

**DISTRICT OF COLUMBIA COURT OF APPEALS**

**NO. 24-CM-387**

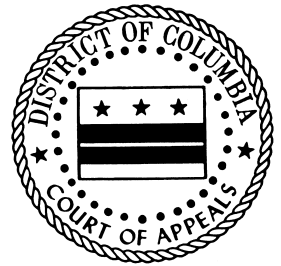
**JAMES A. CARTER**

**Appellant**

**V.**

**UNITED STATES**

**Appellee**



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**Appeal from the Superior Court of the District of Columbia,**

**Criminal Division, Misdemeanor Branch**

**BRIEF OF APPELLANT**

Case Below: 2023-CMD-007556

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## **ISSUE PRESENTED**

Whether the trial Court erred in denying Appellant’s motion to suppress the tangible evidence that was recovered from him during a police seizure of his person on a public street, after Appellant alleged that the police seized him without a reasonable articulable suspicion that he was involved in criminal activity.

## **STATEMENT OF THE CASE**

This case came before the Superior Court as the result of an incident that occurred during the afternoon hours of October 25, 2023 in the 4000 block of Kansas Avenue NE. Police officers on a routine patrol vehicle encountered Appellant, approached him, and seized suspected narcotics that were in his possession. Appellant was subsequently charged with one count of possession of a controlled substance phencyclidine (PCP) in violation of D.C. Code § 48-901(d).

The case came before the Superior Court for a bench trial on March 13 and 14, 2024, the Honorable Judge Rigsby presiding. Appellant moved to suppress the statements he made and suspected narcotics that were recovered during the encounter as the fruits of an illegal seizure. The trial Court denied this motion, and both Appellant's statements and the items seized from Appellant were admitted into evidence. At the conclusion of the trial Appellant was found guilty of the single count of attempted possession of PCP, as the suspected contraband had not been tested to determine if it was actually PCP. He was sentenced to one hundred eighty days of incarceration, with all but thirty days suspended, followed by one year of supervised probation. This appeal followed.

## **STATEMENT OF THE FACTS**

### **I. Suppression Hearing and Trial Testimony**

At Defense counsel's request, the trial court held a hearing on the suppression motion just prior to but separate from the trial. The Government called as its' single witness at the hearing, Officer Maurice Clifford of the Metropolitan Police. He testified that on the afternoon of October 17, 2023 while on patrol with his partner Officer Alarcon, he drove into an alley of the 4000 Block of Kansas Avenue NW. At that location, he saw an individual later identified as Appellant manipulating something in his hands (3/13 tr. 17). The witness stated that he considered that alley a "high drug area" and that he stopped his vehicle so that he and his partner could get out and investigate (3/13 tr. 18). Officer Clifford noted that as he stopped the car, Officer Alarcon rolled down his window and asked the individual what he was holding in his hand; at this point Officer Clifford exited the vehicle and both officers approached Appellant (3/13 tr. 19). He noted that his car was stopped approximately ten feet away from Appellant.

The Government then played a short clip of Officer Clifford's body worn camera video footage from that encounter, which was admitted into evidence as Government Exhibit 1 without objection (3/13 tr. 22). The witness identified Appellant and Officer Alarcon as the two individuals visible in the video clip. Officer Clifford then testified that as he approached Appellant after exiting the

police cruiser he detected the odor of PCP coming from Appellant's person and saw Appellant hand a cigarette that had been dipped in amber liquid to Officer Alarcon (3/13 tr. 24). The witness stated that based on his training and observations, he believed the cigarette was a "dipper" (a cigarette dipped in liquid PCP solution and then smoked to ingest the drug). The officer further testified that as he and Officer Alarcon approached, Appellant held out his hand holding the cigarettes toward Alarcon. When Alarcon asked "You have a dipper?" Appellant replied "yes." (3/13 tr. 25). The Government then played another short video clip from Clifford's body worn camera, which was entered into evidence as Government Exhibit 3. Officer Clifford stated that after Appellant had handed the cigarette to Officer Alarcon, Clifford placed Appellant under arrest (3/13 tr. 27).

On cross examination, the witness noted that at the time of the incident he was driving a marked police cruiser and that both he and Officer Alarcon were in uniform. He also noted that he first drove by Appellant, then backed up, at which point Officer Alarcon opened his window and asked Appellant what was in his hand (3/13 tr. 31). Officer Clifford testified that he and his partner both exited the car at the same time, and that as both were approaching Appellant on foot he heard Alarcon ask Appellant if he had a dipper (3/13 tr. 34). The witness admitted that he did not know if Officer Alarcon said anything to Appellant between the time he stopped the car and the time he was able to hear Alarcon ask Appellant if the item

in his hand was a dipper (3/13 tr. 40). On redirect, the witness stated that Appellant did not have to answer Officer Alarcon's questions and could have walked away instead. (3/13 tr. 48). The Government then rested on the motion.

The defense then called Appellant to the stand. Mr. Carter testified that it was the other officer in the car, not Officer Clifford, who asked him what was in his hand. He stated that Officer Alarcon got out of the police car, walked over to him, and asked "What is that in your hand? Is that a dipper?" (3/13 tr. 55). The Defense then entered two portions of Officer Alarcon's body camera footage and a still from that footage into evidence as Defense Exhibits, 1 through 3, which were admitted. The witness stated that at that point where the two officers approached him on foot he did not believe he was free to leave and walk away from the scene and for that reason he stayed and responded to their questions (3/13 tr. 56). He also testified that he believed he was under arrest at that point in time. The witness stated that as Alarcon approached and asked him what was in his hand, the officer reached out his right hand to take the item that Appellant was holding (3/13 tr. 57). On cross examination, the Mr. Carter admitted that the officers had never told him to stop or to remain where he was, and had not drawn their weapons (3/13 tr. 61). He also acknowledged that as the officers approached him, he walked towards them (3/13 tr. 65).

After Appellant testified the trial Court heard arguments on the motion from counsel for the parties. The trial Judge then held that there was no custodial interrogation of Appellant by Officers Clifford and Alarcon in this case. Based on that finding, the trial Judge denied the defense motion to suppress both Appellant's statement that he had a dipper as well as the items seized by police in response to that statement (3/13 tr. 76).

The case then moved on to the trial, with Officer Clifford again the sole Government witness. He testified that as he and Officer Alarcon drove through the alley in what he described as a high drug & crime area, they saw Appellant manipulating an object in his hand. Officer Clifford then reversed the vehicle and both he and Officer Alarcon stepped out and approached Appellant (3/13 tr. 82). The witness stated that as he approached Appellant on foot he could see a cigarette in Appellant's hands and smell the odor of PCP (3/13 tr. 83). The previously played video from Clifford's body camera was then entered into evidence as Government Exhibit 1. The officer noted that when he got closer to Appellant he could smell PCP and see that the cigarette had been dipped into amber liquid. He also heard Appellant say "yes" when Officer Alarcon asked if he was holding a dipper (3/13/ tr. 87). From these observations he concluded that Appellant was in possession of PCP. Officer Alarcon took the cigarette from Appellant and placed

it into an evidence bag. The seized items and the drug analysis report were then entered into evidence as Government Exhibit 4.

The defense then declined to cross-examine this witness or present any direct evidence at trial. The Government rested and the Court denied the defense motion for judgement of acquittal (3/14/ tr. 6). The trial Court also reiterated that it denied Appellant's motion to suppress because it found that there was no custody and no interrogation of Appellant during the incident (3/14 tr. 8). After hearing closing arguments, the trial Judge found Appellant guilty of attempted possession of PCP.

## II. THE VIDEO EVIDENCE

The timeline on both of the two officers' BWC videos is more or less identical, and can be summarized as follows 3:26:41 – Officers drive by the mouth of the alley where Appellant is standing; 3:26:42-3:26:44 – The car reverses and Appellant can be seen through the passenger front window standing in the alley; 3:26:45-3:26:50 – Officer Alarcon rolls down the passenger side window; 3:26:51 the officers begin to leave the car and the sound is activated; (beginning at this point the two videos have different content)

Clifford: 3:26:52-58 – Officer Clifford exits the driver's door and walks around front of car. Officer Alarcon can be seen standing a few feet in front of



Appellant, who is facing the officer and holding both hands out in front of his body. The video does not capture what Alarcon is saying to Appellant. Alarcon: 3:26:52-3:27:01 As Alarcon exits the passenger side door he says “What you got in your hand man?” Appellant takes a couple of steps toward Alarcon with his hands held out before him, the right holding a cigarette and the left holding a piece of paper. Alarcon points at Appellant’s hand as he continues to approach Appellant and repeats “What you got in your hand?” Clifford: 3:26:58-3:27:02 – Clifford continues to approach Appellant, who is standing still with his hands held out before him. His right hand appears to be holding a cigarette. Alarcon reaches out and takes papers from Appellant’s left hand. Officer Alarcon can be heard saying “Let me hold this right here, you got a dipper?” Alarcon: 3:27:02 – 3:27:08 Officer Alarcon takes the papers from Appellant’s hand and says “Let me hold this for you right here. You got a dipper?” Appellant responds “Yes sir” as Officer Clifford approaches Appellant’s right side and takes hold of Appellant’s right arm. Clifford: 3:27:03 – 3:27:07 – Appellant can be heard saying “yes sir,” Clifford takes hold of Appellant’s right wrist as Appellant hands Alarcon the cigarette with his left hand. Alarcon: 3:27:09 – 3:27:21 Appellant now has the cigarette in his left hand. Alarcon says “Put it here dude” and holds out the papers he had just taken from Appellant. Officer Clifford can be seen holding Appellant’s right wrist. Appellant puts the cigarette inside the papers in Alarcon’s hand. Alarcon says “Put

your hands behind your back.” Clifford: 3:27:08 – 3:27:21– Alarcon tells Appellant to “put your hands behind your back” as Clifford removes Appellant’s backpack and begins to handcuff him.

### **ARGUMENT**

The trial Judge erred in denying Appellant’s Motion to Suppress in this case. Appellant argued that the police had illegally seized him and interrogated him without any reasonable articulable suspicion. The trial Judge concluded that there was no seizure and thus no interrogation, but the evidence presented during the motions hearing clearly showed that the officers both seized and questioned Appellant during the incident that resulted in his arrest.

The question of whether a person has been “seized” for Fourth Amendment purposes is question of law which this Court reviews de novo, deferring to the trial Court’s factual findings unless completely erroneous. When the trial Court wrongfully denies a motion to suppress on Fourth Amendment grounds, the conviction must be overturned unless the error was harmless beyond a reasonable doubt, *Posey v. United States*, 201 A.3d 1198 (D.C. 2019). When physical or testimonial evidence is obtained as the result of an illegal seizure, it must be excluded as the fruit of a poisonous tree, *Crews v. United States*, 263 A.3d 128 (2021). In assessing whether the police have seized an individual this Court will consider the totality of the circumstances to determine whether police conduct

would have convinced an ordinary person that they were not free to decline the officers' requests or otherwise terminate the encounter, *Dozier v. United States*, 220 A.3d 933 (D.C. 2019).

This Court has recognized that repeated or insistent questions or requests by police officers designed to determine whether an individual approached on the street is in possession of contraband, especially in conjunction with coercive circumstances, can create a powerful impression on the individual that he is not free to walk away and terminate the encounter, *Golden v. United States*, 248 A.3d 925 (D.C. 2021). In this case, both prongs of this standard are met. Officer Alarcon's statements as he approaches Appellant were both repeated and insistent. Officer Clifford immediately walked around the front of the police cruiser and approached Appellant as Appellant was facing Officer Alarcon. Other circumstances that this Court has held should be considered in determining whether a seizure has occurred include: 1. whether the person was alone when police approached, 2. Whether the officers were armed and in uniform, 3. Whether the location of the encounter was secluded or out of public sight, and 4. Whether the police have obstructed the person's potential exit paths, *T.W. v. United States*, 292 A.3d 790 (D.C. 2023). The physical circumstances in Appellant's case met all these conditions. The officers drove by Appellant, then immediately backed up and parked about ten feet away from him across the mouth of the alley. The video

shows that by doing this the police had effectively boxed Appellant in and blocked his exit; as he faced the police cruiser there were fences to his right and behind him, while a parked car blocked the way on his left. Appellant was standing alone and no other civilians were in sight, so there was no question that the officers were coming directly towards Appellant as soon as they exited the automobile.

Assessing the situation in light of the factors this Court has used in the past, it is clear that Appellant was seized by the police when they approached him and repeatedly demanded to know what was in his hands.

In *Golden, supra*, this Court has held that during an individual's encounter with officers, the subject is seized for Fourth Amendment purposes at the moment that he manifests obedience to police orders or questions. In Appellant's case, he can be seen on Officer Alarcon's BWC footage walking towards the police cruiser with his hands held out towards the officers. This act of compliance to authority occurs before Officer Clifford is close enough to Appellant to smell PCP or see what he has in his hands; therefore the Appellant was seized before the officers had any additional evidence that might have justified a seizure of his person.

Because Appellant was seized at the outset of his encounter with police, his statement acknowledging that he possessed PCP and the physical evidence obtained pursuant to the seizure must be suppressed because the officers lacked a reasonably articulable suspicion ("RAS") to stop him. In order to legally seize an

individual, police must have a reasonable and particularized basis to believe that Appellant was engaged in criminal activity, *Sharp v. United States*, 132 A.3d 161 (D.C. 2016). Police officer may not rely on hunches or on good faith to justify a seizure. As this Court noted in *Posey*, it will review the justification by viewing the totality of the circumstances through the eyes of a reasonable and cautious police officer guided by experience and training.

At the motions hearing, the only justification provided by the prosecution for stopping Appellant was Officer Clifford's testimony that as the police officers drove by, they saw him "manipulating an object in his hand" and that he was in what they considered a "high drug area" of the city. Such scant information did not support a reasonable suspicion that Appellant was engaged in criminal activity; the "object" that Appellant was manipulating could have been any common innocent item, from loose change to wireless earphones to a wrapped piece of candy, to name just a few. The police were therefore acting on no more than a "hunch" that the object in Appellant's hand was contraband. This Court has repeatedly rejected such overbroad supporting rationales as insufficient to support a seizure. Without the items seized from Appellant or the use of Appellant's statement acknowledging he possessed a "dipper," both of which are the fruits of the illegal seizure, the Government could not have proceeded with this case. Accordingly, Appellant asks that his conviction be overturned by this Court.

## CONCLUSION

Based on the foregoing, Appellant asks this honorable Court to vacate his conviction and enter a verdict of not guilty, or in the alternative to remand the matter to the trial Court with instructions to grant Appellant's motion to suppress, or to provide whatever other relief may be appropriate.

Respectfully submitted,

/S/

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# CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above was electronically served on the Office of the United States Attorney for the District of Columbia this 11

Day of August, 2024

/S/

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