

Circuit Court for Baltimore City
Case No. 117131009

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1836

September Term, 2017

MONTRELL WASHINGTON

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: December 14, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Montrell Washington, appellant, was tried before a judge in the Circuit Court for Baltimore City on charges of possession of a firearm in connection with drug trafficking and possession of cocaine with intent to distribute. Prior to trial, he filed a motion to suppress, which was granted in part and denied in part. Appellant proceeded to trial on an agreed statement of facts and a plea of not guilty. He was found guilty of both charges. The court sentenced appellant to concurrent terms of incarceration for eight years, with all but seven years suspended, the first five years to be served without the possibility of parole, to be served consecutive to any other sentences previously imposed on appellant. This timely appeal followed.

QUESTIONS PRESENTED

The sole question presented for our consideration is whether the circuit court erred in denying appellant's motion to suppress. For the reasons set forth below, we shall reverse.

FACTUAL BACKGROUND

This case proceeded on the following agreed statement of facts:

On April 23rd, 2017 at approximately 2:11 p.m. an officer was observing the corner of Poplar Grove and Edmondson Avenue via CCTV. He observed Defendant Montrell Washington, the individual standing to the right of counsel at trial table, standing on the corner who matched the description of an armed robbery suspect that had occurred earlier in the day.

The officer then called another officer to the scene to investigate. As that officer approached the Defendant, believing he may be armed, he conducted a pat down for weapons, at which time he advised the officer that he had marijuana on him. The officer subsequently recovered one clear sandwich bag with 21 zips of cocaine from the Defendant's pocket. The Defendant was then placed under arrest and recovered from his groin area was a Glock 23 handgun loaded with 12 live rounds. The Defendant is

prohibited from possessing a handgun and ammunition based on a 2016 conviction for handgun on a person. . . .

A routine check of the firearm through police databases revealed that it was reported stolen out of Clayton County, Georgia. The handgun that was recovered and its proximity to the drugs satisfied sufficient circumstances to constitute a nexus to the drug trafficking crime.

All evidence was submitted to the Baltimore Police Evidence Control Unit. The CDS was analyzed and tested positive for cocaine. The amount of drugs recovered, the manner in which it was packaged, and the surrounding facts of this case indicate the Defendant possessed the drugs with the intent to sell them and not for his mere personal use.

At this time the State offers into evidence State's Exhibit No. 1 a copy of the operability report which shows the handgun was operable and a copy of the chemical analysis, which shows that the CDS recovered was in fact cocaine. If called to testify the officers would identify the Defendant as the individual in possession of that firearm and the cocaine on April 23rd, 2017. And all events occurred in Baltimore City, State of Maryland.

DISCUSSION

I.

Prior to trial, appellant sought to suppress his statement that he had marijuana on him and all evidence that followed on the grounds that the stop was unlawful because the police did not have reasonable suspicion to believe he was engaged in criminal activity. In the alternative, appellant argued that he was under arrest or in custody when he was handcuffed and, without being given *Miranda*¹ warnings, stated, in response to a question, he had marijuana on his person. With the exception of statements made by appellant after the cocaine was discovered, the suppression court denied the motion. In this appeal, appellant challenges that decision.

¹ See *Miranda v. Arizona*, 384 U.S. 436 (1966).

A. Standard of Review

In reviewing a circuit court’s denial of a motion to suppress evidence, we consider only the record developed at the suppression hearing. *Raynor v. State*, 440 Md. 71, 81 (2014) (citing *Briscoe v. State*, 422 Md. 384, 396 (2011)). We view the evidence and inferences that may be drawn therefrom in the light most favorable to the prevailing party. *Id.* We review the circuit court’s factual findings for clear error, but “make our own independent constitutional appraisal, by reviewing the relevant law and applying it to the facts and circumstances” of the case. *Lee v. State*, 418 Md. 136, 148 (2011) (quotation marks and citation omitted); *accord Holt v. State*, 435 Md. 443, 457 (2013).

B. Suppression Hearing

At the pre-trial suppression hearing, Baltimore City Police Officer Deonte Duck testified that on April 23, 2017, he was working overtime, patrolling in the area of Edmondson Avenue² in Baltimore City, when a City Watch³ officer “got on the air” and reported that “he had eyes on a possible suspect” from an armed robbery that had occurred earlier that day. The City Watch officer provided the suspect’s location and described him as a black male wearing a red and black hat, a Louis Vuitton belt, and a gray sweatshirt with black sleeves. Officer Duck went to that location and observed appellant, who matched the description given by the City Watch officer. Officer Duck was wearing a body camera and his interactions with

² The transcript mistakenly refers to the location as Emerson Avenue.

³ “City Watch” is a reference to Baltimore City’s CitiWatch program which includes a system of closed circuit cameras located throughout Baltimore City and monitored by officers. Because the transcript refers to the program as “City Watch,” we shall use that phrase herein for consistency.

appellant were recorded. That recording was played during the suppression hearing. Officer Duck approached appellant and asked if he had any identification on him. Appellant started to move as if reaching for his identification, but Officer Duck told appellant to put his hands on his head. According to Officer Duck, appellant was then handcuffed for officer safety. Officer Duck “detained [appellant] because he was possibly a suspect in an armed robbery.” Officer Duck asked appellant if he had anything illegal on him and appellant replied that he had some weed. Officer Duck recovered a baggie from appellant’s left front pocket that contained smaller baggies of suspected cocaine. He also recovered other items from appellant including a face mask, phones, and identification. Shortly after Officer Duck recovered the cocaine in appellant’s pocket, other officers arrived and recovered a handgun from appellant’s waistband. Officer Duck testified that he did not arrest appellant until after the cocaine was discovered in his pocket.

About five or six hours after his encounter with appellant, Officer Duck prepared a statement of probable cause based on his memory of what had occurred and not on a review of the footage from his body camera. On cross-examination, Officer Duck acknowledged that part of the statement of probable cause that he prepared was “not accurate to the body camera video.” In the statement of probable cause, Officer Duck reported that appellant matched the description of one of the suspects from the earlier armed robbery. That information was based on what Officer Duck was told by the City Watch officer and not his own observations. Officer Duck never spoke with any of the victims of the armed robbery, or the officer who wrote the incident report for that crime. Prior to the time he arrested appellant, he did not have any description of the suspects in that crime given by the victim in that crime. The incident report from the armed robbery was offered as defense exhibit 2 at the suppression hearing. That report

indicated that the City Watch officer did not see the initial robbery, but screened the area for possible suspects.

The victim's description, to the responding officer, of one of the suspects in the armed robbery was a black male, approximately five seven, in his mid-twenties, with an unknown tattoo on his face, 155 to 160 pounds, light skinned, chin hair, gold fronts, light brown hair, wearing a gray jacket, gray jeans, gray sneakers, white shirt, black pull up face mask and carrying a black semi-automatic handgun. The victim described the other suspect as a black male, approximately five seven, skinny, black face mask, wearing a black jacket, blue jeans, black Nike boots, and carrying a black handled switch knife. Officer Duck acknowledged that, in addition to other differences between the descriptions of the suspects and the description provided by the City Watch officer, appellant was wearing red shoes with orange laces.

Officer Duck admitted that he never conducted a pat down of appellant, although in the statement of probable cause he wrote that he felt packages consistent with controlled dangerous substances during a pat down. He acknowledged that he did not give appellant *Miranda* advisements after he was handcuffed. Officer Duck also acknowledged that the statement of probable cause he prepared was inaccurate and that the description of the suspect he received from the City Watch officer was inconsistent with the descriptions given by the victims of the armed robbery.

The defense argued that Officer Duck did not conduct a proper *Terry* stop,⁴ because there was no evidence connecting the description by the City Watch operator to the earlier

⁴ This is a reference to *Terry v. Ohio*, 392 U.S. 1 (1968).

robbery. Moreover, according to the defense, as soon as Officer Duck grabbed appellant from behind, appellant was under arrest.

Defense counsel also argued that if not under arrest, appellant was in custody at the time he stated that he had marijuana and had not been advised of his *Miranda* rights. Thus, everything that followed should be suppressed.

The State countered that when Officer Duck approached appellant it was for the purpose of conducting a *Terry* stop, and that Officer Duck had reasonable articulable suspicion, based on the “collective knowledge doctrine”⁵ and information received from the City Watch officer, that appellant was a suspect in an armed robbery that had occurred earlier in the day. The State acknowledged that Officer Duck never conducted a frisk of appellant, but asserted that appellant was placed in handcuffs for officer safety. At that point, appellant was not under arrest but was merely being detained, so it was not necessary to give *Miranda* advisements. Before Officer Duck “even had a chance to frisk him,” however, appellant stated that he had weed. At that point, Officer Duck had probable cause to arrest appellant and search his pockets. Once the cocaine was found, appellant was under arrest and everything else found was the result of a search incident to that arrest.

The suppression judge determined that the description given by the City Watch officer and appellant’s act of reaching into his pocket after being asked if he had identification provided Officer Duck with reasonable articulable suspicion that appellant was a suspect in an

⁵ Under the collective knowledge doctrine, we are permitted to substitute the knowledge of the instructing officer or officers for the knowledge of the acting officer. *See generally United States v. Hensley*, 469 U.S. 221, 232 (1985); *United States v. Massenbergh*, 654 F.3d 480, 492 (4th Cir. 2011); *Peterson v. State*, 15 Md. App. 478, 488-89 (1972).

armed robbery and gave him “the right to make a *Terry* stop” of appellant. The judge also found that it was “reasonable at this point for the officer under these circumstances to cuff [appellant] as part of a *Terry* stop as he continues to conduct what I find would be reasonable aspects, at least up to this point, of a *Terry* stop.”

With respect to whether Officer Duck’s question about whether appellant had anything illegal on his person constituted a custodial interrogation requiring *Miranda* advisements, the court recognized that appellant was not free to leave, but concluded that it was “reasonable common sense for an officer in this situation . . . , when he’s got somebody who’s going for his pockets after being told not to do that, armed robbery suspect, to ask a question of that nature.” According to the suppression judge, once appellant stated that he had marijuana, Officer Duck had probable cause to arrest him.

With respect to finding the gun on appellant, the court determined that even if the arrest was unlawful, and notwithstanding Officer Duck’s testimony that he did not conduct a pat down of appellant, there was “either a pat down or the equivalent of a pat down.” The suppression judge stated:

But in terms of – this is somewhat of an alternative decision I’ve got to make. If for some reason the grabbing of the – the feeling of the bulge, the soft packets and unloading the cocaine from [appellant’s] pockets would not be found to have justified – and I’m comfortable enough with it. I’ve made that ruling, you know, at that point. And that the finding of the gun would be subject of, you know, of an arrest for probable cause for the drugs and so forth. But if for some reason that would go down alternatively, you know, we’ve still got somebody who’s a suspect at this point in an armed robbery. And we’ve got a visible bulge under his sweatshirt as these two officers are confronting him.

And they’re talking. They don’t say on the tape, they haven’t testified that they can see a gun or they can’t see a gun, et cetera. But they’re like on top of him. They’re saying, you know, we’re here to help, you know, and the kind of stuff that, you know, experienced police officers do. You know, let us know if you have anything. And it goes on for [a] few minutes in that vein on top.

And then finally I would make the finding that [appellant] never affirmatively responds to that. Again, there's some slight nodding, there's some slight, you know, I'll call it a negative response, but it's very, very minimal both ways when they're saying front or back or, you know, and that type of thing. And then at some point very quickly one of the officers, you know, says he's got a gun. He's putting on latex gloves and that kind of thing.

I would find basically that even if the probable cause went down that they've still got reasonable suspicion of an armed robbery at that point, and that the finding of the gun either was equivalent – was either a pat down- the officer's like right on top of him and the bulge is there. When he grabs the gun, you know, we get hung up on the patting the outer garment for hard objects and that kind of thing, or even if he didn't do that and in fact, and again, I don't necessarily have this articulated by verbiage, but I've got the body camera, he grabs that gun. So I would find it's under those circumstances they would have – it would be the equivalent of a valid pat down. You know, he's right there. In order to get to any gun under his belt, under his sweatshirt, you know, he's going to have to touch the outer garments and so forth. Now, granted, that may all happen in a half a second or two. So I just make that finding that even if this wasn't a valid arrest where they would have a right, they would still have had a right that they did do a pat down. And they would have a right to continue to hold him to investigate the armed robbery aspect. So I make that as kind of an alternative finding under the law.

The court granted the motion to suppress with respect to statements made by appellant after the cocaine was seized because appellant had not received *Miranda* advisements.

DISCUSSION

On appeal, as noted above, appellant raises several challenges to the circuit court's decision to deny his motion to suppress. He argues that the police did not have reasonable, articulable suspicion that he was engaged in criminal activity to justify a stop. Even if the stop was lawful, appellant argues that he was under arrest at the time the police officer handcuffed him and asked if he had anything illegal on him, and the arrest was not supported by probable cause. According to appellant, even if the stop was lawful and he was not under arrest at the time the police officer asked if he had anything illegal on him, he was in custody at that time

and was questioned without the benefit of *Miranda* advisements. Finally, appellant challenges the suppression court's alternative holding that, even if the arrest was unlawful, the police had the right to conduct a pat down for weapons. Appellant maintains that such a conclusion "is inconsistent with case law" and "belied by the record."

The State concedes, as it must, that the initial detention of appellant was not supported by reasonable suspicion or probable cause. The parties do not dispute that, under the "collective knowledge doctrine," Officer Duck was entitled to act on a communication from the City Watch officer without himself having information to support reasonable suspicion that appellant committed an armed robbery, but the State failed to demonstrate at the suppression hearing that the information known to the City Watch officer was connected to the robbery. As a result, the State acknowledges, and we agree, that the State failed to establish that the seizure of appellant was supported by reasonable suspicion.

Nevertheless, the State argues that the exclusionary rule should not apply to suppress evidence resulting from appellant's detention because Officer Duck relied in good faith on the information received from the City Watch officer, and as a result, he was justified in handcuffing appellant in the course of conducting a *Terry* stop, "conduct that otherwise would be characteristic of an arrest," and probable cause was not required. Assuming the exclusionary rule does not apply, the State further asserts that (1) appellant was not under arrest when placed in handcuffs, and thus, probable cause was not required; (2) appellant was not in custody; (3) even if Officer Duck's questioning of appellant constituted a custodial interrogation without *Miranda* advisements, such a violation should result only in suppression of appellant's response and not in other evidence obtained as a result of his statement; and (4) after appellant stated that he had marijuana, a search incident to arrest was proper. We conclude that the

argument that the exclusionary rule is not applicable was not preserved, and in any event, the record does not support a finding that it is not applicable. Thus, there is no need to address the other issues.

The Fourth Amendment to the United States Constitution provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” The same protection is provided in Article 26 of the Maryland Declaration of Rights.⁶ Generally, when the government has violated a defendant’s Fourth Amendment rights, courts are required to suppress evidence obtained as a result of an unconstitutional search or seizure. *Mapp v. Ohio*, 367 U.S. 643, 657 (1961); *Nardone v. United States*, 308 U.S. 338, 340-41 (1939); *Myers v. State*, 395 Md. 261, 278 (2006) (the exclusionary rule is ordinarily the appropriate remedy for a violation of the Fourth Amendment).

With respect to the State’s argument that the exclusionary rule should not apply in this case because Officer Duck detained appellant in good faith reliance on information provided

⁶ Article 26 of the Maryland Declaration of Rights provides:

That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted.

Although Article 26 does not expressly address warrantless searches and seizures, the Court of Appeals has long interpreted it to prohibit unreasonable searches and seizures under the same circumstances as does the Fourth Amendment. *See e.g. Givner v. State*, 210 Md. 484, 492-93 (1956); *Miller v. State*, 174 Md. 362, 371 (1938).

by the City Watch officer, as noted above, this argument was not raised in or decided by the suppression court and is not properly before us. Md. Rule 8-131(a); *Walker v. State*, 338 Md. 253, 262 (1995) (“We ordinarily will not review an issue that was not presented to the trial court.”).

To demonstrate that the exclusionary rule should not apply, the State relies on *Arizona v. Evans*, 514 U.S. 1 (1995) and *Herring v. United States*, 555 U.S. 135 (2009). In *Herring*, the Supreme Court explained that,

[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.

Herring, 555 U.S. at 144. The rule “serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.” *Id.* See also *State v. Copes*, 454 Md. 581, 606-07 (2017) (the exclusionary rule is not applied when law enforcement officials engage in “objectively reasonable law enforcement activity.”) In *Evans*, the Supreme Court applied the good faith doctrine to an arresting officer’s reliance on information about a warrant that was in a database. The information was later determined to be an error made by a court clerk. 514 U.S. at 15. In *Herring*, the Supreme Court applied the good faith doctrine to an arrest based on information from another jurisdiction relating to an outstanding warrant. The jurisdiction’s database showed that the warrant was active, but in fact, it had been recalled. 555 U.S. at 146-147.

In this case, were we to reach the issue, there is no record to determine whether the lack of reasonable suspicion is due to non-culpable negligence, deliberate disregard for constitutional rights, gross negligence, or systemic error. Perhaps this is because the issue was

not raised in the suppression court. Regardless of the reason, the record does not support application of the good faith exception to the exclusionary rule.

For the above reasons, we reverse the judgments.

**JUDGMENTS OF THE CIRCUIT COURT
FOR BALTIMORE CITY REVERSED;
COSTS TO BE PAID BY THE MAYOR AND
CITY COUNCIL OF BALTIMORE CITY.**