DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 23-CM-998

GEORGE BELL,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the Superior Court of the District of Columbia

Criminal Division

BRIEF FOR APPELLANT

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II.

WHETHER THE DEFENDANT'S ADMISSION THAT HE POSSESSED MARIJUANA WITH THE INTENT TO DISTRIBUTE IS SUFFICIENT TO CONVICT WHERE THERE IS NO EVIDENCE OF THE QUANTITY OF MARIJUANA AND NO EVIDENCE THAT THE INTENDED DISTRIBUTION WAS FOR REMUNERATION

STATEMENT OF THE CASE

Appellant was arrested on July 4, 2023, and arraigned in Superior Court on a charge of possession with intent to distribute marijuana.

The defense filed a motion to suppress physical evidence on September 26, 2023, which the government opposed on October 9, 2023.

A hearing on Appellant's motion was held on November 27, 2023. The motion was denied. Tr., pp. 93-95.[1]

The stipulated trial was held after denial of the motion. The parties stipulated that appellant possessed the marijuana recovered by the police and intended to distribute it. Tr., p. 97. The court conducted a *Boyd* inquiry,[2] and appellant indicated that he did not want to testify. Tr., pp. 98-100. The trial court found appellant guilty of possession with intent to distribute marijuana and sentenced him to 60 days incarceration, execution of sentence suspended in favor of six months unsupervised probation. Tr., pp. 106-07. Appellant was ordered to pay $50 to the victims of violent crime fund pursuant to D.C. Code § 4-516 (2001). Tr., pp. 106-07.

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[1] "Tr." refers to the single-volume, continuously-paginated transcript of proceedings on November 27, 2023.

[2] *Boyd v. United States*, 586 A.2d 670, 673 (D.C. 1991).

The trial court advised Appellant of his appeal rights. Tr., pp. 101-02, 106. Appellant filed a timely notice of appeal on November 28, 2023.

STATEMENT OF FACTS

The government's sole factual witness was Officer Alarcon. He testified that he was a member of the Crime Suppression Unit. This unit does not respond to radio calls, but rather drives around the city attempting to discover crime. Tr., pp. 19, 40.

Officer Alarcon and his partner, Officer Clifford, drove into an alley that he described as a "high crime area," having responded "several times" to that alley in his 10-year career. Tr., pp. 18, 20, 42. However, on this occasion, the officers were not responding to a call, nor had they had any prior interaction with appellant. Tr., p. 41.

They came upon a group of young black men – of which appellant was a member – at a construction site where a townhouse was being renovated. There was a building permit in the window and the men were sitting on patio tiles next to a half-completed patio where the tiles were ready to be installed. Tr., pp. 44, 46.

The officers were suspicious of the men. Before even getting out of their patrol marked car, they ran the tag of a car parked at the construction site in their database. Tr., p. 47. The officers were in a marked patrol car; there was no testimony that their arrival caused any concern among the group of men. Tr., p. 48.

Despite the encounter being during business hours on a weekday, Officer Clifford did not ask the men whether they were construction workers; Officer Clifford simply ordered the men to leave the construction site. Tr., p. 49.

The men immediately complied, doing exactly what they were ordered to do. Tr., p. 49. The men went to the edge of the construction site approximately 20 feet away and remained – waiting and watching – while Officer Alarcon and Officer Clifford entered the construction site. Tr., pp. 30, 52.

One of the men who was ordered to leave had left behind a red bag. Tr., p. 49-51. Appellant left behind his cell phone and a large, blue, cloth Walmart bag measuring approximately two feet by two feet. Tr., pp. 24, 53. As the group waited 20 feet away, Officer Clifford searched the red bag and then permitted one of the men to return to retrieve his bag. Tr., pp. 49-51.

Officer Alarcon went up to the blue Walmart bag that was mostly closed but with an opening permitting the officer to look inside. Tr., p. 53. Officer Alarcon testified that he saw part of a Mylar bag, but could not determine its size since it was inside the mostly closed Walmart bag. In terms of his ability to observe inside the bag, Officer Alarcon conceded that the incident occurred "at 3 p.m. in the afternoon ... on a bright day" yet testified that he "used the flashlight to see better." Tr., pp. 53-54.

Officer Alarcon testified that Mylar bags are often used to store marijuana. Tr., p. 23. He asked the group of men whose bag it was, indicating that if no one claimed it, he would take for destruction. Tr., p. 54. Appellant indicated the bag was his and contained marijuana. Tr., pp. 24, 54-55.

Appellant approached Officer Alarcon – who standing next to the bag – and retrieved the bag and his cell phone, which he had also left behind when he was initially ordered to leave. Appellant then began to walk away. As described by Officer Alarcon, after appellant retrieved the bag, he turned around and took a few steps away from the officer. Tr., p. 59.

Officer Alarcon told him to come back. Tr., pp, 57, 59. Officer Alarcon stated words to the effect of, "Hey! Let me see. Open it for me," while simultaneously motioning with his arm and hand for appellant to return. Tr., p. 60.

Appellant complied and returned to Officer Alarcon. Officer Alarcon then instructed appellant to show him what was in the bag, stating, "Let me see what's in there, man. Come on." Tr. p. 60. Appellant again complied, opening the Walmart bag.

Once the Walmart bag was opened, Officer Alarcon saw the entire Mylar bag – rather than just the top of the bag – for the first time. He then arrested appellant.

As indicated below, the trial court found that Officer Alarcon did not know the size or weight of the Mylar bag before appellant opened the Walmart bag and exposed it. However, the trial court concluded as a matter of law that because appellant admitted he had marijuana in the bag and he complied, the officer had probable cause to search the bag to determine whether the amount exceeded the legal amount. In the alternative, the trial court ruled that appellant had voluntarily exposed the Mylar bag to Officer Alarcon.

ARGUMENT

I. TRIAL COURT ERRED IN NOT SUPPRESSING THE MARIJUANA BASED ON THE ILLEGAL SEARCH

A. Factual Introduction

Pursuant to Superior Court Criminal Rule 23(c), the defense requested that the trial court make specific findings of fact. In denying the defendant's suppression motion, the trial court stated:

> Okay. So [defense counsel], I think the issue that we have here is I think, while the officer did not testify and tell the Court, like, this was a large Zip -- I mean, large Mylar bag, a small Mylar bag, a mini Mylar bag; I think the testimony that I do have is that he saw a blue cloth bag after they walked away. He saw a partial -- saw a partial Mylar packaging consistent with drug packaging for marijuana flower. He then determined to see -- he said the -- I'm

> sorry. The blue bag was approximately two-feet-by-two-feet was the measurement he was able to give the Court. And this was prior to the back and forth with the group about the bag.
>
> On cross-examination, [defense counsel] asked him was the bag mostly closed? He said, yes. And [defense counsel] asked him why he had to use a flashlight because it was 3 p.m. in the afternoon. And he said it wasn't dark in the bag. He just used the flashlight to see better. And then, immediately after seeing this Mylar bag in the bag, after using the flashlight, he asked the unidentified individual and Mr. Bell, if the bag belonged to anyone. And [defense counsel's] client immediately steps up and says, that's my weed. I'm not going to lie.
>
> The Court finds that at that point, coupled with his training and experience of seeing this Mylar bag in the Walmart bag and [defense counsel's] client's immediate response that he had probable cause at that point. The Court also finds that once [defense counsel's] client came to retrieve the bag, the officer said to him, let me see, open them. How much you got here? It's your bag, right? And not giving any verbal response that the Court was able to hear on the body-worn camera footage, your client voluntarily pulls out this Mylar bag full of marijuana and hands it over to the officer.
>
> So I'm going to deny the motion to suppress and find that the officer had probable cause at the time he asked [defense counsel's] client to see what was in the bag and [defense counsel's] client voluntarily gave him the item in the bag. But I find whether or not your client gave him the item on his own, the officer had probable cause to search the bag at that time.

Tr., pp. 93-95.

B. Standard of Review

This Court recently reiterated its standard of review with respect to suppression motions:

> When reviewing a trial court's denial of a motion to suppress, this court "must defer to the [trial] court's findings of evidentiary fact and view those facts and the reasonable inferences therefrom in the light most favorable to sustaining the ruling below." *Jackson v. United States*, 157 A.3d 1259, 1264 (D.C. 2017) (quoting *Joseph v. United States*, 926 A.2d 1156, 1160 (D.C. 2007)). However, "[w]hether officers had reasonable suspicion to justify a stop is a question of law that we review *de novo*." *Posey v. United States*, 201 A.3d 1198, 1201 (D.C. 2019) (citing *Miles v. United States*, 181 A.3d 633, 637 (D.C. 2018)). The government bears the burden of demonstrating that at the time [the defendant] was stopped MPD officers had reasonable and articulable suspicion to justify the stop. *United States v. Jones*, 1 F.4th 50, 52 (D.C. Cir. 2021).

Mitchell v. United States, No. 20-CF-0073 (D.C. May 9, 2024).

C. Legal Discussion

(1) Appellant's Compliance with a Police Order Constitutes a Seizure

Appellant was seized when he attempted to walk away but was ordered by Officer Alarcon to come back to the officer.

> Q: Okay. And Mr. Bell stepped forward to get his bag, correct?
>
> A: Yes, sir.

Q: And as you described him, he was very polite.

A: Yes, sir.

Q: And when he picked up his cell phone and the Walmart bag, he turned his back to you and started to walk away, correct?

A: Yes, sir.

Q: And how many steps did he get before you stopped him?

A: I'd have to watch it again and tell you that exactly.

....

Q: He picks it up, he turns, he starts to walk away, and then you tell him to come back, right?

A: Yes, sir.

....

Q: Okay. And you see that Mr. Bell turns away from you and picks up his items after you had had that conversation with him. Turns away from you and starts to walk away, correct?

A: Yes, sir.

Q: And then you tell him to come back, correct?

A: Yes, sir.

....

Q: Now, just to sort of pick up where we left off. We saw your partner's video where Mr. Bell had started to walk off a few steps. You ordered him back.

A: Yes, sir.

Tr., pp. 55-59.

After appellant's return pursuant to Officer Alarcon's command, Officer Alarcon testified:

Q: And he handed you the bag like you wanted, correct?

A: Yes, sir.

Q: And you then ordered Mr. Bell to open the bag, correct?

A: I asked him to show me what was in the bag. Yes.

Q: You said. "Let me see -- let me see what's in there, man. Come on."

A: Yes, sir.

Q: And Mr. Bell complied, correct?

A: Yes, sir.

Tr., p. 60. In fact, Officer Alarcon testified that when appellant didn't comply with the first command to open the Walmart bag, he asked again:

Q: So Officer, the situation where you asked -- had to ask him twice to show you what was in the bag, correct?

A: Yes, sir.

Tr., p. 61.

Officer Alarcon explained that his purpose in instructing appellant to open the bag was so that he could see the size of the Mylar bag inside and determine how much marijuana it contained. Tr., p. 25. Only after the Mylar bag was exposed, did Officer Alarcon believe it exceeded the legal amount. Tr., p. 31.

Appellant was seized at the point Officer Alarcon twice ordered him to stop walking away and show him what was in the bag. A reasonable person would not have believed that they were free to ignore the officer's command. "An arrest requires either physical force . . . or, where that is absent, submission to the assertion of authority." *California v. Hodari D.*, 499 U.S. 621, 626, 113 L. Ed. 2d 690, 111 S. Ct. 1547 (1991).

(2) At the Time of the Seizure and Search, There Was Not Probable Cause for an Arrest

The trial court erred in finding there was probable cause to arrest, thus justifying a search of the bag. To the contrary, prior to the Walmart bag being opened, Officer Alarcon possessed insufficient facts to conclude that appellant had committed a crime.[3]

[3]The trial court understood that this was a full search requiring probable cause and not a *Terry* frisk for weapons requiring only reasonable articulable suspicion.

Appellant admitted to Officer Alarcon that he possessed marijuana in his bag; Officer Alarcon testified that marijuana is often stored in Mylar bags and that he could see the top of a Mylar bag in the Walmart bag..

Yet, prior to the search, Officer Alarcon had no basis to conclude that the Mylar bag contained more than two ounces – the demarcation point between legal and illegal possession of marijuana. Even after using his flashlight on a sunny day, Officer Alarcon could only see the top of the Mylar bag. Officer Alarcon testified:

> Q: And since the Walmart bag was only open by your description a little bit, you couldn't see in terms of the second bag how big it was, how wide it was, how tall it was; is that correct?
> ....
> A: Yes, sir.
>
> Q: Okay. And you couldn't tell, for that matter, how much the second bag weighed?
>
> A: No, sir. I cannot tell.

Tr., p. 53.

Bottom line: at the time of the search of appellant's Walmart bag, Officer Alarcon knew that it contained a Mylar bag often used to store marijuana and that appellant admitted that the bag contained marijuana. But he had no clue as to the size of the Mylar bag, he didn't know "how big it was, how wide it was, how tall it was" or "how much [it] weighed." *Id.*

To be sure, there will be situations where the officer's perception of the size of a bag informs a reasonable belief that the content weighs over two ounces, permitting arrest and a search. This is not that case here. Prior to the search of the Walmart bag, Officer Alarcon had no basis to conclude that appellant possessed more than the legal amount of marijuana.[4] It is black-letter law that a search cannot be justified by what it produces.

(3) Conclusion that Appellant Voluntarily Showed Officer Alarcon the Mylar Bag Is Erroneous

Even assuming that appellant was not seized when he was trying to walk away and returned in compliance with Officer Alarcon's direction, his compliance with Officer Alarcon's two separate commands to show him what was in the bag was not voluntary.

As Officer Alarcon described, appellant: "reached inside after I asked him to show me what was in the bag. He reached inside and showed me what was in the bag." Tr. p. 31.

It is still police action regardless of whether Officer Alarcon opened the Walmart bag himself or appellant did so at Officer Alarcon's command. While the trial court correctly found that appellant "pulls out this Mylar bag full of marijuana

[4]The District of Columbia has long decriminalized the possession of less than two ounces of marijuana. D.C. Code § 48-904.01(a)(1)(A).

and hands it over to the officer," he did so only after he was directed to do so twice by Officer Alarcon.

Compliance with police direction can hardly be deemed a voluntary act. This is especially true given today's current events where non-compliance with police orders can have deadly consequences.

II. GOVERNMENT FAILED TO PROVE THAT THE AMOUNT OF MARIJUANA RECOVERED FROM APPELLANT EXCEEDED TWO OUNCES AND THAT THE APPELLANT INTENDED TO SELL THE MARIJUANA

A. Factual Introduction

The defendant stipulated that marijuana was found in his possession and that he intended to distribute it.

B. Standard of Review

This Court has held that "it is well settled in this jurisdiction that a full range of challenges to the sufficiency of the evidence are automatically preserved at a bench trial by a defendant's plea of not guilty ... [including] challenges to the requisite elements of the crime." *Carrell v. United States*, 165 A.3d 314, 326 (D.C. 2017) (*en banc).*

With respect to the standard of review when determining whether the government has proven the elements of the crime, this Court has explained:

> When reviewing the sufficiency of the evidence, this "court must deem the proof of guilt sufficient if, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Rivas v. United States*, 783 A.2d 125, 134 (D.C. 2001) (*en banc*) (internal quotation marks and citation omitted). This standard recognizes "the province of a trier of fact to weigh the evidence, determine the credibility of the witnesses and to draw reasonable inferences from the testimony." *Dickerson v. United States*, 650 A.2d 680, 683 (D.C.1994). "The evidence is insufficient, however, if in order to convict, the jury is required to cross the bounds of permissible inference and enter the forbidden territory of conjecture and speculation." *Roy v. United States*, 652 A.2d 1098, 1103 (D.C.1995) (internal quotation marks and citation omitted). To prevail, appellants must establish "that the government presented no evidence upon which a reasonable mind could find guilt beyond a reasonable doubt." *Carter v. United States*, 957 A.2d 9, 14 (D.C. 2008) (internal quotation marks and citation omitted).

Smith v. United States, 68 A.3d 729, 738 (D.C. 2013).

C. Legal Discussion

In the District of Columbia, it is legal to possess two ounces or less of marijuana and also legal to intend to distribute one ounce or less without remuneration. D.C. Code § 48-904.01(a)(1)(A); D.C. Code § 48–1201(a).

While appellant stipulated at trial that he possessed marijuana, no evidence was presented to the trial court regarding the weight of the marijuana possessed.

Further, while appellant stipulated at trial that he intended to distribute the marijuana he possessed, no evidence was presented to the trial court that he intended to sell the marijuana.

In the District of Columbia, it is permissible to distribute less than an ounce of marijuana to another person provided there is not payment. D.C. Code § 48–1201(a) provides: "Notwithstanding any other District law, the possession or transfer without remuneration of marijuana weighing one ounce or less shall constitute a civil violation."[5]

In *Kornegay v. United States*, 236 A.3d 414 (D.C. 2020), this Court explained: "Accordingly, we understand § 48-904.01(a)(1) to permit an adult to possess two ounces or less of marijuana regardless of their intent, so long as that adult does not 'sell, offer for sale, or make available for sale' the marijuana." *Id.* at 420.

Appellant admitted that he possessed marijuana with the intent to distribute it. However, distribution is not the same as sale. There was no evidence at trial that

[5]A civil violation does not permit an officer to search a citizen – only when an officer has probable cause for a criminal violation may s/he then search the citizen.

appellant intended to sell the marijuana, only that he intended to distribute marijuana to another person.

This Court has held: [T]ransferring a small amount of marijuana without remuneration likewise is treated differently from selling it—the former is lawful while the latter is not." *Simms v. United States,* 244 A.3d 213 (D.C. 2021). In *Simms,* this Court stated:

> Thus, while there remains a prohibition on transfers of marijuana (1) by sale, (2) in quantities greater than an ounce, or (3) to persons under 21 years of age, the statute expressly exempts from that prohibition, and unambiguously permits, unremunerated transfers of an ounce or less of marijuana to an adult.

Id. at 219.

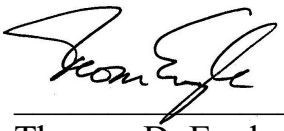
To be sure, appellant was charged with possession with intent to distribute marijuana. However, the facts proven at trial did not show that he possessed an illegal amount of marijuana. The facts proven at trial did not show that he intended to distribute more than an ounce of marijuana. The facts proven at trial did not show that his intended distribution of marijuana was to be by sale.

In short, the government failed to establish illegal possession with intent to distribute marijuana, as articulated by the case law from this Court. His conviction must be reversed.

CONCLUSION

The government's evidence at trial was insufficient, requiring this case to be reversed as a matter of law. In the alternative, the marijuana should have been suppressed as obtained through an illegal stop and search.

Respectfully submitted,



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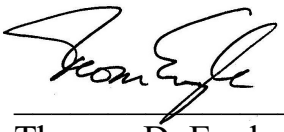
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was delivered via electronic service to the government on this 17th day of December, 2024.



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