Circuit Court for Worcester County
Case No.: C-23-CR-22-000024

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 2300

September Term, 2022

ROBERT L. PENICK

v.

STATE OF MARYLAND

Wells, C.J.,
Ripken
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Ripken, J.

Filed: March 6, 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).

Appellant, Robert L. Penick ("Appellant"), was charged in the District Court of Maryland for Worcester County with driving a vehicle while under the influence of alcohol and related charges. After Appellant requested a jury trial, the case was transferred to the Circuit Court for Worcester County. Appellant was convicted by a jury of driving under the influence of alcohol and driving while impaired by alcohol. As a subsequent offender with multiple prior convictions of driving while under the influence, Appellant was sentenced to eight years incarceration, with all but two and one-half years suspended, and three years of supervised probation. Appellant noted this timely appeal and presents the following issue for our review:[1] whether the trial court erred in denying the motion to suppress. For the following reasons, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant's sole contention is that he was illegally seized under the Fourth Amendment and thus, the court erred by denying Appellant's motion to suppress. The limited evidence pertinent to that argument was presented at the beginning of Appellant's jury trial, in the presence of the jury.[2]

[1] Rephrased from: Did the trial court err in denying the motion to suppress?

[2] Before trial, Appellant filed a written omnibus Motion to Suppress Identification Evidence and Testimony, which included a motion to suppress an illegal detention, arrest, or search and seizure in violation of the Fourth Amendment. There was no separate hearing on this motion, nor was the issue determined before trial in accordance with Maryland Rule 4-252 (g)(1). *See Huggins v. State*, 479 Md. 433, 444 (2022) ("[G]iven its potential for legal and factual complexity as well as its potentially outcome-determinative nature, that the search and seizure issue must be raised and decided before trial") (citing Md. Rule 4-252 (g)(1) (footnote omitted). Although we shall set forth a brief summary of the trial evidence, our standard of review is limited to the facts before the court when it ruled on

(continued)

Maryland State Trooper First Class Brian Brader ("Trooper Brader"), assigned to the Berlin Barrack, was the State's sole witness. Trooper Brader testified that he had been with the Maryland State Police since May of 2018 and was assigned to night patrol from 10:00 p.m. to 6:00 a.m. Prior to his assignment, Trooper Brader attended a 24-week training program for State Troopers that included education in criminal and traffic laws, and certification in conducting standardized field sobriety tests and detection. Trooper Brader also received continuing education after graduation on these subjects.

This case concerns the events of March 14, 2021, at approximately 3:05 a.m., when Trooper Brader was on road patrol in near U.S. Route 50 and Inlet Isle Lane in West Ocean City, Maryland. Trooper Brader was traveling eastbound at that location when he observed a Toyota SUV turn right into the park and ride near Inlet Isle. The driver of the Toyota then made an immediate left turn into the parking area near Bluewater Yacht Sales, which was closed for business at the time. At that point, the Toyota stopped but the vehicle's lights remained on and the engine continued to run.

Trooper Brader waited at the intersection for approximately two and a half to three minutes and continued to observe the Toyota. He explained, "I wanted to wait a little bit to see if I could get any other observations as to what the vehicle was doing at a closed business." Trooper Brader then decided to approach the vehicle. Relevant to Appellant's argument on appeal, Trooper Brader testified as follows:

Appellant's motion. *See Hill v. State*, 418 Md. 62, 66–67 (2011) ("Because the legal question we decide involves the correctness of a ruling on a pre-trial motion to suppress evidence, it is unnecessary to discuss in detail the evidence that was developed at trial.").

Q. You said that you approached the vehicle thereafter; is that right?

A. Yes.

Q. Why did you do that?

A. Because I needed to make sure the vehicle -- it was a suspicious vehicle, make sure the driver was okay, didn't need any type of -- it was like more of a check welfare type of a stop.

Q. Was there anything that drew your attention as related to the business where -- where the Toyota had stopped?

[DEFENSE COUNSEL]: Objection; again, leading, Your Honor.

[THE STATE]: It doesn't suggest an answer, Your Honor.

THE COURT: Overruled.

BY [THE STATE]:

Q. You can answer.

A. So during the off season, we respond to a lot of theft and burglary calls at all the marinas due to -- these are not occupied, everyone has their boat out of the water, in storage, there's no one around. So we do extra patrols in those areas to try to prevent thefts and burglaries to those boats.

Q. And you were yourself aware of -- were you aware of thefts that had occurred in the preceding period of time that related to boats?

A. Yes.

Q. So based upon those concerns and your observations, what did you then do?

A. I repositioned my police car behind the SUV who was parked there and activated my emergency lights.

At this point, the court held a bench conference wherein Appellant's counsel moved to suppress based on an alleged illegal stop. The State responded that the stop was justified

on two grounds: (1) to check on the welfare of the driver; and, (2) because there had been prior thefts in the area. The court denied Appellant's motion, finding as follows:

> THE COURT: Okay. So, first, I would – I would have thought this would have been the sort of thing that would be most appropriately litigated during a pretrial suppression hearing pursuant to Rule 4-252.
>
> But beyond that, considering the testimony of the trooper, I would note that two different bases have been provided for his interaction with the vehicle, that includes, both the checking of the welfare of someone who, in the middle of the night, is at a closed business without any apparent reason, plus the trooper's own history or understanding as to . . . there being thefts in the area. Certainly, the first basis would have been sufficient to check on the operator, but the second basis, in terms of the history of thefts in the area, would suggest that, given the hour and the circumstances, the trooper would have reasonable articulable suspicion that criminal activity was afoot so as to justify at least the Terry stop and interaction with the vehicle.
>
> So for that reason, the motion, as it were, to exclude this testimony or otherwise rule that the interaction on its face from the inception was somehow invalid is and would be denied. And, for that reason, I find that there's a legitimate basis for the trooper to have initiated the contact with the vehicle as he did.

Following the ruling on the motion to suppress, the jury heard further evidence from Trooper Brader about the stop, including Appellant's actions and statements following the trooper's approach of the vehicle. These included, but were not limited to, the trooper's observations that Appellant's movements and speech were "slow and lethargic," that his eyes were "very bloodshot" and "glassy," and that there was a "very strong" odor of alcohol on Appellant's breath. Based on these observations, Trooper Brader asked Appellant to exit his vehicle and then administered several field sobriety tests. Appellant was "swaying back and forth," failed to complete the walk-and-turn test and declined to perform the one-leg stand test. Trooper Brader placed Appellant under arrest at 3:21 a.m.

A dashcam video recording of the encounter, filmed from a camera on Trooper Brader's vehicle, was admitted into evidence and played for the jury. Appellant refused to submit to a breath alcohol concentration test. While in route to the Berlin Barrack, Appellant admitted that he consumed one margarita earlier that day. Additional facts will be included as they become relevant to the issues.

DISCUSSION

Appellant contends the court erred in denying his motion to suppress because the initial stop cannot be justified either as a welfare check, under the community caretaking doctrine, or as a valid stop under *Terry v. Ohio*, 392 U.S. 1 (1968). The State disagrees and responds that the court's ruling was correct based on the totality of the circumstances. We agree with the State.

"When reviewing a trial court's denial of a motion to suppress, we are limited to information in the record of the suppression hearing and consider the facts found by the trial court in the light most favorable to the prevailing party, in this case, the State." *Washington v. State*, 482 Md. 395, 420 (2022) (citing *Trott v. State*, 473 Md. 245, 253–54, *cert. denied*, ___ U.S. ___, 142 S. Ct. 240 (2021)). *Accord State v. McDonnell*, 484 Md. 56, 78 (2023). "We accept facts found by the trial court during the suppression hearing unless clearly erroneous." *Id*. "In contrast, our review of the trial court's application of law to the facts is *de novo*." *Id*. "In the event of a constitutional challenge, we conduct an independent constitutional evaluation by reviewing the relevant law and applying it to the unique facts and circumstances of the case." *Id*. (internal quotation marks and citations omitted). *Accord In re: D.D.*, 479 Md. 206, 222-23 (2022).

The Fourth Amendment to the Constitution of the United States, made applicable to the States through the Fourteenth Amendment, *Mapp v. Ohio*, 367 U.S. 643, 655 (1961), guarantees, *inter alia*, "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *In re. David S.*, 367 Md. 523, 531–32 (2002). "The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). "Reasonableness 'depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" *Wilson v. State*, 409 Md. 415, 427–28 (2009) (quoting *Maryland v. Wilson*, 519 U.S. 408, 411 (1997) (in turn quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975)).

There is no real dispute that Appellant was seized when Trooper Brader pulled his vehicle behind Appellant's, turned on his emergency lights, approached Appellant and asked for his license and registration. *See Lewis v. State*, 398 Md. 349, 361 (2007) (stating that a temporary "detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment]") (quoting *Whren v. United States*, 517 U.S. 806, 809–10 (1996)). *Accord Scott v. State*, 247 Md. App. 114, 130 (2020). The issue is whether that seizure was lawful pursuant to the Fourth Amendment.

Vehicle stops are reasonable when they are either based on probable cause or reasonable articulable suspicion that a traffic violation has occurred. *See Rowe v. State*, 363 Md. 424, 433 (2001) ("Where the police have probable cause to believe that a traffic violation has occurred, a traffic stop and the resultant temporary detention may be

reasonable.") (citing *Whren, supra*); *State v. Williams*, 401 Md. 676, 687 (2007) (observing that a traffic stop may be justified under reasonable articulable suspicion standard). A temporary detention of a vehicle may also be justified when "the officer has a reasonable belief that 'criminal activity is afoot.'" *Rowe, 363* Md. at 433 (citing *Terry* 392 U.S. at 30). Further, as argued by the State in this case, a police officer may stop a vehicle where the circumstances suggest the "person is in apparent peril, distress or in need or aid" under the community caretaking function. *Wilson*, 409 Md. at 439. *See also Cady v. Dombrowski*, 413 U.S. 433, 441 (1973) ("Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in . . . community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.").

Here, Trooper Brader did not observe any traffic violation, therefore that rationale is not before us. Rather, Trooper Brader testified, and the circuit court credited, that the purpose of the stop was: (1) to "make sure the driver was okay" under the community caretaking function; and, (2) because there were recent thefts and burglaries in the area and the circumstances, including the time of night and the location, warranted further investigation.

A. The stop was reasonable under the community caretaking function.

In *Stanberry v. State*, 343 Md. 720 (1996), *cert. denied*, 520 U.S. 1210 (1997), the Supreme Court of Maryland first recognized the "community caretaking function" and noted the important distinction "between assessing police behavior when the police are 'acting in their criminal investigatory capacity' and assessing police behavior when they

are 'acting to protect public safety pursuant to their community caretaking function.'" *State v. Brooks*, 148 Md. App. 374, 382 (2002) (quoting *Stanberry*, 343 Md. at 742–43). The community caretaking exception "embraces an open-ended variety of duties and obligations that are not directly involved with the investigation of crime." *Stanbury*, 148 Md. App. at 383. As one commentator recognized:

> [T]he police are also expected to reduce the opportunities for the commission of some crimes through preventative patrol and other measures, aid individuals who are in danger of physical harm, assist those who cannot care for themselves, resolve conflict, create and maintain a feeling of security in the community, and provide other services on an emergency basis.

WAYNE R. LAFAVE, 3 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 6.6, p. 623 (6th ed. 2020).

"When the police cross a threshold not in their criminal investigatory capacity but as part of their community caretaking function, it is clear that the standard for assessing the Fourth Amendment propriety of such conduct is whether they possessed a reasonable basis for doing what they did." *State v. Alexander*, 124 Md. App. 258, 276–77 (1998) (footnote omitted). When a police officer uncovers evidence of a crime in the course of his non-investigatory caretaking duties, that evidence need not be suppressed for failure to obtain a warrant. *State v. Alexander*, 124 Md. App. at 277–80.

Our Supreme Court adopted the following test to determine whether the public welfare community caretaking function was conducted reasonably under the Fourth Amendment:

> To enable a police officer to stop a citizen in order to investigate whether that person is in apparent peril, distress or in need or aid, the officer must have objective, specific and articulable facts to support his or her concern. If the

> citizen is in need of aid, the officer may take reasonable and appropriate steps to provide assistance or to mitigate the peril. Once the officer is assured that the citizen is no longer in need of assistance, or that the peril has been mitigated, the officer's caretaking function is complete and over. Further contact must be supported by a warrant, reasonable articulable suspicion of criminal activity, or another exception to the warrant requirement. The officer's efforts to aid the citizen must be reasonable. In assessing whether law enforcement's actions were reasonable, we consider the availability, feasibility and effectiveness of alternatives to the type of intrusion effected by the officer.

Wilson, 409 Md. at 439 (citation and footnote omitted).

Here, Appellant pulled his vehicle off Route 50 in West Ocean City and then proceeded to stop in the parking area of a closed business at 3:05 a.m. As Trooper Brader observed from the nearby intersection, Appellant's vehicle remained with its lights on and the engine running for two and a half to three minutes. We are persuaded that these circumstances were sufficient to justify a brief investigation under the community caretaking function to, as the trooper testified, "make sure the driver was okay." Thus, we conclude that the stop was lawful under this rationale.

B. The stop was supported by reasonable, articulable suspicion.

In addition, Trooper Brader testified that, during the off season, he had responded to on several prior occasions to theft and burglary calls at the marinas on his patrol. The State argued, and the court found, these circumstances provided an additional rationale for the stop. In contrast, Appellant argues that "there are many innocent reasons why a driver might pull off the highway for a few minutes late at night," including to make a phone call or to look at a vehicle's navigation system or application on the driver's phone.

Although Appellant suggests a possible explanation for his conduct, nevertheless,

this court finds it to be clear that even seemingly innocent behavior, under the circumstances, still may permit a brief stop and investigation. *Illinois v. Wardlow*, 528 U.S. 119, 125–26 (2000) (observing that "[e]ven in *Terry*, the conduct justifying the stop was ambiguous and susceptible of an innocent explanation", but that, because another reasonable interpretation was that the individuals were casing the store for a planned robbery, "*Terry* recognized that the officers could detain the individuals to resolve the ambiguity"); *see In re: D.D., supra*, 479 Md. at 235 ("As *Terry* itself demonstrates, wholly innocent conduct may provide reasonable suspicion that criminal activity is occurring or is about to occur."); *see also Chase v. State*, 449 Md. 283, 297–98 (2016) ("To be sure, '[a] factor that, by itself, may be entirely neutral and innocent, can, when viewed in combination with other circumstances, raise a legitimate suspicion in the mind of an experienced officer.'") (quoting *Crosby v. State*, 408 Md. 490, 507–09 (2009)).

In the case at bar, these other circumstances included the time of the morning that the stop occurred and the location of the stop. As previously set forth, Trooper Brader was asked, with respect to the "business where -- where the Toyota had stopped," namely, Bluewater Yacht Sales, whether there was anything that "drew [his] attention." Trooper Brader confirmed that the business was a "boat dealer" located right off of Route 50 and had "boats that are for sale in this parking lot." Trooper Brader explained that "at all [of] the marinas" in the area, "everyone has their boat out of the water," and because the boats are "not occupied," and are in "storage," the police conduct "extra patrols in those areas to try to prevent thefts and burglaries to those boats." We concur with the circuit court that

Trooper Brader articulated specific facts justifying the brief *Terry* stop of Appellant's vehicle. Hence, the court properly denied the motion to suppress.

JUDGMENTS OF THE CIRCUIT COURT FOR WORCESTER COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.