ORAL ARGUMENT SCHEDULED FOR FEBRUARY 4, 2

No. 23-CM-998

DISTRICT OF COLUMBIA COURT OF APPEALS

GEORGE BELL,

Appellant,

v.

UNITED STATES,

Appellee.

Appeal from the District of Columbia Superior Court
Criminal Division, Misdemeanor Branch

REPY BRIEF FOR APPELLANT GEORGE BELL

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Mr. George Bell, through his undersigned counsel, respectfully submits this Reply Brief to respond to the search and seizure argument contained in the brief filed by the government. The government argues that the trial court correctly concluded that D.C. Metropolitan Police Department ("MPD") Officer Byron Alarcon had probable cause to search Mr. Bell's Walmart bag, and in the alternative, that Mr. Bell voluntarily consented to the search of his bag. The government and the trial court are mistaken on both grounds.

I. Officer Alarcon Did Not Have Probable Cause to Search Mr. Bell's Walmart Bag

The first ground on which the trial court denied Mr. Bell's motion to suppress the marijuana found inside his Walmart bag was that Officer Alarcon had probable cause to search the bag. The trial court made factual findings in support of that conclusion that Mr. Bell does not dispute on appeal. Mr. Bell does dispute the trial court's legal conclusion that the officer had probable cause to search the bag. This Court reviews this legal conclusion *de novo*. *Maye v. United States*, 314 A.3d 1244, 1251 (D.C. 2024); *Hooks v. United States*, 208 A.3d 741, 745 (D.C. 2019).

The trial court found as the factual basis for its denial of the suppression motion that after Officer Alarcon and his partner drove in their marked police car to a house worksite on an alleyway in the 5500 block of 7th Street, N.W., and Officer Alarcon's partner ordered the men who were hanging out at the worksite to disperse,

he saw a blue Walmart bag on the ground near where the men had been congregating. Tr. 11/27/23 at 94.[1] Officer Alarcon then exited his police car and walked over to the blue Walmart bag, which was partially opened, and looked inside it, using his flashlight to help illuminate the inside of the bag. *Id*. Inside the Walmart bag he observed a Mylar bag, but he could not determine whether that Mylar bag was small, medium, or large size. *Id*. The officer testified that from his experience Mylar bags were consistent with being used to package marijuana. *Id.*

Officer Alarcon then called over to the men who were standing nearby whom his partner had previously ordered to move away from the worksite, asking if the Walmart bag belonged to any of them. *Id*. (Officer Alarcon added, in his body worn camera video, that if no one took responsibility for the bag he would take it to the police station and destroy it, and then Officer Alarcon gave a husky laugh, "huh, huh, huh, huh." BWC, Gov. Ex. 1 at 15:15:36-44.) At that point, Mr. Bell walked forward toward Officer Alarcon and said it was his bag, and there was "weed" inside it and that he was "not going to lie" to the officer. *Id.*

[1] In this Motion, the transcript of the suppression hearing is cited as Tr. 11/27/23 followed by the page number of the transcript cited. The record on appeal is cited as "R." followed by the document number, *e.g.*, R. 1. The videotape of Officer Alarcon's body worn camera footage, introduced as Gov. Ex. No. 1 at the suppression hearing, is cited as BWC, with the time indicated as, for example, 15:15:53-57 from the upper right-hand corner of the video. All citations to the D.C. Code are to the 2001 edition, as amended, unless otherwise indicated.

The trial court held that, based upon these factual findings, Officer Alarcon had probable cause at that time to search the bag. *Id*.

The trial court was mistaken. If this case had involved any other illegal drug in D.C., and Mr. Bell had told the officer, for example, that he had crack cocaine, or PCP, or heroin in his bag, the officer would have had probable cause to search it to seize the illegal drug. Marijuana, however, presents a different situation because it is not an offense under D.C. law for an adult to possess up to two ounces of marijuana in D.C. *See* D.C. Code § 48-904.01(a)(1)(A), enacted in 2015.

Mr. Bell does not dispute that (1) Mylar bags can be used, as Officer Alarcon testified, to package marijuana to keep it fresh (and are also sold in stores and used to package many other foods and other items for that purpose), and (2) that Mr. Bell admitted to Officer Alarcon that there was marijuana in his Walmart bag that contained the Mylar bag. But these facts did not give Officer Alarcon probable cause to search the bag. The officer testified that he could not tell whether the Mylar bag inside the Walmart bag was small, medium, or large size, and he had no reason to believe that the marijuana inside the bag was in excess of the two-ounce limit which is not illegal under D.C. law. Thus, based upon the factual findings that the trial court made, Officer Alarcon did not have probable cause to believe that Mr. Bell's Walmart bag contained more than two ounces of marijuana, and that Mr. Bell's admitted possession of "weed" in the bag constituted a criminal offense under D.C.

law. Based upon the factual findings made by the trial court, it erred in concluding that there was probable cause for Officer Alarcon to search the Walmart bag. Mr. Bell's motion to suppress the marijuana found in the bag should have been granted.

In fact, the D.C. Code provides that possession of marijuana without evidence of quantity in excess of one ounce cannot "constitute reasonable articulable suspicion of a crime."[2] If possession of marijuana without evidence that the quantity

[2] D.C. Code § 48–921.02a provides:

> **(a)** Except as provided in subsection (b) of this section, none of the following shall, individually or in combination with each other, constitute reasonable articulable suspicion of a crime:
>
> **(1)** The odor of marijuana or of burnt marijuana;
>
> **(2)** The possession of or the suspicion of possession of marijuana without evidence of quantity in excess of 1 ounce;
>
> **(3)** The possession of multiple containers of marijuana without evidence of quantity in excess of 1 ounce; or
>
> **(4)** The possession of marijuana in proximity to any amount of cash or currency without evidence of marijuana quantity in excess of one ounce
>
> **(b)** Subsection (a) of this section shall not apply when a law enforcement officer is investigating whether a person is operating or in physical control of a vehicle or watercraft while intoxicated, under the influence of, or impaired by alcohol or a drug or any combination thereof in violation of subchapter III-A of Chapter 22 of Title 50 [§ 50-2206.01 *et seq*.].

is in excess of one ounce cannot reasonable articulable suspicion of a crime, in cannot constitute probable cause to search Mr. Bell's bag in this case.

The brief filed by the government in this Court argues that the motion to suppress was properly denied by the trial court based upon a factual finding that the trial court did not make, and that the government did not ask the trial court to make (*see* Tr. 11/27/23 at 91-93) – that in addition to Mr. Bell stating that the Walmart bag was his and it contained "weed," that he also told the officer that "I ain't gonna let nobody else take the blame for my weed or nothin." Gov. Br. at 4. The government's brief on appeal emphasizes that this alleged statement by Mr. Bell substantially strengthens its argument for probable cause to search the bag because it showed that "Bell knew the quantity of the drug therein was not lawful." *Id*. at 11; *see also id*. at 12.

The government is asking this Court to affirm the trial court's denial of the suppression motion based upon this factual finding that the trial court did not make and government counsel did not ask the trial court to make in either its written Opposition to Mr. Bell's motion to suppress, R. 8, or in the government's oral argument at the conclusion of the suppression hearing urging the trial court to deny the motion to suppress, Tr. 11/27/23 at 91-93.

It is inconsistent for the government to argue in its brief in this Court that the trial court's decision denying the suppression motion should be upheld based upon

factual finding that the trial never made and that the government never asked the trial court to make, while at the same time the government's brief in this Court argues that this Court should not consider Mr. Bell's alternative argument that the trial court erred when it found him guilty of possession with intent to distribute marijuana because he "raises" this issue "for the first time on appeal." Gov. Br. at 17.

This Court has made clear that it "'may affirm a decision for reasons other than those given by the trial court,' provided there is a sufficient evidentiary basis and no procedural unfairness to the parties." *United States v. Pope*, 313 A.3d 565, 573 (D.C. 2024) (quoting *Purce v. United States*, 482 A.2d 772, 775 n.6 (D.C. 1984)). In this case, affirming the trial court's denial of Mr. Bell's motion to suppress based on a factual finding that the trial court never made would be inappropriate because it would result in procedural unfairness to Mr. Bell for several reasons.

First, because government counsel at trial never asked for this factual finding in its written opposition to the suppression motion or its oral argument at the conclusion of the suppression hearing, defense counsel never had the opportunity to contest this factual finding. Second, this Court has no idea why the trial court did not make this factual finding, and can only speculate on the reasons the trial court did not make this factual finding. This Court accords great deference to the trial court's factual findings, based on the trial court's broad discretion in determining which testimony to credit and not credit, *Randolph v. United States*, 882 A.2d 210,

219 (D.C. 2005), and this Court will not lightly substitute its own judgment to make findings of fact related to a suppression motion that the trial court did not make for whatever reasons the trial court concluded it would not make those factual findings. *Id*. at 219.

The government interprets Mr. Bell's alleged statement as showing that "Bell knew the quantity of the drug therein was not lawful," Gov. Br. at 11, but this is not the only possible interpretation of Mr. Bell's alleged statement. The trial court may have viewed Mr. Bell's alleged statement that he didn't want anyone else to "take the blame" for his marijuana as unclear or ambiguous or not sufficiently clear to serve as the basis for its decision on the suppression motion. Perhaps Mr. Bell was merely saying that he wanted to take responsibility for the marijuana in his bag after Officer Alarcon threatened to take the bag back to the police precinct and destroy it. Perhaps Mr. Bell was merely saying that he didn't want any of the other men he was with at the worksite hassled by Officer Alarcon over his marijuana in the bag. Perhaps Mr. Bell was thinking of the Federal drug law, which makes possession of any amount of marijuana a criminal offense, 21 U.S.C. § 844, not just possession of over two ounces of marijuana that is a criminal offense under D.C. law. This Court cannot know what the trial court thought the alleged statement by Mr. Bell may have meant, or why the trial court did not make any factual finding about this alleged statement in the trial court's decision denying the motion to suppress. This Court

should not now, as the government urges it to do, rely on this alleged statement to support the trial court's denial of the suppression motion, when the trial court did not rely on it, and to rely on it now, for the first time on appeal, would result in procedural unfairness to Mr. Bell for the reasons set forth above.

II. Mr. Bell Did Not Voluntarily Consent to the Search of His Walmart Bag

The government argues, in the alternative, that even if Officer Alarcon did not have probable cause to search Mr. Bell's Walmart bag, the search was nonetheless lawful because Mr. Bell consented to the search by voluntarily handing the bag to Officer Alarcon so the officer could search inside it. Gov. Br. at 14-17. This argument is also misplaced. Mr. Bell did not voluntarily hand his bag to Officer Alarcon, but did so only after Officer Alarcon twice ordered him to hand over his bag. Officer Alarcon first said to Mr. Bell: "[H]ey, lemme see, open that [Walmart bag] for me. How much you got here?" Gov. Brief at 15, quoting the body worn camera footage, BWC, Gov't Ex. 1 at 15:15:53-54; Tr. 11/27/23 at 25, 60. Officer Alarcon subsequently told Mr. Bell: "[T]his is your bag, right? Let me see what's in there man, come on." Gov. Br. at 15, quoting BWC, Gov't Ex. 1 at 15:15:58–16:01; Tr. 11/27/23 at 31. In response, Mr. Bell removed the Mylar bag containing marijuana from inside the Walmart bag and handed it to the officer.

In fact, from the beginning of his encounter with Officer Alarcon that afternoon, Mr. Bell had complied with each and every direction from Officer Alarcon. When the officer first approached Mr. Bell and the other men who were sitting at the worksite and Officer Alarcon's partner told the individuals to leave, Tr. 11/27/23 at 49, Mr. Bell and the other men immediately complied, and moved about 20 feet away. Officer Alarcon then exited his police car and walked to where Mr. Bell and the other individuals had been seated and saw a blue Walmart bag on the ground. The officer called out to the men, asking who's bag it was and stating that if no one claimed it he would take it to the police precinct and have it destroyed. Tr. 11/27/23 at 54. Mr. Bell indicated it was his bag, and walked back to where he had left it and picked it up, together with his cell phone, and began to walk away. Tr. 11/27/23 at 59. After he had taken only a few steps, Officer Alarcon told him, as indicated above, "[T]his is your bag, right? Let me see what's in there man, come on," while simultaneously motioning with his arm and hand for Mr. Bell to stop and return to where the officer was standing. Tr. 11/27/23 at 31, 60.

The legal standards that this Court will apply in determining whether Mr. Bell voluntarily consented to the search of his bag were set forth in the Court's recent decision in *Ward-Minor v. United States*, 316 A.3d 438, 444 (D.C. 2024):

> [The government] bears the burden to prove that 'consent was, in fact, freely and voluntarily given.'" *Dozier v. United States*, 220 A.3d 933, 940 (D.C. 2019) (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968)). "This burden cannot

> be discharged by showing no more than acquiescence to a claim of lawful authority." *Bumper*, 391 U.S. at 548-49, 88 S.Ct. 1788.
>
> The burden is on the government "to prove, by a preponderance of the evidence, that [the individual] affirmatively consented to [the] search." *Hawkins v. United States*, 248 A.3d 125, 131 (D.C. 2021). "Because the government often asserts that a defendant consented in cases 'where the police have some evidence of illicit activity, but lack probable cause to arrest or search,'" courts "carefully examine the government's claim that a defendant consented." *United States v. Worley*, 193 F.3d 380, 386 (6th Cir. 1999) (quoting *Schneckloth*, 412 U.S. at 227, 93 S.Ct. 2041).
>
> The voluntariness of consent is a factual question to be judged under the totality of the circumstances. *Henderson v. United States*, 276 A.3d 484, 489 (D.C. 2022); *Basnueva*, 874 A.2d at 369. "The test is subjective, focusing specifically on the consenting person's characteristics and subjective understanding and on whether consent was freely given." *Basnueva*, 874 A.2d at 369 (quotation marks omitted).

The *Ward-Minor* Court also described the standard for appellate review of voluntariness issues as follows, 316 A.3d at 444-45:

> Whether a person consented to a search, and did so voluntarily, are findings of fact that we review for clear error. *See Henderson*, 276 A.3d at 489; *Hawkins*, 248 A.3d at 129. Under the clearly erroneous standard, it is not enough to warrant reversal for a reviewing court to be "convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Dorsey v. United States*, 60 A.3d 1171, 1205 (D.C. 2013) (en banc) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985)). However, while the "'clearly erroneous standard of review is highly constraining,' it does not relieve us of our obligation to conscientiously review the trial court's finding based on the record presented." *Hawkins*, 248 A.3d at 130 (quoting *Dorsey*, 60 A.3d at 1205).

> [W]e will find clear error when "we are 'on the entire evidence ... left with the definite and firm conviction that a mistake has been committed.'" *Hawkins*, 248 A.3d at 131 (omission in original) (quoting *Anderson*, 470 U.S. at 573, 105 S.Ct. 1504).

Applying these standards, as those standards have recently been applied by this Court in *Dozier v. United States*, 220 A.3d 933 (D.C. 2019), and *Jones v. United States*, 154 A.3d 591 (D.C. 2017), the trial court clearly erred in concluding that Mr. Bell voluntarily consented to the search of his bag. The totality of circumstances clearly show that he did not:

- Mr. Bell's interactions with Officer Alarcon occurred at an abandoned worksite in a secluded alley that Officer Alarcon described as a "high crime [area] known for narcotics." Tr. 11/27/23 at 20.
- Officer Alarcon and his partner drove up to the abandoned worksite in a marked police car dressed in full police uniforms, and even before exiting the police car, Officer Alarcon's partner ordered Mr. Bell and the other men nearby to disperse. *Id.*
- Mr. Bell and the other men complied with this directive, and walked a short distance away from the abandoned worksite. *Id.* at 21.
- Officer Alarcon then exited his police car and walked over to the area of the abandoned worksite where Mr. Bell and the other men had been congregating, and observed a blue Walmart bag on the ground. *Id*. at 94.

He then called out to Mr. Bell and the other men, asking who the bag belong to, and threatening to bring the bag back to the police precinct and destroy it if nobody acknowledged ownership of the bag. *Id*. at 23-24.

- While this was going on, Officer Alarcon's partner had also exited the police car and was standing at the other end of the alley, according to Officer Alarcon's body worn camera video, Gov. Ex. No. 1.
- Mr. Bell walked towards Officer Alarcon and stated that he was the owner of the bag, picked up the bag and his nearby cell phone, and began to walk away. Tr. 11/27/23 at 25.
- Officer Alarcon said to Mr. Bell: "[H]ey, lemme see, open that [Walmart bag] for me. How much you got here?" BWC, Gov't Ex. 1 at 15:15:53-54; Tr. 11/27/23 at 25, 60.
- Officer Alarcon then said to Mr. Bell: "[T]his is your bag, right? Let me see what's in there man, come on." BWC, Gov't Ex. 1 at 15:15:58–16:01; Tr. 11/27/23 at 31.
- In response, Mr. Bell removed a Mylar bag containing marijuana from inside the Walmart bag and handed it to the officer. Tr. 1/27/23 at 25.

This sequence of events makes clear that Mr. Bell did not voluntarily hand his bag over to Officer Alarcon, but was responding to the officer's directives to show him what was in the bag. In fact, from the very beginning of the contacts between

Officer Alarcon, his partner, and Mr. Bell, the officers ordered Mr. Bell to take a number of actions, and Mr. Bell followed those orders in every instance. The sequence of events showed coercive police actions, from beginning to end of Mr. Bell's interactions with the officers, not Mr. Bell acting freely and voluntarily.

The circumstances in this case are analogous to the circumstances in *Dozier v. United States, supra*, where this Court found an illegal pat-down of the defendant:

> An innocent person in appellant's situation, we believe, would not have felt free to decline that request after he had been approached by two uniformed and armed police officers who engaged in repeated questioning and escalating requests, culminating with a request to put his hands on the wall for a pat-down, at a time when he was alone, at night, in a secluded alley partially blocked by a police cruiser with two additional officers standing by….
>
> We note other factors … that we think are relevant in evaluating the coercive character of the overall setting of the encounter: that it took place in a "high crime area" and involved an African-American man.

220 A.3d at 941, 942-43 (footnote omitted).

Another analogous case is *Jones v. United States*, *supra*, where two police officers were in a marked police car during the day in an area known for "a high volume of drug sales." 154 A.3d at 593. While driving through an alley, they spotted the defendant who was walking out of the alley holding a Newport cigarette box in his hand. *Id*. at 592-93, 595-96. One of the officers, who was visibly armed and in uniform, then got out of the car, and, noticing that Jones tried to hide the cigarette box behind his back, asked Jones for his name, date of birth, and address, which

Jones provided. *Id.* The officer then asked to see the cigarette box, which turned out to contain cocaine. *Id.* The officer used a cordial tone of voice throughout and the encounter was short, lasting only a minute or two. *Id.* at 595. This Court concluded, viewing the circumstances as a whole, that Jones's encounter with the police was a seizure within the meaning of the Fourth Amendment. *Id*. at 598. This Court held that the cocaine recovered from inside the cigarette box should have been suppressed as the fruit of an illegal search, and reversed his cocaine conviction. *Id.*

As in the analogous cases of *Dozier* and *Jones*, the search of Mr. Bell's bag in this case was not the product of his voluntary actions. The totality of the circumstances show that the trial court clearly erred when it concluded that Officer Alarcon's search of Mr. Bell's bag was the product of Mr. Bell's voluntarily handing the bag to Officer Alarcon.

CONCLUSION

WHEREFORE, for all the reasons set forth above and in his opening brief, Mr. George Bell's motion to suppress should have been granted because the police did not have probable cause to search his bag and he did not voluntarily consent to that search. Mr. Bell's conviction for possession with intent to distribute marijuana should be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief for Appellant George Bell was served electronically on the office of counsel for Appellee, Chrisellen R. Kolb, Esquire, Appellate Division, U.S. Attorney's Office this 6thth day of January 2026.

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