

Circuit Court for Baltimore City
Case No. 119248009

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2421

September Term, 2019

JAMES A. HARRISON

v.

STATE OF MARYLAND

Leahy,
Shaw Geter,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: June 15, 2021

*This is an unreported opinion and therefore may not be cited either as precedent or as persuasive authority in any paper, brief, motion, or other document filed in this Court or any other Maryland court. Md. Rule 1-104.

James Harrison pled not guilty in the Circuit Court for Baltimore City, after the denial of his motion to suppress, based on an agreed statement of facts to charges of possession with intent to distribute cocaine and possession of cocaine. The court convicted Mr. Harrison of possession of cocaine, acquitted him of possession with intent to distribute, and imposed a sentence of one year, suspending all but time served, followed by one year of probation. On appeal, Mr. Harrison raises one question for our review: “Did the circuit court err by denying his motion to suppress?” We hold that the circuit court did not err and so affirm.

BACKGROUND

Detective Kirby’s Observation That Led to Search Incident to Arrest

On August 10, 2019, around 7 p.m., Baltimore City Police Detective Thomas Kirby was on duty at the Central District precinct observing the live feed from the Citi Watch Cameras¹ (“CCTV cameras”) that captured the 400 block of East Baltimore Street and the intersecting Custom House Avenue, which is a one-block north-south street connecting East Baltimore Street and Water Street. Detective Kirby observed what he believed to be a hand-to-hand drug transaction between Mr. Harrison, as seller, and a man later identified as Casey Weaver, as buyer. Based on Detective Kirby’s observations, an arrest team consisting of Detectives Ritzen, Kstopolis, and Carpenter apprehended Mr. Weaver and seized a blue zip bag containing suspected cocaine.

¹ The CCTV cameras were identified as cameras numbered 61, 67, and 69.

Detective Kirby then advised the arrest team of Mr. Harrison's location and Mr. Harrison was arrested. During the search incident to arrest, officers seized two clear plastic bags containing what was later confirmed to be 7 grams of cocaine.

Mr. Harrison moved pretrial to suppress the cocaine evidence. At the hearing on that motion, Detective Kirby, who had "arrested and participated in over 1,000 controlled dangerous substances cases," was accepted as an expert in "the identification of controlled dangerous substance[s], and the techniques used to distribute those same substances." He testified that the area surrounding the 400 block of East Baltimore Street and Custom House Avenue is a "high violent crime area" and an "open [air] drug market." Detective Kirby identified the video footage from the two CCTV cameras, which was admitted into evidence, and testified about what was shown on the video. In the video footage it shows Detective Kirby controlling the direction of the cameras and zooming in and out.

Camera 61 was positioned at the corner of South Street and East Baltimore Street, facing east. Camera 67 was positioned at the corner of Custom House Avenue and Water Street, facing north. At 7 p.m. the camera 61 feed showed the man later identified as Mr. Weaver carrying a large duffle bag backpack, accompanied by a woman wearing a neon yellow tee shirt, white visor, and jeans. The two walked around the block for several minutes. They twice walked south on Custom House Avenue, looked around and then returned to the 400 block of East Baltimore Street.

When Mr. Weaver and his companion crossed to the northern side of East Baltimore Street, walking east, Detective Kirby redirected Camera 61 to follow them. He testified that he did so because they appeared to be “walking around looking for something and [he] believed it to be a suspected CDS purchase.”

A moment later, Detective Kirby then redirected Camera 61 back to the south side of East Baltimore Street. At 7:03 p.m., Mr. Harrison, wearing a white tee shirt, gray shorts, white socks and white sneakers, appeared on the camera feed walking east along that side of the East Baltimore Street near its intersection with Custom House Avenue. Mr. Weaver and his female companion crossed back into view and walked right up to Mr. Harrison. Mr. Weaver and Mr. Harrison spoke briefly.² Detective Kirby testified that brief conversations, which usually include what the dealer had and the price, are typical of the start of a drug transaction.

After the two men spoke, Mr. Harrison turned and began walking westbound toward Custom House Avenue. Mr. Weaver and his companion followed close behind. Mr. Harrison stopped at the corner and Mr. Weaver and his companion continued past him, turning left onto Custom House Avenue. Meanwhile, a woman wearing a long black open sweater and a pink tee-shirt ran up to Mr. Harrison from behind, grabbed his right elbow, and spoke to him briefly. Mr. Harrison then made a left onto Custom House Avenue. The woman in the sweater followed a few seconds later.

² CCTV cameras do not capture sound, but it was apparent they were speaking.

At 7:04 p.m., Camera 67 showed Mr. Weaver and his female companion walking south on Custom House Avenue. Mr. Weaver glanced back at Mr. Harrison, who had stopped at the corner, and then walked a short distance, stopped near a pay phone, and turned back again. By then, Mr. Harrison was walking south on Custom House Avenue. He walked past Mr. Weaver and his companion and, as he did so, he looked directly at Mr. Weaver. He then crossed diagonally to the west side of the street and Mr. Weaver followed.

Mr. Harrison walked toward the entrance of Norma Jean's, a strip club with an entrance on the western side of Custom House Avenue. The doorway is not fully visible from Camera 67, however, because of an overhanging awning. Mr. Harrison disappeared under the awning near the entrance of the club, though his legs still could be seen, and then walked inside the door at 7:05 p.m. Mr. Weaver waited to the right of the entrance to Norma Jean's. His female companion, who also had crossed the street, waited further north. The woman in the black sweater waited just to the right of the awning. She was holding cash in her hands and appeared to be counting it.

Less than a minute later, the woman in the black sweater and Mr. Weaver both moved simultaneously toward the entrance to Norma Jean's, stepped just inside the entryway, and then turned around and walked away. Within seconds of Mr. Weaver and the woman in the black sweater leaving, Mr. Harrison reemerged from inside Norma Jean's, also walking north on Custom House Avenue. At that time, they all went their separate ways.

Detective Kirby opined that Mr. Weaver and the woman in the black sweater “appear[ed] to be signaled to come to the door” of Norma Jean’s by someone standing in the doorway. Though Detective Kirby acknowledged that he could not tell who signaled them, he noted that Mr. Harrison had just walked into Norma Jean’s a minute earlier and walked out right after Mr. Weaver and the woman in the black sweater walked away.

Detective Kirby testified that he believed that the conduct was consistent with a “CDS transaction” and notified an arrest team to apprehend Mr. Weaver. Within 10 minutes, Mr. Weaver was arrested and found to be in possession of suspected cocaine.³ Detective Kirby then alerted an arrest team to Mr. Harrison’s location. At 7:16 p.m., Mr. Harrison was ordered out of a vehicle parked on Water Street near its intersection with Custom House Avenue and placed under arrest. A search of his person revealed 7 grams of cocaine.

Court’s Ruling at the Evidentiary Hearing

At the end of the evidentiary portion of the hearing, the motions court described what it found “significant in the CCTV footage,” much of which amounted to a recitation of the above stated facts. The court noted that after Mr. Harrison turned onto Custom House Avenue behind Mr. Weaver and his companion, he “look[ed] directly” at the couple and they returned his gaze. The court found that after Mr. Harrison entered Norma Jean’s, Mr. Weaver and the woman in the black sweater both stood nearby

³ The exact time and location where Mr. Weaver was arrested is not apparent from the record, but Detective Kirby testified that he was arrested before Mr. Harrison.

looking at the entrance of the club. The woman in the black sweater was “playing with some money” and put some of it, “perhaps all of [it,]” into a small wallet. Both Mr. Weaver and the woman in the black sweater moved toward the entrance of Norma Jean’s at the same time, remained there “momentarily,” and then immediately turned and left. Mr. Harrison emerged “right on their heels.”

Based on the above findings, the court ruled that there was probable cause for the police to arrest Mr. Harrison for suspected distribution of drugs, explaining:

The officer indicates that he contacted an arrest team, a cohort of his other officers, and directed them, described for them, an individual who he believed had recently purchased some form of CDS. And they were able to track him down, and it would be the white male with the duffle bag, and in fact find a blue zip that appears to contain controlled substances.

Armed with all of that information, the officer concludes that there should be a stop made of Mr. Harrison. The question then being, armed with the information that I’ve just imparted, is that sufficient probable cause to allow for the detention and search of Mr. Harrison, who is found in the area in a car that, I don’t know, was parked or -- I don’t know, but regardless, he’s in a car in the immediate area?

The – I think a fair inference in this, even though you can’t see whether Mr. Harrison is, in fact, the agent that gave the CDS that is found on the white male, that – whether the – you’re allowed to infer – I’m allowed to infer whether the prior interchange between those individuals, including the white male and Mr. Harrison, can lead one to conclude with sufficient constitutional certainty that he, in fact, was the individual who distributed some drugs.

And again, we’re not talking about certainties here. It’s not beyond a reasonable doubt. It’s whether there is sufficient evidence such to allow one to conclude that there’s probable cause. I’m not really quite sure that probable cause equals preponderance of the evidence.^[4] Judge Moylan in some of his cases has indicated that probable cause is something less than

⁴ We note that the record reflects that the Assistant State’s Attorney argued that preponderance of the evidence was the appropriate standard.

preponderance of the evidence, but I'll go with the preponderance of the evidence standard for purposes of this hearing. The officer has indicated, as an expert this is suspicious activity, consonant with narcotics distribution. Again, the question – I'll grant that. It is consonant. The question really becomes is what is observable enough to make a conclusion that Mr. Harrison was the agent of the distribution in this case?

I will not consider what, if anything, the officers found on [Mr. Harrison's] person, as I can no more consider that for the benefit of the defendant as I could for the benefit of the State if the shoe were on the other foot, But it's rather measuring what evidence the officers had at the time of their accosting of Mr. Harrison, and the constitutional or unconstitutional action that they took at that time.

Based on the standard of probable cause, I will conclude there was probable cause to allow the police action. And what's particularly decisive in my – decisive for me in my decision, is the exchanges that happen between Mr. Harrison, however briefly, and the individual – at least, an individual who was found to have CDS on his person. That – those exchanges, those communications, are consonant, according to the officer whose testimony I credit, with those type of situations where they are preparatory to a distribution of controlled dangerous substances.

And further, everybody's actions in this case – the other people's, I should say, the woman in the sweater, the couple that – they're all following around Mr. Harrison as if they're waiting for him to act. That is a fair inference. They're not looking at anybody else. Their attention is – when – they follow him, basically, to the threshold of club Norma Jean. When they are apparently satisfied with whatever's happening at club Norma Jean under the canopy, they turn away and lo and behold, who follows on their heels? That would be Mr. Harrison.

I think it's fair to conclude that whatever is going on there began – well, began with the individuals who approached Mr. Harrison, but ended with whatever Mr. Harrison was doing, notwithstanding the fact that you really can't see what Mr. Harrison was doing, other than entering and then exiting the club.

On that basis, I will find there was probable cause and the motion for suppression will be denied.

(Emphasis added).

As mentioned, after Mr. Harrison’s motion to suppress was denied, he was convicted of possession of cocaine on an agreed statement of facts. The court acquitted Mr. Harrison of possession with intent to distribute cocaine. This timely appeal followed.

STANDARD OF REVIEW

In reviewing the circuit court’s denial of the motion to suppress, we “consider only the evidence contained in the record of the suppression hearing.” *McFarlin v. State*, 409 Md. 391, 403 (2009). We “extend great deference to the findings of the motions court as to first-level findings of fact and as to the credibility of witnesses[.]” *Padilla v. State*, 180 Md. App. 210, 218 (2008) (citation omitted). We accept the circuit court’s factual findings unless clearly erroneous. *McFarlin*, 409 Md. at 403. Viewing those facts and the inferences that may reasonably be drawn from them in the light most favorable to the State, we undertake our own independent constitutional appraisal of the suppression ruling. *Bost v. State*, 406 Md. 341, 349 (2008).

DISCUSSION

Mr. Harrison contends that the motions court committed reversible error by applying “the wrong legal standard” – preponderance of the evidence – to its assessment of whether there was probable cause. Even if the court had applied the correct standard, Mr. Harrison asserts that the conduct observed by Detective Kirby was “innocuous or at worst ambiguous behavior occurring primarily in a public setting” and was insufficient to establish probable cause. (Quoting *Longshore v. State*, 399 Md. 486, 535 (2007)).

The State responds that because the legal standard applied by the circuit court was stricter than that required for a probable cause determination, any error inured to Mr. Harrison's benefit and could not have caused him prejudice. It maintains that the CCTV camera footage, coupled with Detective Kirby's expert testimony that the encounter captured on video was consistent with a hand-to-hand CDS transaction, were sufficient to establish probable cause for a warrantless arrest.

The Fourth Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, provides that "the 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 . . ." U.S. Const. amend. XIV. "A warrantless arrest made in a public place is not unreasonable, and accordingly does not violate the Fourth Amendment, if there is probable cause to believe that the individual has committed either a felony or a misdemeanor in an officer's presence." *Donaldson v. State*, 416 Md. 467, 480 (2010). Evidence seized subject to search incident to a lawful arrest is not subject to suppression. *Barrett v. State*, 234 Md. App. 653, 673 (2017).

Probable cause is "a non-technical conception of a reasonable ground for belief of guilt." *Haley v. State*, 398 Md. 106, 132 (2007). "Probable cause to arrest exists where the facts and circumstances within the knowledge of the officer at the time of the arrest, or of which the officer has reasonably trustworthy information, are sufficient to warrant a prudent person in believing that the suspect had committed or was committing a criminal

offense.” *Barrett*, 234 Md. App. at 666 (citation omitted). It is a “fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules.” *Maryland v. Pringle*, 540 U.S. 366, 370-71 (2003) (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)). “In assessing ‘whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause.’” *Barrett*, 234 Md. App. at 666 (quoting *Pringle*, 540 U.S. at 371) (additional citation omitted). “[E]xperience and special knowledge of police officers” may be considered in determining if probable cause exists. *Longshore*, 399 Md. at 534 (2007) (citation omitted).

As a threshold matter, we agree with the State that the preponderance of the evidence standard is more stringent than that required to satisfy probable cause. As the Court of Appeals has made clear, “[p]robable cause does not depend on a preponderance of the evidence, but instead depends on a ‘fair probability’ on which a reasonably prudent person would act.” *Pacheco v. State*, 465 Md. 311, 324 (2019) (quoting *Robinson v. State*, 451 Md. 94, 109 (2017), in turn quoting *Florida v. Harris*, 568 U.S. 237, 244 (2013)). The trial court, by finding that an objectively reasonable police officer could have found that it was more likely than not that Mr. Harrison was engaged in the distribution of illegal narcotics, held the State to a higher burden and no prejudice could have flowed to Mr. Harrison.

We now turn to the merits of the trial court’s probable cause determination. We note that Mr. Harrison does not assert that any of trial judge’s findings of fact were clearly erroneous. Thus, we must assess whether the facts as found by the trial court were sufficient to support its ruling that probable cause supported the warrantless arrest of Mr. Harrison and, consequently, that the evidence seized from his person was admissible.

Mr. Harrison relies primarily upon *Longshore*, 399 Md. at 486. There, as pertinent, a confidential informant provided police with a videotape of an alleged drug transaction. *Id.* at 495. That tape showed the defendant and another man get into a vehicle in the parking lot of a mall and remain there briefly while a third man stood outside the driver’s side door. *Id.* “No drugs, paraphernalia, or money could be seen on the videotape.” *Id.* A police officer observing the videotape concluded “based on his experience” that it depicted a drug transaction. *Id.* at 534. The trial court found that the video, standing alone, established probable cause for the defendant’s arrest. *Id.* at 497.

The Court of Appeals reversed. It reasoned that though a police officer’s experience and expertise is relevant to a probable cause determination, the officer’s opinion “must be based on something factual” and two men getting into a car while another man stands by, without more, may be suspicious but does not rise to the level of probable cause for an arrest. *Id.* at 534. It held that the videotape “reflect[ed] no drug activity, only innocuous or at worst ambiguous behavior, occurring primarily in a public setting,” and that it, coupled with trace evidence of drugs found in the car of one of the

two other men and “nervous behavior” by the defendant, did not provide a substantial basis for probable cause. *Id.* at 535.

Here, unlike in *Longshore*, Detective Kirby testified that the activity in the CCTV cameras showed Mr. Weaver and the woman in the black sweater unambiguously involved in a drug transaction. The CCTV camera showed them having very brief conversations with Mr. Harrison, following him to a side street, waiting for him as he went inside a club, simultaneously approaching the entrance to that club as if they had been signaled from beneath the awning, and then turning and leaving immediately thereafter. The woman in the sweater was seen handling cash right before she walked to the entrance. The events occurred in an area characterized by Detective Kirby as an open-air drug market. Further, Mr. Weaver was stopped within minutes of these events and was in possession of a small quantity of cocaine. These facts created a fair probability that the crime of distribution of cocaine had occurred in the doorway at Norma Jean’s.

The central thrust of Mr. Harrison’s argument, however, is that the evidence was not sufficient to create probable cause that *he* was the agent of the distribution. He argues that two cases in which probable cause determinations were upheld reflect the type of evidence necessary to support such a finding.

In *Williams*, 188 Md. App. at 78, like in this case, a police officer was remotely monitoring cameras set up in an “open-air drug market” and witnessed the defendant engage in what he believed to be a drug sale. *Id.* at 83-84. The officer observed the

defendant reach into his waist area and remove an object that he “deliver[ed]” to an unknown man. *Id.* at 84. The defendant concealed the object during the transfer. *Id.* The unknown man then gave something to the defendant that the officer believed to be money. *Id.* at 83. The defendant was arrested later that night and moved to suppress drug evidence seized incident to the arrest. *Id.* at 82, 85. The trial court denied the motion to suppress, ruling that based on the above facts, the police had probable cause to believe he was engaged in the illegal distribution of drugs and to arrest him. *Id.* at 86.

On appeal, following the defendant’s conviction, we affirmed the suppression ruling. *Id.* at 82. We rejected the defendant’s argument that a police officer’s observations of an exchange of an unknown object, without more, might create reasonable suspicion, but did not give rise to probable cause to arrest. *Id.* at 93-94. We emphasized that the officer observing the cameras testified based upon “extensive experience and expertise” that the exchange between the defendant and the unknown man was consistent with a CDS transaction. *Id.* at 96. The fact that the defendant concealed the object amounted to “furtive behavior” and was a factor considered by the trial court. *Id.* We reasoned that the officer “did not need absolute certainty in regard to the objects that were exchanged . . . in order to obtain probable cause.” *Id.* Further, “innocent explanations” for the conduct need not be eliminated to find probable cause. *Id.*

In *Donaldson*, 416 Md. at 467, the Court of Appeals relied upon the reasoning in *Williams* to uphold a probable cause finding under similar facts. There, a police officer surveilled a street in Baltimore City and observed the defendant and several other men

walk to a corner near an alley where the defendant reached into “the rear of his pants” and retrieved a plastic bag. *Id.* at 473. The defendant removed a small white object from the plastic bag and exchanged it for money with one of the other men. *Id.* The police arrested the defendant and a search of his person revealed fourteen capsules of heroin. *Id.* at 476. At the hearing on the motion to suppress, the police officer surveilling the defendant testified as an expert that he believed he had witnessed a drug transaction, explaining that the concealment of the plastic bag in the rear of the defendant’s pants was consistent with the items retrieved being illegal. *Id.* at 475. In affirming the trial court’s denial of the motion to suppress, we emphasized that the exchange of “an unidentified item for money” may support a probable cause finding when “the totality of circumstances supports the conclusion that the exchange involved an unlawful substance.” *Id.* at 487. The Court reasoned that the concealment of the exchanged item in a plastic bag in the back of the defendant’s pants, the location of the exchange in the corner of an alley, the “high crime” character of the area, and the experienced police officer’s testimony that the exchange was consistent with a drug transaction sufficed to create probable cause. *Id.* at 484-85.

We return to the case at bar. Mr. Harrison emphasizes that unlike in *Williams* and *Donaldson*, Detective Kirby did not observe a hand-to-hand transaction and could not testify that Mr. Harrison was the person who provided drugs to Mr. Weaver or the woman in the black sweater. We disagree that this distinction is dispositive. *See Williams*, 188 Md. App. at 95 (“two cases are seldom sufficiently alike for the first to be

an absolute binding precedent for the second.” (quoting Wayne R. LaFave, *Search and Seizure*, § 3.6 at 303-304 (4th ed. 2004 & Supp. 2008-09) (citation omitted)).

The circuit court found that Mr. Harrison was the central figure driving the series of events culminating in the CDS transaction. Based upon Detective Kirby’s experience and expertise, the conversations between Mr. Harrison and Mr. Weaver, on the one hand, and the woman in the black sweater, on the other, were consistent with buyer/seller communications in advance of the sale of illegal narcotics. Immediately after these conversations, both individuals followed Mr. Harrison to Custom House Avenue. The trial court found that the video showed Mr. Harrison making direct eye contact with Mr. Weaver while on Custom House Avenue, right before Mr. Harrison crossed the street to Norma Jean’s. Mr. Weaver and the woman in the black sweater also crossed the street and stood near Norma Jean’s. A reasonable police officer would conclude from these events that Mr. Weaver and the woman in the black sweater were following Mr. Harrison to a point of sale. This was borne out by the fact that Mr. Weaver and the woman in the black sweater stood by while Mr. Harrison went inside, watching the entrance. They left quickly once they were signaled to the door. Mr. Harrison’s departure immediately following was strong evidence that he was the person who signaled them.

Further, like in *Williams* and *Donaldson*, Mr. Harrison engaged in furtive behavior consistent with concealing the distribution of illegal drugs. He spoke to Mr. Weaver and the woman in the black sweater on East Baltimore Street, in public view. He then walked to a discreet location on Custom House Avenue in the entrance of a club obscured by an

awning. The awning blocked the view of the CCTV camera that is continuously recording that block.

Just as in *Williams* and *Donaldson*, an experienced police officer observing this conduct concluded, in his experience, that it was consistent with a concealed drug transaction. Also, here, unlike in *Williams* and *Donaldson*, the buyer was intercepted right away and drugs were seized from his person. These facts, viewed by an objectively reasonable police officer, exceeded the relatively low bar of probable cause to conclude that Mr. Harrison was the agent of the sale of illegal narcotics. *See State v. Johnson*, 458 Md. 519, 535 (2018) (“In short, probable cause is not a high bar.” (citation omitted)). Thus, we find, the trial court did not err by denying Mr. Harrison’s motion to suppress.

**JUDGMENT OF THE CIRCUIT
COURT FOR BALTIMORE CITY
AFFIRMED. COSTS TO PAID BY
APPELLANT.**