Circuit Court for Prince George's County
Case No. CT171588X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 768

September Term, 2018

XAVIER MATTHEWS

v.

STATE OF MARYLAND

Meredith,
Shaw-Geter,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: May 21, 2019

Appellant Xavier Matthews pled guilty in the Circuit Court for Prince George's County to wearing, carrying, or transporting a firearm. Pursuant to Maryland Rule 4-242(d), he conditioned his guilty plea on the right to appeal the denial of a motion to suppress. He presents the following question for our review:

> "Did the Circuit Court err in denying Appellant's motion to suppress?"

Finding that the suppression court did not err, we shall affirm.

I.

On June 11, 2018, appellant pled guilty to wearing, carrying, or transporting a firearm. The court sentenced him to a term of incarceration of three years, all suspended, and two years probation.

We set out the following facts established at the suppression hearing. On September 26, 2017, a teacher at Potomac High School noticed appellant and a former high school student meeting in a hallway at the high school. The two young men showed each other large quantities of cash, ignored the teacher's instruction to go to class, and walked out of the teacher's view into a stairwell. The teacher was concerned about the suspicious activity and called Corporal Carr, the school's "resource officer."[1] She reported what she saw to Corporal Carr.

[1] By statute, a resource officer is either a member of law enforcement assigned to a school by agreement between the school and the law enforcement agency or a member of the Baltimore City School Police Force. Md. Code, Educ. Art., § 7-1501(j); 4-318(a). Corporal Carr was a member of the former category.

Corporal Carr reviewed security recordings from the school but was unable to see an exchange of contraband or locate the former student. She and a school security guard went to appellant's classroom to speak with him. A third security guard joined them before they reached the classroom. Corporal Carr entered appellant's classroom and asked to speak with him. She and the security guards walked with appellant to the school security office and closed the door behind them. The witnesses' statements about the incident were inconsistent,[2] but after hearing testimony, the suppression court found that Security Officer Rennard Sweetney remained in the security office and saw the ensuing conversation.

Corporal Carr asked appellant why he spoke to the former student, and appellant replied that they were acquaintances. She noticed that appellant smelled like marijuana and that there was a large, unidentifiable "bulge" in his pants. She asked if he had anything "on him," particularly marijuana. Corporal Carr had found marijuana in appellant's possession in a previous encounter and testified that in that instance he was apologetic and not aggressive toward her. This time, appellant laughed in response to Corporal Carr's question. He pulled from his pants pocket approximately $300 in cash and pulled from his jacket pocket an assortment of personal items. Corporal Carr noticed that the bulge in appellant's pants did not change shape when appellant removed the cash from his pants pocket.

[2] Security Officer Rennard Sweetney testified that he saw Corporal Carr attempt to search and arrest appellant. Corporal Carr testified that Security Officers Sweetney and Clarke left before she attempted to search appellant.

Concerned about the item in his pants, Corporal Carr ordered appellant to remove everything he had in his pockets. After appellant became "agitated" and yelled at her, she stepped toward him, and he shoved her twice, trying to get past her. She told him that he was under arrest for assault and placed his hands in handcuffs behind his back. When she attempted to search his pants, he struggled with her. A much larger collection of cash, perhaps $1,500, fell from appellant's pants. During the altercation, appellant pushed and kicked Corporal Carr until she forcibly subdued him. As she subdued him, the end of the "bulge" slipped out of his waistband, and Corporal Carr saw the grip of a handgun. She removed it from his pants and placed it on a desk. Corporal Carr called for backup at some point in the altercation, and the security guards came to her assistance.

Before trial, appellant moved to suppress the handgun and money as evidence unconstitutionally seized in violation of the Fourth Amendment to the United States Constitution. The court denied the motion, and appellant pled guilty to handgun possession on the condition that he could appeal the decision of the suppression court. This timely appeal followed.

II.

Appellant argues that the suppression court should have suppressed the handgun and money that were in his pants as unconstitutionally seized. He argues first that Corporal Carr lacked reasonable, articulable suspicion sufficient to remove him from his classroom and that any subsequent search should have been suppressed as "fruit of the poisonous tree." He emphasizes that proximity to a person committing a criminal act (in this case,

trespassing) is insufficient to create reasonable, articulable suspicion. He contends also that when Corporal Carr brought him into the security office, she unconstitutionally *de facto* arrested him without probable cause. In support of that argument, he notes that three officers escorted him to the security office and that Corporal Carr closed the door to the office. He asserts that a subsequent search was fruit of the poisonous tree which warranted suppression. Finally, appellant argues in the alternative that Corporal Carr searched him (by requesting that he empty his pockets) before she arrested him, and hence, it was not a search "incident" to a lawful arrest.

The State argues that Corporal Carr searched appellant lawfully. The State asserts that Corporal Carr "stopped" appellant pursuant to reasonable, articulable suspicion, developed probable cause to arrest him, and searched him incident to a lawful arrest. Beginning with the "stop" in which Corporal Carr asked appellant to leave his classroom, the State contends that the circumstances provided Corporal Carr with reasonable, articulable suspicion to detain appellant. The State points to the trespassing former student, the large quantities of money displayed, and that Corporal Carr had confiscated marijuana from appellant in the past.

Proceeding to the interaction in the security office, the State begins with appellant's claim that Corporal Carr *de facto* arrested him, arguing first that appellant waived the argument by failing to raise it at the suppression hearing. On the merits, the State argues that appellant was not *de facto* arrested because he left his classroom voluntarily, walked into the unlocked office without force, and spoke with Corporal Carr from a distance of five feet. The State proceeds to the facts of that conversation, arguing that the smell of

marijuana and the bulge in appellant's pocket, coupled with the facts of the earlier meeting, provided probable cause for an arrest. Because Corporal Carr had probable cause to arrest, the State concludes, Corporal Carr permissibly searched appellant incident to her arrest. Citing *Barrett v. State*, 234 Md. App. 653, 672 (*cert. denied*, 457 Md. 401 (2018)), the State maintains that whether the search of appellant immediately preceded his arrest is of no consequence.

Finally, the State addresses reasonable articulable suspicion, the lower legal standard for searches by school officials. It argues that because Corporal Carr is a school resource officer, she qualifies as a school official, contrasting her position with that of an externally stationed police officer entering the school to investigate. Referencing the same circumstances listed in its argument above, the State concludes that Corporal Carr's search of appellant's pockets was reasonable and the evidence admissible.

III.

We hold that Corporal Carr's reasonable, articulable suspicion justified her initial "stop" in the classroom and that she had probable cause to arrest and search appellant in the security office.

When we review the denial of a motion to suppress, ordinarily we review only the evidence that was before the suppression court. *Williams v. State*, 219 Md. App. 295, 314 (2014). As the State was the prevailing party, we consider the facts and available inferences in the light most favorable to the State. *Id.* We accept the factual findings of the suppression court unless clearly erroneous; however, "we make our own independent

constitutional appraisal as to whether an action was proper by reviewing the law and applying it to the facts of the case." *Id.* at 314–15.

We begin with the initial "stop." The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Consistent with the Fourth Amendment, a police officer may "briefly detain a person for investigative purposes if the officer has reasonable suspicion, supported by articulable facts, that criminal activity 'may be afoot.'" *Johnson v. State*, 154 Md. App. 286, 300 (2003) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). Reasonable, articulable suspicion is more than a police officer's mere "hunch" but less demanding than probable cause. *Id.* A combination of otherwise innocent facts can establish reasonable, articulable suspicion, *United States v. Sokolow*, 490 U.S. 1, 9 (1989), and known previous criminal behavior may contribute also. *Coley v. State*, 215 Md. App. 570, 586 (2013).

Appellant's meeting with a trespassing former student and mutual display of a large quantity of money was suspicious. He made his behavior more suspicious by ignoring a teacher's instruction to go to class and walking out of view with the other individual. Given that Corporal Carr confiscated marijuana from appellant previously, his engaging in behavior consistent with an illegal transaction furnished her with reasonable, articulable suspicion to detain him briefly and question him about his and the former's student's possible criminal activity.

Appellant argues that when Corporal Carr brought him into the security office and closed the door, she *de facto* arrested him. *See Reid v. State*, 428 Md. 289, 299–300 (2012).

The State contends that appellant waived this argument. We agree with the State. To preserve his right to raise on appeal an argument for suppression, a defendant must raise the argument in a pretrial motion to dismiss. Rule 4-252(d); *Savoy v. State*, 218 Md. App. 130, 145 (2014). Plain error review is barred, which is a prophylactic measure intended to avoid vague, "catch-all" motions and to provide the prosecution with fair notice. Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 11.2(a) (4th ed. 2004), *cited in Savoy*, 218 Md. App. at 145. At the suppression hearing, appellant argued that Corporal Carr could not search his pockets prior to her formal arrest in the security office because he was not under arrest until the formal arrest. He did not argue in the alternative that she improperly *de facto* arrested him in the office. He waived his right to raise that argument before this Court.

We turn next to Corporal Carr's search of appellant's pockets in her office. Appellant presents alternative arguments for suppressing the evidence seized from his person. We address them each in turn and hold that the suppression court did not err in denying his motion to suppress.

Ordering a person to empty his pockets is a "search" triggering the protection of the Fourth Amendment. *In re Devon T.*, 85 Md. App. 674, 701 (1991). The Fourth Amendment prohibition against "unreasonable" searches and seizures means that "[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing . . . reasonableness generally requires the obtaining of a judicial warrant." *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995). A search incident to a lawful arrest is an exception to the warrant requirement. *Riley v. California*, 573 U.S. 373,

383 (2014). The exception is justified by the officer's need to safeguard herself and others as well as her need to preserve evidence. *Id.*

"A warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer's presence, is consistent with the Fourth Amendment if the arrest is supported by probable cause." *Maryland v. Pringle*, 540 U.S. 366, 370 (2003). An officer has probable cause where she has "a reasonable ground for belief of guilt" that is "particularized with respect to the person to be searched or seized." *Id.* at 371. The reasonable ground may be based on "facts and circumstances within the knowledge of the officer at the time of the arrest, or of which the officer has reasonably trustworthy information." *Barrett*, 234 Md. App. at 666; *Robinson v. State*, 451 Md. 94, 109-10 (2017). The odor of marijuana can provide probable cause if localized to the suspect and combined with other facts. *Barrett*, 234 Md. App. at 671.

Once an officer has probable cause to arrest a suspect, she may search him incident to arrest. *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980). It is not "particularly important that the search preceded the arrest rather than vice versa;" the search must simply be very close in time to the arrest. *Id.*; *Barrett*, 234 Md. App. at 673.

In the instant case, Corporal Carr's order that appellant empty his pockets was a search, which triggered Fourth Amendment protections. At the time she ordered him to empty his pockets, she had probable cause to arrest him on suspicion of possession of marijuana. As discussed above, appellant's behavior that morning and unusually uncooperative attitude were suspicious. Importantly, when Corporal Carr brought him into the security office, she isolated the odor of marijuana coming from appellant. His behavior,

the odor, and her knowledge of his previous possession of marijuana provided Corporal Carr with probable cause to search and arrest him.[3] Once Corporal Carr established probable cause, she could search appellant immediately before arresting him. The search was "incident" to appellant's arrest. The suppression court denied correctly appellant's motion to suppress.

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

[3] Because Corporal Carr's search was constitutional under the higher probable cause standard, we need not address the State's arguments that a lower standard of reasonable articulable suspicion applied to the search, *see New Jersey v. T.L.O.*, 469 U.S. 325 (1985), and that the money that fell out of appellant's pocket during the altercation was admissible under the "plain view" doctrine.