DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 24-CM-387
(Cr. No. 2023-CMD-7556)

Clerk of the Court
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JAMES A. CARTER, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

MOTION FOR SUMMARY AFFIRMANCE

Pursuant to D.C. App. R. 27(c), appellee, the United States of America, respectfully moves for summary affirmance of appellant James A. Carter's conviction for attempted possession of PCP. Carter claims that the trial court erred in denying his motion to suppress his statements and the PCP found on his person. Carter's claim is without merit. Summary affirmance is appropriate because "the basic facts are both uncomplicated and undisputed . . . and . . . the trial court's ruling rests on a narrow and clear-cut issue of law." *Oliver T. Carr Mgmt. v.*

National Delicatessen, Inc., 397 A.2d 914, 915 (D.C. 1979); *accord Watson v. United States*, 73 A.3d 130, 131 (D.C. 2013).[1]

BACKGROUND

By information filed on October 18, 2023, Carter was charged with unlawful possession of a controlled substance (phencyclidine, that is, PCP) (D.C. Code § 48-904.01(d)) (Record on Appeal (R.) 9 (PDF#)). On February 1, 2024, Carter moved to suppress his statements and tangible evidence found on his person; on February 9, 2024, the government opposed (R.21, 31). On March 13, 2024, the Honorable Robert R. Rigsby held an evidentiary hearing and denied Carter's motion (3-13-24 Transcript (Tr.) 75-76). Judge Rigsby conducted a bench trial on March 13-14, 2024, at which time the government orally amended the information to charge attempted possession of PCP; the court found Carter guilty (3-14-24 Tr. 17-18). On March 14, 2024, Judge Rigsby sentenced Carter to 180 days' incarceration, execution of sentence

[1] Pursuant to D.C. App. R. 27(c), if this Court denies summary affirmance, we ask that this motion be treated as our brief on the merits.

suspended as to all but 30 days (R.41). On April 15, 2024, Carter timely noted his appeal (R.43).

The Motion to Suppress

In his February 1, 2024, motion to suppress statements and tangible evidence, Carter claimed his statements were inadmissible both because they were unwarned and the product of custodial interrogation in violation of *Miranda v. Arizona*, 384 U.S. 436 (1984), and because they were involuntary (R.21-23). Although Carter stated in the first sentence of his motion that he was moving to suppress "pursuant the Fourth and Fifth Amendment to the United States Constitution" (R.21), he developed no Fourth Amendment argument, nor did he cite any Fourth Amendment cases (see R.21-23). In its February 9, 2024, opposition, the government contended that Carter's statements were not the product of custodial interrogation and were voluntary (R.31-35). The government did not respond to any Fourth Amendment argument.

The Evidence at the Hearing

Metropolitan Police Department (MPD) Officer Maurice Clifford testified that on October 17, 2023, at approximately 3:30 p.m., he was

driving his marked MPD police car in the east alley of the 4000 block of Kansas Avenue, Northwest, an area known to Officer Clifford to be a high-drug area (3-13-24 Tr. 15-18, 30). MPD Officer Alarcon was with him in the car, and both men were in uniform (*id*. at 30). Officer Clifford observed Carter standing in the alley manipulating an object in his hands (*id*. at 17). Officer Clifford backed up the car and stopped (*id*. at 19, 30). The officers did not use their lights or siren (*id*. at 18). Officer Alarcon rolled down his window and asked Carter, "What do you have in your hand?" (*id*. at 19). At the time, Carter was standing 10 feet from the passenger side of the car (*id*. at 20). Officer Clifford got out of the car and approached Carter; as he did so he detected a strong chemical odor coming from Carter that Officer Clifford recognized from his training and experience as the smell of PCP (*id*. at 23-24). In Carter's hand, Officer Clifford observed a cigarette dipped in amber-colored liquid he believed to be PCP, known in street terms as a "dipper" (*id*. at 24). Carter placed the dipper in Officer Alarcon's hand (*id*. at 24-25). Officer Alarcon asked Carter, "You have a dipper?," to which Carter responded, "Yes, sir" (*id*.

at 24-25). Officer Clifford then placed Carter under arrest for possession of PCP (*id.* at 27, 36).[2]

Carter testified that at approximately 3:30 in the afternoon he was in the alley when he was approached by two police officers in a squad car (3-13-24 Tr. 53). Officer Alarcon, in the passenger seat, asked him what

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[2] The court received excerpts of Officer Clifford's body-worn camera (BWC), Government Exhibits (GX) 1 and 3, and Officer Alarcon's BWC, Defense Exhibit (DX) 2 (3-13-24 Tr. 21-22, 26, 49-50).

In Officer Clifford's BWC (GX.1 and 3), which runs from 15:26:45-15:27:15, Officer Clifford gets out of the driver's seat of the car (15:26:51), walks around the front of the car to the front of the passenger side of the car, where Officer Alarcon and Carter are standing face to face and several feet from each other in a wider portion of the alley (15:26:55-59). Officer Clifford then approaches the right side of Carter as Officer Alarcon stands in front of Carter (15:27:02). Officer Alarcon asks Carter, "You got a dipper?," as Carter holds a brown-colored cigarette in his left hand; Carter's response is inaudible (15:27:01-:05). Officer Clifford then grabs Carter's right wrist as Officer Alarcon says, "Put it here, dude," and Carter uses his left hand to place the brown-colored cigarette in Officer Alarcon's hands (15:27:08). Officer Clifford then begins to handcuff Carter (15:27:14). On the video there appears to be several feet between the passenger side of the police car and the alley fence (see, e.g., 15:26:59).

In Officer Alarcon's BWC, DX.2 (15:26:52-15:27:01), Officer Alarcon gets out of the passenger side of the police car, saying, "What you got in your hand, man?" (15:26:55). There is no audible response from Carter. Officer Alarcon then approaches Carter, without touching him, saying, "What you got in your hand" (15:26:58). There is no audible response from Carter to this second question.

he had in his hand and got out of the car (*id*. at 54). The officers did not have their weapons drawn, and they did not order Carter to stop or remain where he was (*id*. at 61). As Officer Alarcon approached Carter, he asked, "what's that you got in your hand? Is that a dipper?" (*id*. at 55). Carter did not believe he was free to leave because he thought he was "about to be arrested" and the officer was "so close up on me" (*id*. at 51-52). He testified that the second time Officer Alarcon asked him what was in his hand, the officer was reaching out to take what was in his hand (*id*. at 58).

Parties' Arguments at the Hearing

At the start of the hearing, defense counsel argued that Carter "was seized within the meaning of the Fourth Amendment . . . at the time that he responded to questions of the officers . . . [a]nd therefore, *Miranda* kicks in or is triggered" (3-13-24 Tr. 14-15). At the conclusion of the hearing, the government argued that Carter was not in custody within the meaning of *Miranda*, and that his statements were voluntary *(id*. at 68-70). The government did not discuss the Fourth Amendment.

Defense counsel then argued that *Miranda* required "seizure or custody" and that "the real issue here is whether or not [Carter] was

seized . . . for Fourth Amendment purposes" (3-13-24 Tr. 70). Citing *United States v. Mendenhall*, 466 U.S. 544 (1980), counsel claimed that police stopped Carter without reasonable articulable suspicion and lacked probable cause for an arrest *(id.* at 71). But after discussing why there was a seizure, counsel then stated that "within the meaning of the Fourth Amendment [Carter] was seized for purposes of initiating or triggering *Miranda*" and that police interrogated Carter when they asked him what was in his hand (*id.* at 73). In rebuttal, the government argued that neither a *Terry* stop nor a traffic stop constituted *Miranda* custody (*id.* at 75).

The Trial Court's Ruling

The trial court noted that it had heard the testimony and reviewed the evidence, including the video evidence (3-13-24 Tr. 75-76). The court credited Officer Clifford's testimony (*id.* at 76). The court concluded that there was no "custodial interrogation" and denied the motion (*id.*). The court made no reference to a Fourth Amendment claim.

The Trial

MPD Officer Clifford testified consistently with his hearing testimony (3-13-24 Tr. 78-93; 3-14-24 Tr. 4-6). The court received Government Exhibit (GX) 4, two cigarettes recovered from Carter, which Officer Clifford identified, based on his training and experience, as "dippers," cigarettes dipped in liquid PCP (3-13-24 Tr. 91-92). Carter presented no evidence (3-14-24 Tr. 6). The court credited Officer Clifford and found Carter guilty of attempted possession of PCP (*id.* at 17-19).

ARGUMENT

The Trial Court Did Not Err By Denying Carter's Motion to Suppress.

Carter presented a Fifth Amendment *Miranda* claim to the trial court but now briefs a Fourth Amendment claim that he was seized unlawfully. His claim lacks merit because he fails to show plain error, or error at all, in the trial court's denial of his suppression motion.

A. Applicable Legal Principles

1. Fifth Amendment

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court held that, to safeguard the Fifth Amendment right against self-

incrimination, "the prosecution may not use statements . . . stemming from custodial interrogation . . . unless it demonstrates the use of procedural safeguards[.]" *Id.* at 444. To determine if a suspect is in "custody" for *Miranda* purposes, the Court considers whether "there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *New York v. Quarles*, 467 U.S. 649, 655 (1984). "In evaluating whether a person was in custody, 'the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.'" *In re I.J.*, 906 A.2d 249, 256 (D.C. 2006) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984)). In assessing whether a defendant is in *Miranda* custody, the Court considers the totality of the circumstances, including:

> the degree to which police physically restrain the suspect—including whether police use handcuffs; communications from the police to the suspect, and particularly, whether the police have informed the suspect that he is not under arrest and that he may decline to answer questions; whether interrogation occurs in public or in a secluded area; the length of the detention and questioning; whether the police questioning is inquisitorial or accusatory; the show of force or brandishing of weapons by the police; and whether the suspect is confronted with obvious evidence of his guilt or the police already have sufficient cause to arrest, and this is known to the suspect.

Morton v. United States, 125 A.3d 683, 688-89 (D.C. 2015) (cleaned up).

Miranda does not prohibit the introduction of physical evidence obtained as a result of voluntary statements. *United States v. Patane*, 542 U.S. 630, 637 (2004). Thus, although the fruits of an involuntary statement may not be introduced at trial, *id.* at 639-40, the exclusionary rule of *Wong Sun v. United States*, 371 U.S. 471 (1963), cannot be applied to exclude the fruits of voluntary statements, even if those statements were taken in violation of *Miranda*. *Patane*, 542 U.S. at 635-36.

2. Fourth Amendment

"A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer, by means of physical force or show of authority, terminates or restrains his freedom of movement." *Brendlin v. California*, 551 U.S. 249, 254 (2007) (cleaned up). To determine whether a seizure has occurred, the Court "analyzes the totality of the circumstances to determine whether 'the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter.'" *Dozier v. United States*, 220 A.3d 933, 940 (D.C. 2019) (quoting *Florida v. Bostick*, 501 U.S. 429, 439 (1991)). "The hypothetical reasonable person is an innocent person." *Dozier*, 220 A.3d

at 940. "A seizure does not occur simply because a police officer approaches an individual and asks a few questions." *Bostick*, 501 U.S. at 434.

There are a number of factors that can indicate that a seizure has occurred, including, "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). To that list, this Court has

> added factors such as whether (1) the individual is by himself in the area so that the police presence was apparently focused exclusively on him; (2) the encounter is in a place that is secluded or out of public sight; (3) the officers are uniformed or have their weapons visible; (4) the officers have blocked the individual's potential exit paths or means of egress; (5) the officers' questions are accusatory; and (6) the officers repeat accusatory questions in the face of an initial denial, signaling that they have refused to accept the answer given. Conversely, an encounter's "brevity" and the officers' "cordiality" during it are factors that often weigh against finding a seizure.

T.W. v. United States, 292 A.3d 790, 795 (D.C. 2023) (cleaned up). A "brief inquiry in a non-hectoring, conversational tone or casual manner, unaccompanied by intimidating or coercive police conduct, likely would

not rise to the level of a seizure." *Golden v. United States*, 248 A.3d 925, 935 (D.C. 2021).

The exclusionary rule of *Wong Sun*, 371 U.S. at 488, applies to physical or testimonial evidence that is the fruit of an illegal Fourth Amendment seizure. *Dozier*, 22 A.3d at 940. "The test is whether the evidence in question 'has been come at by exploitation of [the primary] illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Id*. (quoting *Wong Sun*, 371 U.S. at 488).

B. Carter Has Forfeited His Fourth Amendment Claim.

When reviewing a preserved challenge to the trial court's denial of a motion to suppress, this Court reviews the trial court's legal conclusions de novo. *Maye v. United States*, 314 A.3d 1244, 1251 (D.C. 2024). In such a case, "the facts and all reasonable inferences therefrom must be viewed in favor of sustaining the trial court ruling." *Plummer v. United States*, 983 A.2d 323, 330 (D.C. 2009). In addition, this Court "must defer to the motions court's findings of fact as to the circumstances surrounding the appellant's encounter with the police and [must] uphold them unless they are clearly erroneous." *Id*. at 330.

On appeal (at 10-13), Carter exclusively briefs a Fourth Amendment claim—that he was seized by police without reasonable articulable suspicion and that his subsequent statements and the tangible evidence recovered from his person must be suppressed as fruits of his illegal seizure. He briefs no Fifth Amendment claim.

In his written motion before the trial court, however, Carter exclusively briefed a Fifth Amendment *Miranda*/voluntariness claim (R.21-23). The government construed the motion accordingly and responded only on Fifth Amendment grounds (R.31-35). At the evidentiary hearing, although defense counsel argued that there was no reasonable suspicion or probable cause, he did so in the context of explaining why there was "seizure," which he evidently equated with "custody" within the meaning of *Miranda* (3-13-24 Tr. 14-15, 70-73). Both the government (see *id.* at 68-70, 75), and, more importantly, the trial court (see *id.* at 75-76), understood that Carter was presenting a Fifth Amendment, not a Fourth Amendment claim, as reflected in the court's sole ruling that there was no "custodial interrogation."

On these facts, Carter forfeited any Fourth Amendment claim by failing to present it clearly to the trial court. *See Comford v. United*

States, 947 A.2d 1181, 1186 (D.C. 2008). To the extent he argued he had been illegally seized, he presented his argument as part of his claim of *Miranda* custody and never put the trial court on notice that he was pressing a free-standing Fourth Amendment claim. *See Hunter v. United States*, 606 A.2d 139, 144 (D.C. 1992) ("Objections must be made with reasonable specificity; the judge must be fairly apprised as to the question on which he is being asked to rule."). Moreover, once the trial court denied his motion on Fifth Amendment grounds—clearly failing to apprehend a Fourth Amendment claim—Carter was obliged to alert the court to its failure to address his claim, which he never did. *See Thorne v. United States*, 582 A.2d 964, 965 (D.C. 1990) ("A party who neglects to seek a ruling on his motion fails to preserve the issue for appeal."). Because it is unpreserved, Carter's Fourth Amendment claim should be reviewed only for plain error. *See Comford*, 947 A.2d at 1186.

"Under the test for plain error, an appellant must show (1) error, (2) that is plain, and (3) that affected [his] substantial rights." *Buskey v. United States*, 148 A.3d 1193, 1204 (D.C. 2016) (cleaned up). "Even if all three of these conditions are met, this court will not reverse unless (4)

the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (cleaned up).[3]

C. Carter Cannot Demonstrate Plain Error, or Error at All.

Carter cannot show that the trial court plainly erred, or erred at all, by failing to discern a Fourth Amendment violation in Carter's brief interaction with police. The evidence credited by the trial court demonstrated that police observed Carter standing in an alley manipulating something in his hand, that Officer Alarcon asked Carter once (or twice according to Officer Alarcon's BWC) what he had in his hand, and that Carter apparently declined to answer (3-13-24 Tr. 17-19; DX.2). As the two officers got out of their car and approached Carter, Officer Clifford noted the distinct chemical smell of PCP emanating from Carter's person (3-13-24 Tr. 23-24). He also observed a cigarette, apparently dipped in amber-colored PCP, in Carter's hand (*id.* at 24). It was only after the police saw the cigarette and smelled the PCP that

[3] In the event the Court concludes that Carter did present his Fourth Amendment claim to the trial court and that the court was required to rule on that claim, we request this Court to remand to the trial court to permit it to make findings and rule on the Fourth Amendment claim in the first instance.

Officer Clifford grabbed Carter's hand and Carter gave the cigarette to Officer Alarcon (*id.*; GX.3 15:27:05).

Contrary to Carter's claim (at 10-13), Carter was not seized when the police approached him and asked whether he had a dipper. There were only two officers who were approaching Carter (GX.1, 3). Although the alley was relatively secluded, it was daylight, and, despite Carter's claim (at 11-12) that he was "effectively boxed . . . in," the officers did not appear to block his exit to the left or right down the alley (3-13-24 Tr. 15-18, 30-31; GX.1). The officers were in uniform, but they drew no weapons, issued no commands, and did not touch Carter (3-13-24 Tr. 30, 61; GX.1, 3; DX.2). The interaction was brief, lasting no more than 10-15 seconds, and was cordial (GX.1). Although Officer Alarcon asked Carter once (or twice) what he had in his hands, Carter did not appear to respond to the question, so there was no reason for Carter to conclude that police were refusing to accept his answers and would compel compliance (3-13-24 Tr. 19; DX.2). Nor were the questions accusatory in themselves (3-13-24 Tr. 19; DX.2). Finally, although the police car backed up to encounter Carter, and he testified that he thought he was about to be arrested (see 3-13-24 Tr. 30, 51-52), his subjective view is not determinative here; Carter knew

that police had spotted him holding obvious contraband in his hands, and he could reasonably surmise (correctly) that he was about to be arrested. The Fourth Amendment inquiry considers the perspective of a reasonable *innocent* person, *Dozier*, 220 A.3d at 940, and Carter was far from that.[4]

Carter urges (at 12) that he was seized because he "compli[ed]" with police authority before the officers could smell the PCP or see the dipper in his hand. But submission to a show of authority can constitute a seizure only if there is an antecedent show of authority. *Crews v. United States*, 263 A.3d 128, 136 (D.C. 2021). There was no show of authority here, where, in their brief encounter with Carter, police asked him two apparently unanswered questions in a non-hectoring tone and engaged in no coercive police conduct. *See Maye*, 314 A.3d at 1254-56 (no seizure when two officers in uniform approached defendant on public sidewalk

[4] Carter relies (at 12) on *Golden*, 248 A.3d 925, but that case does not aid him. In *Golden*, police asked the defendant if he was armed, he said no, and then police asked him three times to prove his assertion by showing them his waistband. *Id.* at 932. These repeated manifestations of police disbelief transformed the encounter into a seizure. *Id.* at 940 ("By essentially saying, 'prove it,' [the officer] was not 'merely' approaching an individual on the street and asking a few questions."). Here, by contrast, Carter failed to respond to Officer Alarcon's one (or two) questions, and the questions themselves lacked an accusatory implication.

after seeing defendant manipulating something in his waistband, asked if they could speak to defendant, asked him to take his hands out of his pocket, and asked for consent to pat him down); *Brown v. United States*, 983 A.2d 1023, 1025-26 (D.C. 2009) (no seizure when officer approached defendant and twice asked, "Do you have any guns, drugs or narcotics on you," and there were no threatening gestures, orders, or intimidation).

Furthermore, the only potential act of compliance was when Officer Clifford grabbed Carter's hand and Carter handed Officer Alarcon the cigarette. Officer Clifford's testimony, which the trial court credited (3-13-24 Tr. 76), showed that by that time, Clifford had already smelled PCP and seen the cigarette (*id.* at 24). And at that point, police had reasonable articulable suspicion to stop Carter on suspicion of possession of PCP. *See Griffin v. United States*, 878 A.2d 1195, 1199 (D.C. 2005) (reasonable articulable suspicion to stop defendant where police smelled "a very strong odor of marijuana" coming from defendant).

Indeed, they had probable cause to arrest him. *See Minnick v. United States*, 607 A.2d 519, 525 (D.C. 1992) (distinctive smell of PCP alone was sufficient probable cause to search occupied vehicle); *see also Butler v. United States*, 102 A.3d 736, 741-42 (D.C. 2014) (police officer

had probable cause to arrest defendant for drug-related offense where he smelled the strong odor of marijuana coming from defendant's car and defendant was sole occupant of the vehicle); *Wilson v. United States*, 802 A.2d 367, 372 (D.C. 2002) (reasonable suspicion grounded in flight in high-crime area turned into probable cause when an officer, familiar with the odor and packaging of PCP, smelled PCP coming from defendant's person and observed tin foils of PCP being removed from pocket of person with defendant). In any event, once Officer Alarcon asked Carter if he had a dipper, and Carter answered, "yes, sir," (see 3-13-24 Tr. 24-25), police had ample probable cause for an arrest. *See Nixon v. United States*, 870 A.2d 100, 105 (D.C. 2005) (police obtained probable cause to arrest defendant for possession of a controlled substance at the "instant" he admitted he had "one little bag" in his possession, which officer understood from experience to mean possession of illegal drugs).

In sum, there was no illegal seizure, and because there was no Fourth Amendment violation, there was no basis upon which the court could exclude Carter's statements or the contraband found on his person as fruits of an illegal seizure. *See Dozier*, 220 A.3d at 940. For these

reasons, Carter cannot demonstrate error, much less plain error, in the denial of his suppression motion. *See Buskey*, 148 A.3d at 1204.[5]

CONCLUSION

WHEREFORE, the government respectfully submits that the judgment of the Superior Court should be summarily affirmed.

Respectfully submitted,

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[5] Carter's claim also lacks merit because he cannot show that his is the "extreme situation in which the defendant's substantial rights are so clearly prejudiced that the very fairness and integrity of the trial is jeopardized." *Malloy v. United* States, 186 A.3d 802, 816 (D.C. 2018).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of November, 2024, I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Joel R. Davidson, Esq., jrdnbdty@verizon.net.

/s/
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