came through, I noticed the car was backed in, it had Virginia plates on it and the windows to the car were kind of steamed up, which is, that's kind of really what brought my attention to the car was the windows were all kind of steamed up at that point.
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> It just seemed odd to me and it seemed that there was people possibly sitting in the vehicle and it just, like I said, it just seemed kind of odd to me and I said, well, let me sit here for a few minutes to see what's going on with the

> vehicle and I said, you know, it could be somebody eating from McDonald's, they could have pulled to the back, going to eat and they were sitting there eating and that was something that I had thought could have been occurring. But with the Virginia plates, where it was parked on the back lot and, like I said, the windows being kind of steamed up, I knew somebody had been sitting in the car prior to me getting there for some time. So, at that point, I kind of set up in a surveillance position, kind of where I could observe the back lot and anybody that would enter or exit the vehicle.

When asked why "the fact that the car had Virginia plates" made Sergeant Marley suspicious, the sergeant replied:

> Just because we will get a lot of out of state individuals coming into the State of Maryland, we see West Virginia, we see Pennsylvania, Virginia, we do see a lot of vehicles coming from out of state that will go into the . . . Baltimore area and pass through Baltimore County, a lot of times they'll come out to Baltimore County to administer their drugs here in Baltimore County as they're on their way back. Or, like I said, they will stop in some of these areas, which is right off the beltway, and this McDonald's is right off of 695 onto Frederick Road.

Sergeant Marley watched the Honda for "twenty to thirty minutes," but did not see anyone enter or exit the car "for the longest time." At "one point, the headlights came on, like [the car] was going to pull off," but "then the headlights went back off again." Sergeant Marley contacted Baltimore County Police Detective Robert Strong, advised him he "may have [had] a drug transaction going to occur," and asked the detective to "come over into the area to initiate surveillance." Detective Strong drove his vehicle "around to a lot that was behind the McDonald's lot."

Sergeant Marley and Detective Strong "continued to watch the [Honda] for a pretty decent little bit of time," after which a female, later identified as Bradley, "exited the . . . Honda . . . and went into the McDonald's." Bradley ordered a drink and returned to the Honda. As Bradley was re-entering the Honda, "a Pontiac pulled up . . . maybe three to

four spaces down from her." Sergeant Marley could see the Pontiac was occupied by a male. Approximately "a minute later," Bradley exited the Honda "and went over to the Pontiac and got into the passenger side." The sergeant "realized . . . through [his] training, knowledge[,] and experience," that "a drug transaction [was] going to occur," and "radioed to . . . a couple other individuals [who] had come to [the officers'] location" to approach the Pontiac.

Sergeant Marley and Detective Strong exited their vehicles and approached the Pontiac. As the officers approached, Sergeant Marley saw "a conversation occurring between the two in the vehicle and [the driver] kind of looking down towards his lap area." When asked "what, if any, significance did it have . . . that the male driver was focused on his lap area," the sergeant replied:

> Once again, through my training, knowledge[,] and experience, that it appeared to me that he was looking down as there may be some items in his lap area. With that, I, I'm thinking in the work that I do, that there's drugs possibly involved here and that he's looking down into his lap area either counting out drugs to give to the passenger or money, sometimes it can be money that they're, they're looking at or the drugs that they'll have down, out of view. They don't want to hold it up and view where people that are around can see, so they'll keep it concealed down in their lap area to either count out the drugs that they're going to give to the individual or money that they're receiving to count the money.

Detective Strong, who was standing on the passenger side of the Pontiac, ordered the man to "remove his hands, to show his hands, [and] to get his hands up out of his lap." The officers "had both occupants exit the vehicle for safety," and when the man exited the driver's side, Sergeant Marley "could clearly see . . . that there was CDS lying on the seat

area where the driver had just got up."[2] During cross-examination, the sergeant confirmed that he "did not observe any sort of hand to hand transaction between the two individuals," or "any interaction whatsoever between" them. Sergeant Marley also confirmed that "there were no furtive movements by" the driver of the Pontiac, whom the sergeant identified as Appellant.

The State next called Detective Strong, who testified that he had been a police officer for approximately nineteen years, had approximately three years of experience "pertaining to narcotics investigations," and was assigned to "Vice Narcotics, West Squad, Major Case." The detective stated that he has "made over eleven hundred arrests and . . . about five hundred of them . . . drug related."

When Detective Strong arrived at the McDonald's, he saw the Honda "in a location to the rear of the" restaurant, and "took up a position where [he] could see the rear end of the" car. The detective testified:

> At that time, I noticed that it was backed in toward the rear of the McDonald's. No other cars around it. It wasn't a very busy time for the McDonald's, so there were other parking spots that would be closer to entrances and exits and the, from my position, I could see the tailpipe, because I was behind the vehicle, I could see some steam or smoke emanating from the tailpipe indicating that it may be running and also some condensation on the rear, rear window of, of the car, which indicated to me that it, that it was occupied.

When asked "[w]hat, if any, significance . . . the location of the" Honda had to Detective Strong, he testified:

> So, as I arrived, it raised my suspicion in the manner in which it was parked, it was parked to the rear. There were many other parking spots that would

[2]The substance was subsequently tested and discovered to be cocaine.

> have been more convenient for someone to use or utilize the McDonald's if, if that's what they were going to do. And with it being backed in, through my training and experience on the job, have done undercover purchases myself, backing into a parking spot is just one of many indicators that would indicate that someone may be waiting for someone to arrive so they have a better view of the surroundings.

Approximately twenty minutes later, Detective Strong saw Bradley "exit the driver's door and enter or walk toward the McDonald's." After Bradley returned to the Honda "carrying a McDonald's cup," the detective saw a Pontiac arrive and park "approximately three to four spaces" to the driver's side of the Honda. Detective Strong "could see with using [his] binoculars that [the Pontiac] was occupied by . . . one subject in the driver's seat."

Within "seconds" of the arrival of the Pontiac, Detective Strong saw Bradley exit the Honda, walk to the Pontiac, and sit in the passenger seat. The detective explained:

> [T]hat then raised even more suspicion for me. Someone, surveillance on that female's vehicle was approximately forty minutes in at that point and through my training, knowledge[,] and experience, as well as every day common sense, if you're waiting that long for someone, you would probably greet them with a wave or if you knew them, maybe a handshake, a hug. So, for her to just walk over without making any indication or a wave or glad you're here, and just immediately sat in there, that kind of raised my suspicion as very indicative of somebody who wanted to get in that passenger seat and do something illicit, like a . . . drug transaction.

Approximately one to two minutes later, Detective Strong exited his vehicle, climbed over a short fence, "pulled [his] badge out around [his] neck," and with his hand on his gun, approached the Pontiac. The detective testified:

> [A]s I began to approach on foot, the driver later identified as Mr. [Appellant], began to look up. My badge was displayed. When we made . . . eye contact, I identified myself as Baltimore County Police. He immediately went back down into his lap. I could not see both hands and it appeared that

> he was manipulating and looking down, almost in a frantic manner, in my eyes. I was a little worried at that point. It's not a common approach when, when police approach you to, to either try to conceal or, or manipulate your hands in any manner. Me, myself, even, if and when I get pulled over, I just want to kind of be, here are my hands. I don't want to misconstrue anything.

When asked why Appellant's actions in "looking down towards his lap" and "manipulating both hands towards his lap before he even looked up and made eye contact with" Detective Strong had any significance, the detective testified:

> It, it was very indicative of the totality of everything. It was very indicative of a drug transaction. In my experience, a supplier of drugs never shows up first. I always, when I do my undercovers, when I do CI buys, it's always the, the buyer shows up and you're waiting for the dealer. So, I assumed that he was then getting product ready or out to supply the female that exited the, the black Honda.
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> Through my training, knowledge[,] and experience, in, in numerous arrests and, and post-search incident to arrest, narcotics are often times recovered, and I have personally recovered narcotics from the groin area, within a source that supplies person and/or underwear as, as I know through my training, knowledge[,] and experience, it's a common place to store narcotics or contraband to, to try to keep from detection from law enforcement.

Detective Strong ordered Appellant to show his hands, but Appellant "refused." The detective drew his gun and gave Appellant "several commands" to show his hands. Detective Strong then "went to the passenger side" and asked Bradley "to step out of the vehicle." When Bradley complied, the detective "read her her rights per Miranda," "told her [the detective's] observations," and "asked her if she had purchased any drugs from" Appellant. "Based on" his conversation with Bradley, Detective Strong "had belief, and what [he] believed, probable cause that there was narcotics in that vehicle." During cross-

examination, the detective "categorize[d Whitley's] movements as furtive when he did not comply with the request to show hands."

Following the close of the evidence, defense counsel argued that for the following reasons, the officers did not have reasonable suspicion to detain Appellant:

- The officers "didn't wait long enough to observe . . . an alleged transaction;"
- The officers did not know if [Appellant] and Bradley had "prior CDS contacts," "did not find anything about the history of these individuals," and did not "know anything about . . . [Appellant]'s car;"
- Sergeant Marley "did not see anything going on in the car," and testified that "there were no furtive movements;"
- "[H]ands in the lap is not indicative of any drug activity whatsoever;" and
- There was "no testimony that there [was] an attempt to hide anything."

Following argument, the court concluded that for the following reasons, "there was reasonable articulable suspicion at the time of the stop:"

- The officers "both have quite a bit of training, knowledge[,] and experience in this field;"
- The McDonald's "parking lot is a high drug kind of parking lot," and "is very close to 695;"
- The "fact that [the Honda was] backed in . . . would definitely give . . . the person . . . who's operating the vehicle a better vantage point . . . of who is approaching, or who is just occupying [or] traveling through the rest of the parking lot;"
- The "officers testified that many persons who do travel interstate . . . use that McDonald's to conduct [illicit] drug activity;"
- [Appellant] and Bradley "were meeting up for some purpose;"
- "[W]hen the police officers sort of approached, they did see [Appellant] with his head down, sort of . . . in their view, doing something with his hands . . . in his lap;" and,
- The "two cars [were] parked so far away from [the McDonald's for] any reasonable business purpose."

Accordingly, the court denied the motion.

Appellant subsequently submitted a conditional plea of guilty to the aforementioned offense on an agreed statement of facts. The court subsequently convicted Appellant of the offense.

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. We view the evidence and all reasonable inferences drawn therefrom in the light most favorable to the party prevailing on the motion[.] We review the hearing judge's findings for clear error.
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> Finally, 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. In other words, our plenary review of the record for error requires application of the facts under a totality of the circumstances analysis.

Sizer v. State, 456 Md. 350, 362–63 (2017) (internal citations omitted).

DISCUSSION

A. Parties' Contentions

Appellant contends that the court erred in denying the motion to suppress. He claims that the "officers lacked reasonable suspicion to seize" him (boldface and capitalization omitted), because the officers "had nothing stronger than a hunch that they had witnessed a drug transaction," and Appellant's "conduct did not provide a particularized and objective basis for the stop." The State counters that the "totality of the circumstances . . . provided [the officers] reasonable suspicion to believe that a drug transaction was occurring."

B. Analysis

In *Sizer*, the Court of Appeals explained that:

> Fourth Amendment jurisprudence, as it pertains to stops and seizures, operates along an escalating plane that begins with unparticularized suspicions or hunches and crescendos at probable cause. Reasonable suspicion exists somewhere between unparticularized suspicions and probable cause. And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or hunch, but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.
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> Reasonable suspicion has been defined as nothing more than a particularized and objective basis for suspecting the particular person stopped of criminal activity. Moreover, reasonable suspicion is a common sense, nontechnical conception that considers factual and practical aspects of daily life and how reasonable and prudent people act. The reasonable suspicion standard does not allow a law enforcement official to simply assert that innocent conduct was suspicious to him or her. Rather, the officer must explain how the observed conduct, when viewed in the context of all of the other circumstances known to the officer, was indicative of criminal activity.

Id. at 364–65 (internal citations, quotations, and brackets omitted).

Here, Sergeant Marley and Detective Strong each had a minimum of nineteen years, and had a combined 49 years, of experience as a police officer. The officers each had a minimum of three years, and had a combined fifteen to sixteen years, of experience in narcotics investigations, and together had made at least 600 arrests related to narcotics. Due to the number of narcotics-related arrests that had previously been made in the parking lot where Appellant was arrested, the lot was known to the officers as a "high drug area" where individuals either sold or used narcotics. The lot was also adjacent to a highway known to the officers to be used by individuals who travel to the Baltimore area to obtain narcotics. The Honda from which Bradley emerged was parked away from the doors to the McDonald's and all of the other cars on the lot. The Honda was backed into its parking spot, which Detective Strong knew to be an indicator that the occupants were waiting for

someone to arrive and wanted a better view of the surroundings. The Honda's license plates were issued by the Commonwealth of Virginia. Based on his training, knowledge, and experience working in the Narcotics Unit, Detective Strong knew that individuals came to Baltimore County from neighboring States to administer narcotics. From the "steamed up" windows of the Honda, the officers knew that it was occupied, and had been for twenty to thirty minutes prior to Appellant's arrival. When Appellant arrived, Bradley immediately exited the Honda and entered Appellant's car. Detective Strong noticed that Bradley did not give any indication, such as a wave, handshake, or hug, that she knew Appellant. Detective Strong also knew from his training, knowledge, and experience that the "buyer" in a drug transaction "always" arrives at the location of the transaction first, and the "supplier" arrives later.

As the officers approached Appellant's car, they saw Appellant look down toward his lap area, which the officers knew to occur when an individual "count[s] out the drugs that they're going to give to the individual or money that they're receiving." When Detective Strong identified himself to Appellant as a police officer, Appellant frantically looked down toward his lap and groin area, which the detective knew to be "a common place to store narcotics…to try to keep from detection from law enforcement," and manipulated his hands, which the detective knew to be indicative of "getting product ready." Finally, Appellant did not comply with Detective Strong's command to show his hands until the detective drew his gun and gave Appellant several commands to do so. We conclude that Appellant's conduct, as observed by the officers and viewed in the context of all of the other circumstances known to the officers, was indicative of criminal activity,

and gave the officers a particularized and objective basis for suspecting Appellant of criminal activity.

Appellant contends that the officers did not have reasonable suspicion for the following reasons:

- The officers "did not see any exchange between" Appellant and Bradley, or "see any money change hands;"
- "[P]rior to announcing himself as a police officer and removing [Appellant] from the car," Sergeant Marley "saw no gestures, no furtive movements, [and] no exchange of anything;"
- Detective Strong "admitted that [Appellant] made no furtive movements,"[3] and the detective "did not see any drug activity occurring when he approached;"
- The officers "were not investigating a call for suspected drug activity," and "were not surveilling a person that they knew, or even suspected, to have engaged in drug offenses previously;" and,
- "[P]rior to [the] officers descending on the" Pontiac, [Appellant] "did not act nervously or do anything to suggest he was engaged in any criminal activity."

But, "to determine whether [a] detaining officer has a particularized and objective basis for suspecting legal wrong-doing," we do "not parse out each individual circumstance for separate consideration," but "examine the totality of the circumstances." *Holt v. State*, 435 Md. 443, 460 (2013) (internal citations and quotations omitted). Also, Appellant does not cite any authority that would have prevented the officers from having reasonable suspicion that Appellant was involved in criminal activity simply because they did not see Appellant and Bradley exchange narcotics or money, did not see Appellant make furtive movements

[3]This claim is somewhat misleading. During cross-examination, defense counsel asked Detective Strong: "You didn't observe any furtive movements by my client?" The detective replied: "I would categorize his movements as furtive when he did not comply with the request to show hands." Detective Strong did not specifically testify that Appellant did not make any furtive movements before the detective approached and announced his presence.

before the officers announced their presence, or did not receive a call for suspected drug activity or have any knowledge as to whether Appellant or Bradley had previously engaged in drug activity. Finally, with respect to Appellant's behavior after Detective Strong initially ordered Appellant to show his hands, we have concluded

> that events that occur between a show of authority and the actual seizure may be considered in deciding whether police had reasonable suspicion to seize an individual. In other words, a reasonable-articulable-suspicion inquiry begins, not when there is a show of authority by police, but when the subject yields to that show of authority.

Williams v. State, 212 Md. App. 396, 409–10 (2013) (citations and quotations omitted). Hence, the circumstances cited by Appellant did not preclude the officers from having a reasonable suspicion that he was involved in criminal activity.

Appellant next contends that the "court's ruling . . . radically expands police authority by implying that the mere possibility of a transaction in a vehicle in an area known for drug activity gives rise to the suspicion required to effect a seizure." *See Sellman v. State*, 449 Md. 526, 545 (2016) (a "generalized concern about theft from cars in [an] area is not on par with reasonable suspicion, and, without more, is too weak and attenuated to provide reasonable suspicion that criminal activity [is] afoot"). But, the court did not base its ruling exclusively on the presence of Appellant's "vehicle in an area known for drug activity." The court also, and explicitly, considered the officers' training, knowledge, and experience, the specific location of where, and manner in which, the Honda and Pontiac were parked, Bradley's actions in moving from the Honda to the Pontiac, and Appellant's actions prior to the officers' announcement of their presence. The court did not "imply"

that the officers' actions were justified solely because of the area in which Appellant was detained, and hence, the court's ruling does not "radically expand[] police authority."

Appellant next contends that "[c]onsidering cars bearing a Virginia license plate as suspicious of drug activity when encountered in their neighboring state[,] borders on the absurd given the ubiquity of the occurrence due to their geographic proximity," as "does the fact that [Appellant] had his hands in his lap and looked down when he was sitting in his car." We disagree. We have stated that, in determining whether an officer's suspicion was reasonable, the location of a vehicle "is . . . not without significance," and an officer may consider whether the vehicle was located in a "corridor for drug trafficking" or has "out-of-state license tags." *Jackson v. State*, 190 Md. App. 497, 522–23 (2010). Appellant also does not cite any authority that would have rendered unreasonable the officers' inference that Appellant's hands were in his lap, and eyes were looking down, because he was preparing or manipulating narcotics or money, especially in light of the officers' knowledge that the lap area is used to "count[] out drugs . . . or money . . . out of view," and the "groin area [is] a common place to store narcotics . . . to keep from detection from law enforcement." Hence, the officers' consideration of these circumstances, and the court's reliance on them in denying the motion to suppress, did not "border[] on the absurd."

Appellant next contends that the court erred in denying the motion because his conduct "was consistent with a wide array of innocent possibilities." But, we have stated that "[j]ust because there may be innocent explanations for each aspect of a defendant's conduct, standing alone, does not necessarily mean that it is impossible for an officer with

training and experience in the field to form an objectively reasonable articulable suspicion that the defendant is engaged in criminal activity, based on a totality of the circumstances." *State v. Holt*, 206 Md. App. 539, 560 (2012), *aff'd*, 435 Md. at 468. "In deciding a motion to suppress, a trial court should focus on the totality of the circumstances and analyze what facts are before it rather than focus on what facts are missing," *id.*, and the court did not err in doing so here.

Finally, Appellant contends that the court erred in denying the motion because the "officers had alternative courses of action open to them that were consistent with the Fourth Amendment," including "follow[ing] either vehicle," "pull[ing] either vehicle over if there was reasonable suspicion to believe they had committed a traffic infraction," and "run[ning] license plate checks on either of the vehicles to determine whether they were linked to criminality." However, the Supreme Court has stated that the "fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, by itself, render [a] search unreasonable." *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973) (citation omitted). Appellant does not cite any authority that would have required the officers to "run" the vehicles' license plates or allow either vehicle to leave before concluding that they had reasonable suspicion to detain Appellant, and the court did not err in concluding otherwise.

CONCLUSION

Because Appellant's conduct, as observed by the officers and viewed in the context of all of the other circumstances known to the officers, was indicative of criminal activity,

and gave the officers a particularized and objective basis for suspecting Appellant of criminal activity, the court did not err in denying the motion to suppress.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.