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Recent Developments: Bailey v. State: A Warrantless Search and Seizure Is Not Supported by Probable Cause When an Officer Bases It on the Odor of a Lawful Substance Associated with an Illegal Substance without the Presence of Sufficient Corroborating Factors

Rachel Hirsch

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RECENT DEVELOPMENT

BAILEY v. STATE: A WARRANTLESS SEARCH AND SEIZURE IS NOT SUPPORTED BY PROBABLE CAUSE WHEN AN OFFICER BASES IT ON THE ODOR OF A LAWFUL SUBSTANCE ASSOCIATED WITH AN ILLEGAL SUBSTANCE WITHOUT THE PRESENCE OF SUFFICIENT CORROBORATING FACTORS.

By: Rachel Hirsch

The Court of Appeals of Maryland held that the smell of a lawful substance combined with certain corroborating factors, does not give rise to probable cause for a warrantless search and seizure. *Bailey v. State*, 412 Md. 349, 987 A.2d 72 (2010). Specifically, the presence of the defendant in a high drug crime area and his failure to answer police questioning was not sufficient, when combined with the odor of ether, to give the arresting officer probable cause to proceed in a warrantless search and seizure. *Id.* at 366-86, 987 A.2d at 82-94.

On August 16, 2006, Officer Lewis (“Lewis”) spotted the defendant, Robert Bailey (“Bailey”), from across the street in a high drug crime area. Lewis twice asked Bailey if he lived in the area, but Bailey did not respond. Lewis, along with another officer, approached Bailey and detected a strong smell of ether. When Lewis was close enough to Bailey, he grabbed Bailey’s hands, forced them atop of his head, and proceeded to search his person. Lewis seized a vial of liquid from Bailey’s front pants pocket, which was later found to contain PCP. Bailey was taken into custody and charged with possession of a Controlled Dangerous Substance (“CDS”).

Prior to trial, Bailey moved to suppress the vial, arguing that its admission would violate his rights under the Fourth Amendment and the Maryland Declaration of Rights because it was the fruit of an illegal search. The Circuit Court for Prince George’s County denied the motion, ruling that Lewis had reasonable articulable suspicion to stop and question Bailey, perform a *Terry* frisk, and properly seize the vial. At trial, Bailey was found guilty of possession of CDS.

On appeal, the Court of Special Appeals of Maryland affirmed the judgment with one difference in reasoning. The court held that there was no basis for a *Terry* frisk; however, the seizure was still valid

because it was the product of a valid search incident to an arrest. Bailey filed a petition for a writ of certiorari, which the Court of Appeals of Maryland granted.

The issue before the Court of Appeals of Maryland was whether there was a valid warrantless search and seizure based on a valid *Terry* frisk or on a search incident to arrest. *Bailey*, 412 Md. at 365-87, 987 A.2d at 81-95. The court noted that a warrantless search and seizure is presumptively invalid. *Id.* at 366, 987 A.2d at 82 (citing *Belote v. State*, 411 Md. 104, 112, 981 A.2d 1247, 1252 (2009)). To make its determination in the instant case, the court analyzed the entire encounter between Lewis and Bailey. *Id.* at 364, 987 A.2d at 81. The court began by focusing on Lewis and Bailey's initial encounter, finding that it was a mere accosting because Bailey was free to leave at any time. *Id.* Therefore, the court determined that, at this point in the encounter, the Fourth Amendment was not implicated. *Id.* at 364, 987 A.2d at 81 (citing *Swift v. State*, 393 Md. 139, 151, 899 A.2d 867, 874 (2006)).

Second, the court analyzed whether there was a valid warrantless search and seizure of Bailey. *Id.* at 365, 987 A.2d at 81. An accosting rises to the level of a search and seizure when a person's liberty has been physically restrained in such a way that a reasonable person would believe that he or she was not free to leave. *Bailey*, 412 Md. at 365, 987 A.2d at 81-82 (citing *Swift*, 393 Md. at 152-53, 899 A.2d at 875). The court held that, when Lewis grabbed and forced Bailey's hands atop of his head, a reasonable person in Bailey's position would have believed that he was being detained and was not free to leave. *Id.* at 366, 987 A.2d at 82. Therefore, unless the seizure was supported by a "reasonable, articulable suspicion" of a possible threat to Lewis' safety or a valid exception to the warrant requirement for a search and seizure, Lewis violated Bailey's Fourth Amendment rights. *Id.*

Next, the Court of Appeals of Maryland analyzed whether there was a valid *Terry* frisk. *Id.* at 366, 987 A.2d at 82. The purpose of a *Terry* frisk is to ensure the safety of officers and the public by patting the exterior of the subject's clothing to check for weapons. *Id.* at 367, 987 A.2d at 82-83 (citing *Longshore v. State*, 399 Md. 486, 508-09, 924 A.2d 1129, 1141 (2007)). An officer conducts a valid *Terry* frisk when a reasonably prudent person in the officer's position would believe that his or her safety or the safety of others was in jeopardy. *Id.* at 367, 987 A.2d at 83 (citing *Longshore*, 399 Md. at 509, 924 A.2d at 1141-42). The court held that there was an invalid *Terry* frisk because there were no specific or objective factors that would lead

Lewis to suspect that Bailey was armed and dangerous. *Bailey*, 412 Md. at 368, 987 A.2d at 83.

The Court of Appeals of Maryland then determined whether there was a valid search incident to arrest. *Id.* at 370-87, 987 A.2d at 85-95. An arrest is the physical detention of another analyzed under a four element test: “(1) an intent to arrest; (2) under a real or pretended authority; (3) accompanied by a seizure or detention of the person; and (4) which is understood by the person arrested.” *Id.* at 370, 987 A.2d at 85 (citing *Bouldin v. State*, 276 Md. 511, 515-16, 350 A.2d 130, 133 (1976)). The court held that, when Lewis physically restrained Bailey and took him into custody, an arrest occurred. *Id.* at 373, 987 A.2d at 86-87.

Next, the court determined whether the warrantless arrest was supported by probable cause allowing for a valid search incident to arrest. *Id.* at 374, 987 A.2d at 87. A valid warrantless arrest must be supported by probable cause under the totality of circumstances, which lead the officer to believe that an individual is committing or has committed a crime. *Id.* at 363, 374-75, 987 A.2d at 80-81, 87 (citing *Swift*, 393 Md. at 149-51, 899 A.2d at 873-74; *State v. Wallace*, 372 Md. 137, 148, 812 A.2d 291, 297-98 (2002)). The court noted that there can be no probable cause based on a “wholly innocent factor,” such as the presence of the smell of ether, without additional corroborating factors. *Bailey*, 412 Md. at 382, 987 A.2d at 92 (quoting *Crosby v. State*, 408 Md. 490, 512, 970 A.3d 894, 907 (2009)). Therefore, it was necessary for the court to analyze whether the other factors, such as Bailey’s presence in a high drug crime area and his failure to answer police questions, were enough to constitute probable cause for a warrantless arrest when combined with the odor of ether. *Id.* at 375, 987 A.2d at 88.

Before discussing the corroborating factors, the court analyzed the presence of the smell of ether. *Id.* at 375-83, 987 A.2d at 88-92. Maryland precedent indicates that the smell of contraband, such as marijuana, is sufficient to establish probable cause. *Id.* at 376, 987 A.2d at 88 (citing *Ford v. State*, 37 Md. App. 373, 379, 377 A.2d 577, 580 (1977)). Conversely, courts in other states have held that the smell of a lawful substance, despite a common association with illegal substances, does not provide probable cause for an officer to believe that an illegal substance is present. *Id.* at 377, 987 A.2d at 89 (citing *State v. Ibarra*, 282 Kan. 530, 147 P.3d 842 (2006) (holding the search of a suspect’s car and the seizure of methamphetamine was invalid when based only on an officer smelling ether)).

Regarding the corroborating factors, the court determined that, although Bailey was present in a high drug crime area, he was not engaged in any specific activity that should have led an officer to suspect that Bailey was engaged in illegal activity. *Id.* at 384, 987 A.2d at 93. Furthermore, the court determined that Bailey's failure to answer Lewis' questions could not, by itself, lead to an inference that Bailey was intoxicated. *Bailey*, 412 Md. at 385, 987 A.2d at 93-94. The Court of Appeals of Maryland held that there was no probable cause for a warrantless arrest; therefore, the search incident to Bailey's arrest was invalid. *Id.* at 375, 987 A.2d at 88.

The dissent argued that the majority failed to apply the totality of the circumstances test and, instead, looked at all the factors surrounding Bailey's search and seizure as independent coincidences. *Id.* at 390, 987 A.2d at 97 (Harrell, J., dissenting). Consequently, the dissent contended that the smell of ether, Bailey's presence in a high drug crime area, and Bailey's "glossy eyes" were enough to support Lewis' warrantless arrest and the following search incident to arrest. *Id.* at 391, 987 A.2d at 97 (Harrell, J., dissenting).

In *Bailey*, the Court of Appeals of Maryland affirmed that the mere presence of an odor of a lawful substance associated with an illegal substance does not give rise to probable cause. As a result of this case, defense attorneys should move to suppress evidence if the arrest, search, and seizure were based merely on the odor of a lawful substance. Prosecutors, however, can still successfully defend against a motion to suppress if the arrest, search, and seizure were based on sufficient corroborating factors in addition to the odor of a lawful substance. The resolution of motions to suppress in cases similar to *Bailey v. State* will be fact-specific, depending largely on the ability of the State or the defense to develop a record that supports their respective positions.