UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0913

September Term, 2014

DONZEL MARCUS SELLMAN

v.

STATE OF MARYLAND

Graeff,
Hotten,
Arthur,

JJ.

Opinion by Graeff, J.
Dissenting Opinion by Arthur, J.

Filed: August 14, 2015

Donzel Marcus Sellman, appellant, was convicted, pursuant to an agreed statement of facts, in the Circuit Court for Anne Arundel County of possession with intent to distribute cocaine and possession of a firearm during a drug trafficking crime. The court sentenced appellant to ten years on the conviction for possession with intent to distribute, and it imposed a concurrent sentence of five years, without the possibility of parole, on the conviction for possession of a firearm.

On appeal, appellant presents one question for our review, which we have rephrased slightly, as follows:

> Did the circuit court err in denying appellant's motion to suppress evidence obtained as a result of a frisk of his person?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

At the April 2, 2014, suppression hearing, Corporal William Daughters testified that, on November 12, 2013, he was on patrol in Anne Arundel County with a recruit from the training academy, Officer Dan Kramer. At approximately 1:49 a.m., the two officers were checking out a high crime apartment complex in the area of Southbridge Drive in Glen Burnie, where there had been a shooting, thefts from parked cars, and drug crimes regularly occur. As they approached the intersection of Southbridge and Winborne Drive, they observed a vehicle traveling at a high rate of speed make an abrupt stop at the intersection.

As the officers drove past several apartment buildings, they observed an individual, later identified as appellant, moving from a dark area on the side of the buildings where

there was no entryway. When appellant saw the police cruiser, "[h]is head turned towards [the] car and then he came to an abrupt stop, and then quickly, he started to turn to his right, but then stopped and then watched [the] car as it went by." After the cruiser had passed, appellant "took up a normal pace again and walked out toward the roadway," toward the parking area. He appeared to be walking toward several parked cars on the shoulder of the road. Corporal Daughters stated that there is usually very little pedestrian traffic in that apartment complex at that time of night.

A few moments later, Corporal Daughters saw appellant get into the car they had seen at the intersection earlier. Corporal Daughters decided to follow the car because he thought that it was odd that appellant was walking around the apartment complex at that time, and that, "instead of everyone getting into a car in one location, [they picked] somebody up around the corner."

The officers turned their cruiser around and followed the vehicle. They saw that the vehicle had a broken rear tail light and that the light above its license plate was hanging by a wire. They initiated a traffic stop.

Corporal Daughters approached the driver's side window of the vehicle, and Officer Kramer approached the passenger side window. Using his flashlight, Corporal Daughters was able to see that there were four people in the car. He requested that the driver, Samantha Gillespie, provide him with her license and the vehicle registration. She advised that she had her license, but she did not know where the registration was located because the vehicle belonged to a friend. When asked why she came to the apartment complex, Ms. Gillespie stated that she was picking up the passenger seated in the right rear seat of

the vehicle, Ms. Queen, who lived in the apartment complex. Corporal Daughters asked Ms. Queen if she had identification indicating that she lived in the apartment complex, but Ms. Queen stated that she did not. Corporal Daughters was familiar with Ms. Queen from a previous encounter, and he believed she lived at a different address. During this encounter, appellant "was sitting completely rigid in his seat, he had his hands on his knees and was looking straight ahead and never turned his head once."[1]

The officers returned to their cruiser and ran Ms. Gillespie's information, conducting a "warrant check, a stolen check on the car" and investigating "MVA information on the vehicle and Ms. Gillespie." Nothing was discovered, and Corporal Daughters returned to the vehicle and issued a warning to Ms. Gillespie. At that time, he asked her if there were any "guns, bombs, weapons, [or] dead bodies in the vehicle." When Ms. Gillespie answered in the negative, Corporal Daughters requested permission to search the vehicle. Corporal Daughters testified that Ms. Gillespie responded: "I don't care."

Before attempting to search the vehicle, Corporal Daughters decided to identify everyone in the car, given the criminal history of the apartment complex and the "somewhat conflicting story about who lived in the apartment complex." After obtaining identification from Ms. Queen and the person seated in the passenger seat of the vehicle, Corporal Daughters requested appellant's identification. Appellant responded that he did not have an identification card, but he stated that his name was Marcus Neal Saunders and his date

[1] Ms. Gillespie originally indicated that only Ms. Queen lived in the apartment complex, but then she stated that appellant, who was seated in the left rear seat of the vehicle, lived in the apartment complex as well.

of birth was July 12, 1982. When asked if he lived in the apartment complex, appellant indicated, contrary to Ms. Gillespie's statement, that he did not live there. Corporal Daughters stated that, during this conversation, appellant remained rigid in his seat, but he did turn toward Corporal Daughters to relate the name and date of birth.

Corporal Daughters returned to the cruiser and ran warrant, criminal history, and MVA information searches on the names of the three passengers. The passengers did not have any warrants, but there was no record of Marcus Neal Saunders in the police database, which Corporal Daughters found to be "unusual." At this time, he contacted a nearby officer, Corporal Miller, and requested that he check the parking lot to see if any cars had been broken into.

Corporal Miller arrived at the scene several minutes later. The three officers then returned to the car. Corporal Daughters asked appellant if he had given his real name, and appellant responded that he had. Corporal Daughters told appellant that nothing had come back, and appellant indicated that he had never had a driver's license or been arrested, and he never had obtained an identification card. Corporal Daughters insisted, however, that "[s]omething should come back."

Corporal Daughters prepared to search the car pursuant to Ms. Gillespie's consent. Because he had been told "conflicting stories about who had been picked up where [and] whether anybody at all lived in the" apartment complex, and because it "was odd that they were driving through the parking lot, picking people up on foot at that hour of the morning," Corporal Daughters "wanted to make sure none of the passengers were carrying any weapons." Corporal Daughters frisked appellant, and he discovered a gun in appellant's

waistband. A subsequent search of appellant revealed substantial quantities of PCP, cocaine, oxycodone, and heroin.[2]

Officer Kramer, who was no longer a police officer by the time of the hearing, also testified. He confirmed the testimony given by Corporal Daughters.

Ms. Gillespie also testified. She stated that there was no damage to the lights on the back of the vehicle she was driving, and she denied giving consent for Corporal Daughters to search it.

During argument, the prosecutor described the frisk, the only action at issue on appeal, as follows:

> So now we have, two o'clock in the morning, in a dark area of an apartment complex, in Glen Burnie, which they've already indicated is a high crime area. They have three police officers, they had four people there. So in order to search the vehicle, -- they can't search the vehicle with the individuals inside, they have to ask all the individuals to come out.
>
> So in order to do that Officer Daughters clearly indicated that the standing operating procedure was as they come out, they would search them to make sure that they don't have any weapons on them, to make sure that when they're standing off they can't pull out a weapon – again, they're still outnumbered – and do something while one – because you have now, one officer searching and two against four standing outside.
>
> But in any event, Your Honor, I think at this point in time the fact of what they observed prior to him in the parking lot, then in the car while they were questioning him, and then getting absolutely no response on Marcus Neal Saunders, they – and in a high crime area – they have articulated reasonable suspicion. They have given articula[ble] suspicion in order to do a Terry[3] pat down for officer safety, which they would have normally had

[2] The Statement of Probable Cause in the record indicates that, at that point, appellant provided his correct name. The police then discovered that appellant previously had been convicted of drug distribution.

[3] *Terry v. Ohio*, 392 U.S. 1 (1968).

> to have done under standard operating procedure in order to search the vehicle anyway, in order to get people out.
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> ***
>
> But, more importantly in order to search, not only understanding operating procedure in order – to have whenever somebody comes out to search the vehicle, but also for officer safety, which the officers clearly indicate in the police report, for the officers' safety they did do the pat down of the Defendant. And I believe with that, Your Honor, the State has fulfilled its obligations, in order to stop the vehicle, to extend the search, and also to do a pat down of the defendant.

The prosecutor further argued that the officers were outnumbered "four-to-three" and "for officer safety late at night, and in order to search a vehicle they have to make sure that they are safe and that they've patted the individuals down to make sure there's no weapons they could use on them."

Defense counsel argued as follows:

> And in asking Officer Daughters on cross, where in the report, where in your testimony does it say there's any risk here? Anything about an armed person, anything about dangerousness? There's nothing. Not in his testimony. Nothing.
>
> At the beginning of his testimony there's a general overview of this being a high crime area, problems there with drugs, problems there with some felonies, problems there with some guns, but all – and again, the burden is on the State to show that – again, just a very vague and general overview. There's nothing about what was going on in the month that this happened. There's no testimony about what was going on the month prior, the week prior.
>
> Unlike a lot of cases here, there's no evidence or testimony of, well we had a call earlier in the evening for a burglary in this area, we had a call earlier in the evening for a robbery, we had a call earlier in the evening for a drug deal. No testimony whatsoever that any crime was afoot on this date or any date near to thus. So again, I think those factors weigh in, in favor of my client.

Counsel argued that "there was no reasonable articulable suspicion," other than that appellant was "acting nervous. . . . stopping abruptly and looking wide-eyed, – or whatever it was – to the police, when they first see him right before he gets in the car." Counsel asserted: "All of that being nervous behavior that the case law clearly indicates is not enough or not deemed enough for reasonable articulable suspicion" that appellant was "an armed person."

On April 22, 2014, the circuit court issued its ruling. The court first found that the initial stop of the vehicle was permissible, stating that it believed the testimony of the officers that the tag light of the vehicle was damaged. Moreover, the court believed the testimony of the officers that they obtained consent to search the vehicle from Ms. Gillespie. The court then stated the following:

> I also found the officers credible when they described [appellant] in the manner, in which he was seated in back of the vehicle, how he appeared to be nervous, how he was rigid, how he was looking ahead.
>
> And taking that in conjunction with his earlier behavior, coming out of the dark, being in a high-crime area; there seemed to be some conflict as to who lived in the area. I'm not sure why there was that conflict in regards to the testimony, but certainly there was that.
>
> ***
>
> I do find that given the fact that [the officers] had consent to search the vehicle;
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> They were outnumbered at that point in time;
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> They were in a high-crime area it was late at night;
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> [Appellant] had come from a dark area;
>
> His behavior in the vehicle led to some suspicion on their part; and

I do find that they had a reasonable articulable suspicion at that point to do the pat down;

***

So I deny [appellant's] motion based on those reasons.

As indicated, appellant then was convicted, pursuant to an agreed statement of facts, to possession with intent to distribute cocaine and possession of a firearm during a drug trafficking crime. This appeal followed.

STANDARD OF REVIEW

"In reviewing a trial court's denial of a motion to suppress evidence, we base our decision solely upon the 'facts and information contained in the record of the suppression hearing.'" *Brewer v. State*, 220 Md. App. 89, 99 (2014) (quoting *Longshore v. State*, 399 Md. 486, 498 (2007)). "We accept the findings of fact and credibility determinations of the circuit court unless they are clearly erroneous, and we examine the evidence and inferences reasonably drawn from the evidence in the light most favorable to the party prevailing before the circuit court." *Wallace v. State*, 219 Md. App. 234, 243 (2014) (citing *McFarlin v. State*, 409 Md. 391, 403 (2009)). Nonetheless, "[w]e review the circuit court's legal conclusions *de novo* and 'exercise our independent judgment as to whether an officer's encounter with a criminal defendant was lawful.'" *State v. Donaldson*, 221 Md. App. 134, 138 (quoting *Brown v. State*, 397 Md. 89, 98 (2007)), *cert. denied*, 442 Md. 745 (2015).

DISCUSSION

Appellant contends that the court erred in denying his motion to suppress the evidence obtained from the frisk of his person. He does not dispute that the police had the right to stop the vehicle in which he was riding. Rather, he argues that the frisk of his person was unconstitutional because the police did not have reasonable suspicion to believe that he was armed and dangerous, asserting that "there was no evidence that [he] had committed a crime and no reason to believe that [he] was carrying a weapon." In his view, the only facts apparent to the officers were that he was "in a high crime area late at night, appeared nervous and rigid, and gave a name that was not in the criminal or driver database," and these facts do not support an inference that he was armed and dangerous.

The State contends that the circuit court correctly denied appellant's motion to suppress, asserting that the police had reasonable suspicion to believe that appellant was armed and dangerous, and therefore, they had the requisite suspicion to conduct a frisk of appellant. In support, the State points to the facts that appellant was seen late at night, in a high-crime area, emerging from a dark area of the apartment complex, he was exhibiting nervous, suspicious behavior, including giving a false name, and the police indicated concern that he may have attempted to break into the parked cars that he was walking toward.

In *Terry v. Ohio*, 392 U.S. 1, 23, 39 (1968), the Supreme Court stated that the Fourth Amendment does not bar all searches and seizures, but only "unreasonable" searches and seizures. The Court held that it is reasonable for the police to conduct a "search for weapons for the protection of the police officer, where he has reason to believe that he is

dealing with an armed and dangerous individual." *Id.* at 27. To be entitled to conduct such a frisk for weapons, however, the officer "must be able to point to specific and articulable facts which, taken together with rational inferences for these facts, reasonably warrant the intrusion." *Id.* at 21. The Court explained:

> When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of possible harm.

Id. Accord Arizona v. Johnson, 555 U.S. 323, 327 (2009) (to conduct a lawful frisk, "the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous").

Reasonable suspicion is a "'less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence.'" *Padilla v. State*, 180 Md. App. 210, 221 (quoting *State v. Nieves*, 383 Md. 573, 589 (2004)), *cert. denied*, 405 Md. 507 (2008). When determining if reasonable suspicion exists to support an officer's determination that a suspect is armed, this Court must consider "'the totality of the circumstances – the whole picture.'" *Harrod v. State*, 192 Md. App. 85, 102 (2010) (quoting *United States v. Sokolow*, 490 U.S. 1, 8 (1989)), *rev'd on other grounds*, 423 Md. 24 (2011). "This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

Accord Butler v. State, 214 Md. App. 635, 651 (2013). We "assess the evidence through the prism of an experienced law enforcement officer, and 'give due deference to the training and experience'" of the officer involved in the interaction. *Holt v. State*, 435 Md. 443, 461 (2013) (quoting *Crosby v. State*, 408 Md. 490, 508 (2009)).

The reasonable suspicion standard, however, is an objective one; "the officer's subjective state of mind is not considered." *United States v. George*, 732 F.3d 296, 299 (4th Cir. 2013), *cert. denied*, 134 S.Ct. 1530 (2014). Thus, even if, as appellant argues, he was frisked pursuant to a "standard operating procedure" that Anne Arundel County police officers employ every time they search a car, that does not invalidate the frisk because we look, not to the subjective intent of the individual officers, but to whether a reasonable officer would believe that appellant posed a danger. *See United States v. Patton*, 705 F.3d 734, 738 (2013) (court looks not to officer's stated reason for the frisk, but whether a reasonable person would believe safety in danger); *State v. Lemert*, 843 N.W.2d 227, 231 (Minn. 2014) (because officer's motive does not invalidate objectively justifiable behavior, a frisk may be lawful even if the office improperly conducted it based on departmental policy as opposed to assessment of circumstances).

Here, based on an objective review of the totality of the circumstances, we conclude that Corporal Daughters' frisk of appellant was supported by reasonable suspicion that appellant was armed and dangerous. Initially, we note that the stop occurred late at night in a high-crime neighborhood, factors that weigh in favor of a finding that reasonable suspicion existed. Although these facts, alone, are not sufficient to conduct a frisk, they are relevant factors in the totality of the circumstances analysis. *George*, 732 F.3d at 296

(weighing stop late at night in a high crime area as factors supporting a conclusion that was reasonable suspicion for a frisk). Moreover, appellant's actions were suspicious. He emerged from a dark area of the apartment complex where there was no entryway, and he stopped abruptly when he saw the police car. When the car that he subsequently entered was stopped, appellant sat rigidly in his seat during the traffic stop. *See Underwood v. State*, 219 Md. App. 565, 570-71 (2014) (considering the defendant's nervous behavior, including his "extraordinary rigidity" during a traffic stop, as part of the totality of the circumstances justifying a *Terry* stop and frisk). In addition, the occupants of the car gave inconsistent statements, and appellant gave a name that returned no MVA records, which Corporal Daughters testified was unusual. *See United States v. Richmond*, 641 F.3d 260, 262 (7th Cir. 2011) (when no record of a person's name is discovered, "an officer might naturally be apprehensive of the potential for dangerous reaction to confrontation"); *United States v. Pack*, 612 F.3d 341, 361 (5th. Cir.) (conflicting stories were a part of the totality of the circumstances providing reasonable suspicion), *cert. denied*, 131 S. Ct. 620 (2010).

The totality of these circumstances, viewed in the light most favorable to the State, was sufficient to arouse reasonable suspicion, in the eyes of an experienced law enforcement officer, that appellant had committed or was planning to commit a crime. Indeed, Corporal Daughters asked another officer to check the parking lot, in the area where there had been thefts from cars, to see if any cars had been broken into. The concern that appellant had broken into cars supported a reasonable suspicion that he was armed. *See United States v. Griffin*, 696 F.3d 1354, 1359-60 (11th Cir. 2012) (underlying crime of theft formed part of totality of the circumstances indicating the defendant may have been

armed and dangerous), *cert. denied*, 134 S. Ct. 956 (2014); *United States v. Bullock*, 510 F.3d 342, 347 (D.C. Cir. 2007) ("[C]ar theft is a crime that often involves the use of weapons and other instruments of assault that could jeopardize police officer safety, and thus justifies a protective frisk under Terry to ensure officer safety."), *cert. denied*, 553 U.S. 1024 (2008).

These facts, considered together, created a reasonable suspicion that appellant was armed and dangerous. Accordingly, Corporal Daughters had the right to frisk appellant to protect himself and others at the scene, and the circuit court properly denied appellant's motion to suppress.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

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I respectfully dissent. It is painfully obvious that the officers frisked appellant Sellman not because they were acting upon reasonable suspicion that he was armed and dangerous, but because they routinely conduct suspicionless searches of every passenger in every car they search. The majority devises a post hoc rationale, under which it justifies the frisk on the premise that a law enforcement officer could have reasonably suspected that Sellman was armed and dangerous (even though these particular officers did not). Even with the benefit of hindsight, however, I would conclude that the facts do not generate reasonable suspicion for a frisk.

I concede that Sellman's conduct may have generated reasonable suspicion for a *Terry* stop. Most notably, the officers observed him, late at night, walking away from an unlighted part of the apartment building where there were no exits or entrances. The officers, however, did not rely on *Terry* to effectuate the stop. Instead, they waited until he got into a car and then conducted a pretextual *Whren* stop of the car and its passengers. When the *Whren* stop turned up no basis to detain anyone, the officers did not allow the driver to leave, as they are ordinarily required to do. *See Ferris v. State*, 355 Md. 356, 372 (1999); *accord Rodriguez v. United States*, — U.S. —, 135 S.Ct. 1609, 1614 (2015) ("Authority for a seizure thus ends when tasks tied to the traffic infraction are – or reasonably should have been – completed") (citing *United States v. Sharpe*, 470 U.S. 675, 686 (1985)). Instead, they asked for her "consent" to search the car. They then searched Sellman because, in the words of one of the officers, it is their "standard operating procedure" to search every passenger before they conduct a vehicle search.

In its after-the-fact defense of the officers' actions, the majority cites a number of factors that would justify reasonable suspicion that Sellman had committed or was about to commit a crime. For example, Sellman gave the officers a fake name, and the driver and the passengers gave conflicting accounts about who lived where. I see no reasonable basis, however, to infer that a passenger is armed and dangerous solely because he or his companions act suspiciously or are not entirely forthright with the police.

I personally would put little or no weight on the evidence that Sellman looked straight ahead, sat rigidly, and said nothing while he was being detained. When a person is being detained by several armed police officers late at night, it is a wise policy to sit still and to say nothing unless and until the officers ask a question or issue a command. In any event, it proves too much to say that Sellman was acting suspiciously because he sat still and said nothing. If Sellman were fidgeting or trying to communicate with the other passengers, the officers could regard that as suspicious as well.

The majority points out that the officers frisked Sellman late at night in a high-crime area where car thefts had reportedly occurred at some unspecified point in the past. The record contains nothing, however, to connect Sellman with any such crimes. A person does not forfeit his or her Fourth Amendment rights by living in or passing through a "high-crime area." *See United States v. Griffin*, 589 F.3d 148, 158 (Gregory, J., dissenting) (stating that high-crime areas cannot serve as "endpoint" for *Terry*-frisk analysis, "[o]therwise, we relegate those unfortunate enough to live in such 'high-crime areas' to second-class citizenship for purposes of the Fourth Amendment").

In the circuit court, the State justified the frisk on the ground that the (armed) police officers were "outnumbered," by the slight margin of four-to-three, by the civilians. Although the majority does not dwell on this rationale, it is worth noting that three of the four civilians were women and that one of the women was pregnant. In my view, this rationale is unworthy of credence, and I concur with the majority's decision not to rely on it.

As I see it, this case boils down to the question of whether reasonable suspicion to believe that a person may have committed a crime equals reasonable suspicion to believe that the person is armed and dangerous. Granting the fullest possible recognition to the difficult and dangerous job that police officers have to do, I do not agree that the first equals the second. Consequently, I would reverse the judgment.