UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 965

September Term, 2016

STATE OF MARYLAND

v.

JASON LOUIS FRIDAY

Eyler, Deborah S.,
Kehoe,
Shaw Geter,
JJ.

Opinion by Eyler, Deborah S., J.

Filed: December 19, 2016

A grand jury in the Circuit Court for Montgomery County indicted Jason Louis Friday on one count of possession with intent to distribute PCP. He moved to suppress evidence seized by the police in a warrantless search of his car. After the court granted his motion, the State noted this appeal, asking whether the suppression ruling was in error.[1] We conclude that it was, and shall reverse the court's order.

FACTS AND PROCEEDINGS

The suppression hearing was held on June 24, 2016. The State called Montgomery County Police Department ("MCPD") Officers Nick Bonturi, Shane Kirk, and James Walls. Friday did not testify or call any witnesses. Viewed in the light most favorable to Friday as the prevailing party, the evidence was as follows.

On January 20, 2016, Officers Bonturi, Kirk, and Walls were assigned to the MCPD 6th District Community Action Team, a "proactive unit" that patrols Montgomery Village Shopping Center and Lake Forest Mall, which are "high crime, high drug, high violent crime" areas. Around 3:30 p.m., Officer Bonturi was in a marked police cruiser equipped with a "dash-cam" video recording device. He was parked on a surface lot across the street from a BP gas station. At the same time, Officer Kirk, also in a marked police cruiser, was parked on a surface lot near the BP gas station. According to Officer

[1] Under Md. Code (1973, 2013, Repl. Vol., 2015 Supp.), section 12-302(c)(4) of the Courts and Judicial Proceedings Article ("CJP"), the State may appeal from an order granting a motion to suppress evidence. Such an appeal "shall be heard and the decision rendered within 120 days of the time that the record on appeal is filed in the appellate court." CJP § 12-302(c)(4)(iii). In this case, the record was filed on August 24, 2016. Therefore, our decision must be filed on or before December 22, 2016.

Kirk, it was routine for members of the "proactive unit" to park at these locations to "look for cars that we think would be potential, good candidates to stop, good cars to stop."

Officer Bonturi noticed a man pumping gas at the BP station. Using binoculars, he read the license plate number on the man's car. He then "ran" the number through the National Crime Information Center ("NCIC") computer system, which displays the driver's license of the registered owner of a vehicle. The system showed that Jason Louis Friday was the registered owner of the car. From the picture on Friday's driver's license, Officer Bonturi could tell that he was the man pumping gas. The driver's license showed that Friday's home address was in Olney, which is not in that vicinity.

Officer Bonturi then "ran" Friday's name through the "E-Justice System," an MCPD "report writing system" that MCPD officers are trained to rely on. According to Officer Bonturi, the "E-Justice System" "keeps track of all of the [police] reports that have been semi-recently written[,]" and includes information from the prior "three or four years or so." The "E-Justice System" displayed a screen that gave a physical description of Friday, an address in Rockville, his phone number, and his driver's license number. A header on the screen, in a larger font, read: "Armed Approach With Caution Drug User/Seller Use Universal Precautions."

Officer Bonturi also looked up Friday's name in the Maryland Judiciary's computerized "Case Search" system. That search showed that in the past few years, Friday had some "weapons charges and some drug related charges to include [possession

with intent to distribute] charges." Officer Bonturi could not recall whether "they were charges or convictions."[2]

As he was watching Friday pumping gas, Officer Bonturi noticed that the windows of his car were tinted. He could not tell from his vantage point whether the tint was so heavy as to be illegal.[3] He radioed this information to Officer Kirk. When Friday left the gas station, he drove past Officer Kirk on an access road. Officer Kirk radioed Officer Bonturi that the "tint [was] too dark, [was] illegal."

Officer Bonturi drove out of the parking lot and began following Friday. He did not activate his emergency equipment. He could not recall whether he was directly behind Friday's vehicle or "one or two cars behind [him]." He was convinced that Friday had seen him. He saw Friday drive into the Ridgeline residential development, on Clubhouse Road. Ridgeline is a "dead end neighborhood" in that there are only two points of ingress and egress: the one Friday used and another one farther east on

[2] We can take judicial notice of the fact that when a criminal charge has been adjudicated, Case Search shows not only the charge but also the disposition, if there has been a disposition. On January 20, 2016, Case Search would have shown that Friday had pending charges against him for possession of a controlled dangerous substance with intent to distribute, filed on January 8, 2015, and illegal possession of a regulated firearm and wearing, carrying, and transporting a handgun in a vehicle, filed on February 5, 2015. Because those charges were not disposed of until August 3, 2016, Officer Bonturi would not have seen any disposition of those charges when he reviewed the Case Search database on January 20, 2016.

[3] Md. Code (1977, 2012 Repl. Vol., 2015 Supp.), section 22-406(i)(1)(i) of the Transportation Article ("Transp.") prohibits the operation of a motor vehicle with "any tinting materials added to the window after manufacture of the vehicle that do not allow a light transmittance through the window of at least 35%."

Clubhouse Road. Officer Bonturi testified that because he knew that Friday did not live in Ridgeline (as his home address was in Olney) he suspected that Friday's purpose in driving into Ridgeline was to see whether he was being followed and to get the police off his tail if he was. Officer Bonturi did not follow Friday into Ridgeline. Although, as he put it, he already had "[probable cause] to stop [Friday]" based on the window tint violation, he decided not to carry out a traffic stop at that time. Instead, he decided to wait to see if Friday "came out of the [Ridgeline] neighborhood relatively quickly" because that would "confirm that [Friday] was trying to get away from [the police] . . . add[ing] . . . one more block to my reasonable suspicion." Officer Bonturi parked his cruiser near the easternmost entrance to Ridgeline. Officer Kirk parked his cruiser near the entrance Friday had used to drive into Ridgeline.

About "1 to 2 minutes" later, Officer Kirk saw Friday drive out of Ridgeline the same way he had entered and turn left on Clubhouse Road. Officer Kirk radioed this information to Officer Bonturi. Officer Bonturi considered this to be additional evidence that Friday was trying to "evade" the police. He decided to "make a traffic stop as quickly as [he] [could] get behind [Friday] safely through traffic." He testified that he tried to catch up to Friday's vehicle, but did not activate his lights or siren.

The video from Officer Bonturi's dash-cam begins at this point. There is no audio at the start because audio recording only is triggered when the officer activates the emergency equipment or manually presses the record button.

As the hearing judge later found, Officer Bonturi's description of what he saw as he followed Friday was vague and not fully consistent with what his dash-cam video shows. According to Officer Bonturi, Friday turned left on Montgomery Village Avenue from Clubhouse Road, and then "accelerat[ed] very quickly," although the officer could not tell whether Friday was speeding. Later in his testimony, on questioning from the court, Officer Bonturi said he thought Friday was speeding, and also thought that Friday had sped up because he saw the cruiser following him. The dash-cam video shows that when Officer Bonturi made the same left turn on Montgomery Village Avenue, he was not right behind Friday. Other vehicles were between Officer Bonturi and Friday, and for most of the drive on that road Friday's car is hardly visible.

Officer Bonturi testified that he saw Friday turn right from Montgomery Village Avenue onto Brassie Place, an entry road into an apartment complex that has a surface parking lot. Friday's car can be seen on the dash-cam video making that turn. Officer Bonturi also turned right on Brassie Place. At that point, he activated his emergency lights, triggering the audio recording on the dash-cam. The time on the video is 15:41:14. As Officer Bonturi entered Brassie Place, he radioed Officers Kirk and Walls to "get ready for a bailout." When the emergency lights are activated, Friday is on a very short access road. He then turns right into the surface lot and right again into a parking space.

The dash-cam video shows that Officer Bonturi parks his cruiser behind Friday's car at 15:41:23. Friday's brake lights are still on. Two seconds later (15:41:25) his brake lights go off. Officer Bonturi testified that, although it is not visible on the video, there is

a hedge in front of the parking place, so Friday was blocked in. The driver's side door to Friday's car cannot be seen on the dash-cam video. Officer Bonturi testified that Friday had opened the door, that his left leg was out of the car, that his right leg was "coming out of the vehicle," and that he appeared to be "turning towards" him. Officer Bonturi explained that, given Friday's weapons history and the fact that it is "not normal for someone to get out of the car" during a traffic stop, he feared that Friday intended to "harm [him] . . . with a knife, gun, anything."

The dash-cam video shows that at 15:41:25, the second that Friday's brake lights go off, Officer Bonturi is outside his cruiser with his gun drawn. Friday has not emerged from his car. Officer Bonturi points his service weapon at Friday and shouts, "Stay in the car. Stay in the car." He orders Friday to put his "hands out the window," then orders him to get out of the car, turn to face away from him, and put his hands in the air. At 15:41:44 Friday has his hands in the air and Officer Bonturi holsters his weapon. He quickly approaches Friday, and frisks him. The officer begins to handcuff Friday at 15:41:55, and the handcuffs click on at 15:42:00.

As he is handcuffing Friday, the first thing Officer Bonturi asks is, "Why you driving like that dude?" and "What do you got on ya man?" Friday responds, "Nothing." Officer Bonturi asks, "Why you freaking out?" and "Why you driving like that?" Friday replies, "cos." Officer Bonturi said, "Just cos?" and Friday responds, "I smell like weed." Friday then says he had "smoked some weed." Officer Bonturi replies, "So that's why you're running dude?" Friday denies "running."

Officer Walls testified that he arrived at the scene of the traffic stop almost immediately after Officer Bonturi did. He parked his cruiser behind Officer Bonturi's vehicle. It cannot be seen on the dash cam video. While Officer Bonturi was holding Friday at gunpoint, Officer Walls was covering the passenger side of Friday's vehicle. He tried to look inside to see if there were other people in the car but the window tint was too dark to enable him to do so. At 15:41:43 on the video, while Officer Bonturi was in the process of handcuffing Friday, Officer Walls smelled a strong odor of marijuana coming from inside Friday's car.

Officer Kirk arrived at the scene and parked his cruiser in front of Officer Bonturi's cruiser, but a little distance from it. He can be seen on the video getting out of his cruiser and walking toward the scene as Officer Bonturi has his gun drawn. At 15:41:57 on the video, just as Officer Bonturi has handcuffed Friday, Officer Kirk is at the rear of Friday's car. Officer Kirk testified that upon arriving at that spot he smelled the strong odors of marijuana and PCP emanating from Friday's car.

The dash-cam video shows Officer Bonturi walking Friday, in handcuffs, to the driver's side of his cruiser, which is off camera. The officer can be heard asking Friday if he has any "weapons, drugs, cash" on him, which Friday denies. About a minute later, Officer Bonturi tells Friday he is under arrest because of the odor of marijuana and that he and his car are being "search[ed] incident to th[at] arrest." Seconds later, Officer Bonturi tells Friday that he smells PCP on his breath and asks him if he had smoked a "dipper," which is a PCP-laced marijuana cigarette. Friday denies doing so.

There was no testimony about the search of Friday's person or his car. The dash-cam video shows that about nine minutes after Officer Bonturi pulled up behind Friday's car, a vial of PCP is found inside the car. Officer Bonturi transported Friday to the police station five minutes later.

After listening to the testimony, viewing the dash-cam video, and hearing closing arguments, the hearing judge made the following factual findings. She found that Officer Bonturi's cruiser was "not anywhere near [Friday]" as he followed Friday on Clubhouse Road and Montgomery Village Avenue. She credited Officer Bonturi's initial testimony that, other than the window tint violation, he did not observe Friday committing any "traffic infractions" and rejected his subsequent testimony that Friday may have been speeding after he turned left on Montgomery Village Avenue. She found that Friday parked his car almost simultaneously with Officer Bonturi's pulling up behind him with his emergency lights on.

The hearing judge rejected Officer Bonturi's testimony that Friday was trying to evade the police. She was not convinced from the evidence that Friday knew that the police were following him and that his actions in entering and quickly exiting Ridgeline and then entering and parking at the Brassie Place development were attempts to get away from the police. The judge opined that Officer Bonturi had "developed this whole scenario in his mind that [Friday] was somehow trying to get away, somehow trying to evade him[,]" and the officer's subjective belief that Friday was evading him was not "reasonable," partly because it was based on the assumption that, because Friday did not

live nearby, he had no reason to be in these residential areas. The judge further found that Friday's driving and his actions upon parking his car were not consistent with a "bail out" or an attempt to flee. Without any explanation, she rejected the prosecutor's assertion that, given Friday's weapons history and the "E-Justice System" warning, it was reasonable for Officer Bonturi to use the force that he used for his own safety and the safety of the other officers.

The hearing judge further found that Officer Bonturi effected an arrest of Friday for the tint violation. He had probable cause to believe that Friday had committed a window tint violation, but did not have probable cause or reasonable articulable suspicion to believe that Friday had committed or was committing any other offense. The court made a legal determination that a window tint violation is a civil traffic infraction that is not an incarcerable offense, and therefore Officer Bonturi had no legal basis to arrest Friday for that offense. The court concluded that the arrest violated the Fourth Amendment and granted Friday's motion to suppress the drug evidence.

STANDARD OF REVIEW

We review a circuit court's decision to grant (or deny) a motion to suppress evidence alleged to have been seized in violation of the Fourth Amendment based solely on the record of the suppression hearing (which here is the only proceeding in any event). *Rowe v. State*, 363 Md. 424, 431 (2001). In doing so, "we defer to th[e suppression] court's findings of fact unless we determine them to be clearly erroneous, and, in making that determination, we view the evidence in a light most favorable to the party who

prevailed on that issue." *Taylor v. State*, 448 Md. 242, 244 (2016); *see also Longshore v. State*, 399 Md. 486, 498 (2007) ("Moreover, when there is a conflict in the evidence, an appellate court will give great deference to a hearing judge's determination and weighing of first-level findings of fact. It will not disturb either the determinations or the weight given to them, unless they are shown to be clearly erroneous."). "We will review the legal questions *de novo* and based upon the evidence presented at the suppression hearing and the applicable law, we then make our own constitutional appraisal." *Wilkes v. State*, 364 Md. 554, 569 (2001); *see also Bailey v. State*, 412 Md. 349, 362 (2010) (appellate court must "make [its] own independent constitutional appraisal by reviewing the law and applying it to the facts of the case" (citations omitted)).

DISCUSSION

A.

The State makes three primary arguments to support its contention that the suppression court erred in granting Friday's motion. First, the police were carrying out an investigative stop, under *Terry v. Ohio*, 392 U.S. 1 (1968). When, under the totality of the circumstances, officers doing so reasonably suspect that the person being investigated may be armed or dangerous, or may flee, the use of force to effectuate the stop is reasonable and is not a *de facto* arrest unsupported by probable cause. The State maintains that the hearing judge "failed to consider the facts in their totality in assessing whether Officer Bonturi acted reasonably." Specifically, it argues that Friday's past criminal history and the warning on the "E-Justice System" that he was an armed drug

dealer; Friday's "circuitous" drive, which suggested he thought the police were following him and was trying to get away from them; the timing on the dash-cam video, which shows that Friday drove from Clubhouse Road to Brassie Place in 14 seconds; and the quick moves Friday took upon entering Brassie Place together showed that, when making the traffic stop, Officer Bonturi used reasonable force in drawing his weapon and handcuffing Friday and that the force was not a *de facto* arrest. The State asserts that any factual findings by the hearing judge to the contrary were clearly erroneous.

Second, the State argues that if Officer Bonturi indeed effected a *de facto* arrest of Friday, the arrest was supported by probable cause to believe that Friday was violating the window tint statute, which, contrary to the hearing judge's legal finding, is a misdemeanor, not a civil infraction. The State maintains that under *Virginia v. Moore*, 553 U.S.164 (2008), an arrest for any crime, including a misdemeanor, is not unreasonable under the Fourth Amendment; therefore, the evidence subsequently seized from Friday's car pursuant to the *Carroll* doctrine was not subject to suppression under the exclusionary rule.[4]

[4] *See Carroll v. United States*, 267 U.S. 132, 150-51 (1925) (if police have probable cause to believe there is contraband in a vehicle, they may search the vehicle without first obtaining a warrant).

Finally, the State argues that the drugs seized from Friday's car were not the fruit of an illegal arrest because the police would have developed probable cause to search his car regardless of any alleged improper use of force during the stop.[5]

Friday counters that the suppression court correctly found that Officer Bonturi's actions in blocking his car, drawing his service weapon, ordering him out of the car, and handcuffing him constituted an arrest. He maintains that although Officer Bonturi had probable cause to make a traffic stop for a violation of the window tint statute, he "abandoned altogether" any purported traffic-based purpose for the stop. Rather, he stopped Friday to investigate other criminal offenses that he did not have reasonable articulable suspicion to believe Friday had committed or was committing. Friday asserts the hearing judge correctly determined that a window tint violation is a non-incarcerable offense under Maryland law and therefore could not supply probable cause for arrest. He

[5] The State also argues that Friday's motion should have been denied because it did not specify what evidence he sought to have suppressed and the location where it was seized, nor was there evidence of either at the suppression hearing. Friday responds that the hearing court "knew exactly what [evidence] [he] sought to suppress" because he had been charged with one count of possession with intent to distribute PCP and because the dash-cam video introduced into evidence at trial showed that the police searched his person and his car.

Friday was charged with one count of possession with intent to distribute PCP. The indictment, coupled with the charging documents, clearly established that a vial of PCP was seized from the center console of Friday's car during the search on January 20, 2016. This plainly was the evidence Friday sought to suppress. Moreover, the State never made this argument before the suppression court. Having failed to raise this issue when the record could have been supplemented to correct this alleged deficiency, we decline the State's invitation to consider it on appeal.

maintains that because probable cause to search Friday's car did not arise until after he was illegally arrested, the evidence seized from his car was subject to suppression.

B.

The Fourth Amendment, made applicable to the States by the Fourteenth Amendment, *see Mapp v. Ohio*, 367 U.S. 643 (1961), states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ." Reasonableness is central to whether a search or seizure violated the Fourth Amendment. *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977).

A traffic stop of a vehicle by the police is a seizure within the ambit of the Fourth Amendment. *United States v. Sharpe*, 470 U.S. 675, 682 (1985). Such a stop is not unreasonable under the Fourth Amendment if it is based on probable cause or reasonable articulable suspicion to believe that a traffic law was violated. *Whren v. United States*, 517 U.S. 806, 810 (1996) (holding that if a police officer has probable cause to believe that a driver has violated the traffic code, the stop is reasonable under the Fourth Amendment); *State v. Williams*, 401 Md. 676, 687 (2007) (adopting "[t]he prevailing view among courts" that if a traffic stop is supported by reasonable articulable suspicion of a traffic violation it is reasonable under the Fourth Amendment).

Terry v. Ohio is the seminal Supreme Court case about investigative stops. The *Terry* Court held that a law enforcement officer "may stop and detain a person briefly for investigative purposes if the officer has reasonable suspicion, supported by articulable

facts, that criminal activity 'may be afoot.'" *Longshore*, 399 Md. at 494 (quoting *Terry*, 392 U.S. at 30); *see also Smith v. State*, 161 Md. App. 461, 476 (2005) ("Under *Terry* . . . and its progeny, police may conduct an investigative stop provided that they have 'specific and articulable facts which, taken together with the inferences from those facts,' create a reasonable articulable suspicion for suspecting legal wrongdoing.") (quoting *Terry*, 392 U.S. at 21). "[A]n investigatory stop [under *Terry*] typically is justified where there is some objective manifestation that the person is, or is about to be, engaged in criminal activity." *Longshore*, 399 Md. at 507.

"The reasonableness of a *Terry* stop is determined by considering '[w]hether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.'" *Id.* at 506 (quoting *Terry*, 392 U.S. at 20); *see also Carter v. State*, 143 Md. App. 670, 691 (2002) (reasonable scope and duration of a *Terry* stop is assessed by examining "'whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly'") (quoting *Sharpe*, 470 U.S. at 686).

There was no dispute that once Officer Kirk viewed Friday's car windows as he was leaving the BP station and determined that the window tint was illegal, the police had probable cause to stop Friday for the tint violation. *See, e.g., Williams*, 401 Md. at 691-92 (police officer may stop a car for a window tint violation if he or she has a reasonable articulable suspicion that the tint exceeds the 35% requirement under Transp. section 22-406(i)(1)(i)). For the most part, the hearing judge's first level factual findings about the

events that ensued from the time the police started following Friday until Friday parked his car were not clearly erroneous. There was competent evidence to support her finding that Friday did not know the police were following him, that he was not trying to evade the police, and that he was not speeding or committing any other traffic infraction (other than the tint violation). Likewise, the hearing judge did not commit clear error in finding that merely because Friday did not live in the vicinity did not mean that he had no business being there and therefore was present for some illegal purpose.

The essence of the State's *Terry* argument is that Officer Bonturi carried out an investigative seizure, in the nature of what often is termed a "hard take down," and that the seizure was justified by reasonable articulable suspicion that Friday was armed, and therefore stopping him for the tint violation posed a threat of harm to the police, or a threat that he would flee; and under those circumstances, the force used to carry out that seizure was reasonable.

Ordinarily, "a display of force by a police officer, such as putting a person in handcuffs, is considered an arrest." *Longshore*, 399 Md. at 502; *see also Chase v. State*, 449 Md. 283, 308 (2016) ("absent any special circumstances to justify the use of handcuffs by the police, such action transform[s] a *Terry* stop into an arrest"); *Wilkes*, 364 Md. 554, 586 (2001) ("An arrest is effected (1) when the arrestee is physically restrained or (2) when the arrestee is told of the arrest and submits.") (citations omitted); *Trott v. State*, 138 Md. App. 89, 121 (2001) ("in most instances, placing a suspect in handcuffs does amount to an arrest, which must then be supported by probable cause").

An arrest must be supported by probable cause to believe that the person being placed under arrest has committed or is committing a crime. *E.g., Bailey*, 412 Md. at 374. There are exceptions, however. In *Michigan v. Summers*, 452 U.S. 692, 699 (1981), the Court explained that *Terry* and its progeny

> recognize that some seizures admittedly covered by the Fourth Amendment constitute such limited intrusions on the personal security of those detained and are justified by such substantial law enforcement interests that they may be made on less than probable cause, so long as the police have an articulable basis for suspecting criminal activity.

In *Summers*, the police were about to execute a warrant to search a house for narcotics when they saw the defendant coming down the front stairs. Upon learning that he was the owner of the house, they detained him inside the house while the search was being carried out. After finding narcotics in the house, they arrested him, searched him, and found heroin on his person. He was charged with possession of that heroin. He moved to suppress the drug evidence, arguing that his initial detention by the police, while the warrant was being executed, was an arrest that was not supported by probable cause and was not an investigative seizure, under *Terry*, that could be supported on less than probable cause.

The Supreme Court rejected this argument, holding that the detention was justified under *Terry*. It emphasized that in deciding whether a seizure falls within the ambit of *Terry*, a court must consider the character of the intrusion and its justification, with the latter including the nature of the articulable facts the police had to support the intrusion and the law enforcement interests to be protected. Those interests include the prevention

of flight and the safety of the officers. The Court found that the intrusion into the defendant's freedom was merely "incremental" because the police already had a warrant to enter his house, he was detained inside his home, outside of public view, and most homeowners would want to remain in their homes as they were being searched. *Id*. at 703. With respect to the justification for the detention, the Court observed that even though the evidence did not suggest any "special danger" to the police, executing a search warrant in a home for narcotics "is the kind of transaction that may give rise to sudden violence" and the "risk of harm to both the police and the occupants [of the house] is minimized if the officers routinely exercise unquestioned command of the situation." *Id*. at 702-03.

In *Lee v. State*, 311 Md. 642 (1988), the Court of Appeals relied heavily on *Michigan v. Summers* in holding that an initial detention by the police of the defendants at gunpoint did not violate the Fourth Amendment. A robbery and non-fatal shooting recently had occurred, and the police received information from a reliable tipster that two men had bragged about committing the crimes, that they would be present at a particular time at a tennis court, next to a basketball court, and that they would be armed with a handgun kept in a gym bag. The tipster gave a name for one man and detailed descriptions of both men. Six police officers surveilled the area, which included tennis courts and a basketball court. Seven men were present at the basketball court, two of whom matched the tipster's description. When the police saw one of the two move a blue gym bag like the one the tipster had described, the police decided to effect a "hard

take down." *Id* at 652. They left their surveillance positions and charged the men from all sides with weapons drawn, ordering them on the ground. The police recovered the gun and other evidence that connected the men to the robbery and non-fatal shooting.

After the two defendants were charged with attempted second degree murder, robbery with a dangerous and deadly weapon, and related charges, they moved to suppress the evidence seized by the police, arguing that their detention at gunpoint had violated their Fourth Amendment rights. The case reached the Court of Appeals, which considered whether the "hard take down," based on reasonable suspicion but not on probable cause, was an arrest in violation of the Fourth Amendment. As in *Michigan v. Summers*, the test it used "'balance[d] the nature and quality of the intrusion on the personal security [of the defendant] against the importance of the governmental interests alleged to justify the intrusion.'" *Id*. at 661 (quoting *United States v. Hensley*, 469 U.S. 221, 228 (1985)).

The Court explained that the officers had a "relatively high degree of reasonable and articulable suspicion that the defendants were the robbers and were carrying a handgun in the gym bag," the intrusion into the defendants' privacy was substantial, but brief, and the officers faced the risk that if they did not enter the basketball court in force, the defendants could become alarmed and use the handgun that was nearby in the gym bag. *Id*. at 657. The Court concluded that a "show of force to control the situation and minimize the risks" was reasonable under the circumstances. *Id*. at 662.

More than a decade later, in *In re David S.*, 367 Md. 523 (2002), the Court of Appeals again examined the circumstances in which a "hard take down" by the police is reasonable, under the Fourth Amendment, so as not to constitute an arrest. In that case, the police watched a man named Hall, who was a suspected drug dealer, and David S., a juvenile, enter private property on which an abandoned transformer building was located. The property, located in a high crime area, was posted with a no trespassing sign. David went behind the transformer building, while Hall crouched in front of it. When David emerged, he made a motion with his hand that the police interpreted to be his inserting a handgun in his waistband. The police approached, ordered Hall and David on the ground at gunpoint, and handcuffed them. One of the officers frisked the area of David's waistband and found a hard object he thought was a gun. The object turned out to be a packet of cocaine.

David was charged as a juvenile with possession of cocaine. He moved to suppress the cocaine from evidence on the ground that the hard take down by the officers was not a reasonable use of force, given that they did not have probable cause to believe he was carrying a weapon or contraband, and that it amounted to a *de facto* arrest, in violation of the Fourth Amendment. Ultimately, the Court of Appeals disagreed. It explained that its holding in *Lee* established that a police display of weapons does not "*per se* elevate a seizure to one requiring probable cause." *Id*. at 537. Balancing the intrusion into David's liberty against the interests of the police in maintaining their safety and the status quo, the Court held that the hard take down was not a *de facto* arrest.

> Considering the totality of the circumstances, as they appeared to the officers at the time, in order to maintain their safety, handcuffing [David] and placing him on the ground for a brief time was reasonable and did not convert the investigatory stop into an arrest under the Fourth Amendment. Although this is a severe form of intrusion, we conclude that under the circumstances, it was reasonable.

Id. at 539-40; *see also Chase*, 449 Md. at 309–312 (ordering occupant out of a vehicle and handcuffing him for two minutes was reasonable and not a *de facto* arrest when police reasonably believed the occupant might be armed and dangerous based upon "furtive movements [he] observed . . . as [he was] approaching the vehicle"); *Cotton v. State*, 386 Md. 249, 265 (2005) (when executing a no-knock warrant at a house based on probable cause to believe that the occupants are operating an open-air drug market in and around the property, it is not unreasonable for the police to handcuff and detain persons in the front yard near the porch); *Pryor*, 122 Md. App. at 679 (police officer may conduct a protective pat down if he has "reasonable articulable suspicion that one or more of the occupants [of a vehicle] are armed with a weapon"); *Hamm v. State*, 72 Md. App. 176, 182 (1987) (a police officer may make a protective search of both occupants and the passenger compartment of a car after a traffic stop, even when there is no probable cause, if the officer has a reasonable belief, based on specific and articulable facts, that the stopped person is dangerous and has or may gain immediate possession of weapons) (citing *Michigan v. Long*, 563 U.S. 1032 (1981)).

We return to the case at bar. The nature of the police intrusion into Friday's freedom was serious but brief. Officer Bonturi held Friday at gunpoint for 19 seconds, from the inception of the traffic stop until Friday put his hands in the air. He then was

handcuffed and remained so. Significantly, and as we shall discuss further below, at the exact time the handcuffs were applied—30 seconds after the inception of the stop—Officer Walls smelled the strong odors of marijuana and PCP emanating from Friday's car. The odor of PCP alone gave rise to probable cause to arrest Friday for drug possession. So, the period of time in which Friday's freedom was severely restricted until there was probable cause to arrest him for a crime other than the tint violation for which he was stopped to begin with was half a minute.

This severe but brief intrusion must be balanced against its justification by the police, *i.e.*, the reasonable articulable facts to support the intrusion and the law enforcement interests to be protected by the intrusion. As noted, the hearing judge found that Friday was not aware that he was being followed by the police, and the actions he took in entering and exiting Ridgeline and then entering the residential development at Brassie Place and pulling into a parking spot there were not taken to evade the police. Thus, based on the hearing judge's findings, the police learned nothing more about Friday from the time Officer Bonturi started following him after he left the BP station until he pulled in behind Friday's parked car.

What the evidence showed Officer Bonturi *did* know about Friday when he started following him was that he was in a high crime area and was violating the tint statute, which justified a traffic stop; that the "E-Justice System" cautioned that Friday was "Armed" and should be "Approach[ed] with caution" because he was a drug seller or user; and that Friday had prior charges for weapons and drug offenses. When Officer

Bonturi drove into Brassie Place after Friday did so, he also knew that the heavy window tint on Friday's car made it impossible to see whether anyone else was inside; that Friday pulled into the parking place about 9 seconds after Officer Bonturi activated his emergency lights (not simultaneously, as the court found); that Friday turned his car off after Officer Bonturi stopped behind him; and that Friday started to get out of his car, which, in Officer Bonturi's experience, is an unusual move for a driver who has been stopped by the police. The question is whether the totality of these first level facts, as articulated by Officer Bonturi and, with the exception pointed out above, either credited by the hearing judge or not disputed, support a reasonable belief by Officer Bonturi that Friday posed a danger to his (Officer Bonturi's) physical safety (and that of the other officers) or that he was a flight risk.

Whether Officer Bonturi's belief was reasonable under the totality of the circumstances is a second level factual finding of constitutional dimension that we decide *de novo*. *See Ferris v. State*, 355 Md. 356, 385 (1999) ("'ultimate question[] of reasonable suspicion . . . should be reviewed *de novo*'") (quoting *Ornelas v. United States*, 517 U.S. 690, 691 (1996)). We conclude that his belief that Friday posed a risk to officer safety was reasonable. To be sure, the traffic stop was effected based on probable cause to believe that Friday was violating the tint statute and to give him a citation and/or repair order for doing so.[6] Ordinarily, there is nothing about a tint violation itself that

[6] That was the ostensible purpose, and it does not matter whether Officer Bonturi had an ulterior motive for making the stop. Under *Whren*, which upheld pretextual traffic (Continued…)

would lead a stopping officer to reasonably believe the driver could pose a threat of harm. Here, however, one cannot overlook the combination of information that Officer Bonturi obtained about Friday before the stop from the "E-Justice System" and the Judiciary Case Search system. Officer Bonturi was trained to rely upon the information in the "E-Justice System." Although he did not know precisely when the data that system provided had been entered, he testified, without contradiction, that he had been taught that the data was based on "semi-recently written" police reports within the past "three or four years or so." The system specifically warned that Friday was armed and dangerous. Case Search revealed that Friday had pending charges against him for CDS distribution and, significantly, for illegal possession of a regulated firearm and wearing, carrying and transporting a handgun in a vehicle. With that information, without being able to see into Friday's car due to the heavy tint, and knowing that Friday was emerging from his car, it was reasonable for Officer Bonturi to believe that Friday could be carrying a weapon and could harm him and others with it; indeed, it would have been foolhardy for him to have assumed otherwise.

(…continued)
stops against Fourth Amendment attack, so long as there is probable cause or a reasonable articulable basis for a traffic stop, it does not matter whether the officer effecting the stop has an ulterior motive for making the stop. "As long as, objectively speaking, the officer had probable cause for the traffic stop, it is immaterial if, subjectively speaking, he had some other purpose in mind." *State v. Ofori*, 170 Md. App. 211, 220 (2006).

Given Officer Bonturi's reasonable belief that officer safety was at stake, his brief detention of Friday at gunpoint and by handcuffing up to the point that probable cause to arrest for drug offenses developed was not outside the scope of a seizure under *Terry*, and was not a *de facto* arrest. The seizure did not violate the Fourth Amendment, and the suppression court should not have granted Friday's suppression motion.

C.

Although not necessary to our decision, we shall briefly address the State's alternate argument that if the stop amounted to an arrest, the arrest did not violate the Fourth Amendment because it was based on probable cause that Friday was violating the window tint statute.

As part of this argument, the State maintains that the hearing judge ruled incorrectly that the police cannot arrest a driver for violating the window tint statute. Specifically, the State argues, the police can make a warrantless arrest upon "probable cause to believe that a crime has been or is being committed by an alleged offender in the officer's presence[,]" *State v. Wallace*, 372 Md. 137, 147 (2002), and a window tint violation is a misdemeanor, *i.e.*, a crime, not a civil infraction. Under *Virginia v. Moore*, 553 U.S. at 171, "when an officer has probable cause to believe a person committed even a minor crime in his presence, the balancing of private and public interests is not in doubt . . . [and t]he arrest is constitutionally reasonable." Thus, even if a "warrantless arrest" is made in violation of state law, it is nevertheless reasonable under the Fourth Amendment so long as the officer had probable cause. *Id.*; *see also Atwater v. City of Lago Vista*, 532

U.S. 318 (2001) (arrest of driver for seatbelt violation and for failing to restrain children in seatbelts, driving without a license, and failure to provide proof of insurance was reasonable under Fourth Amendment because the police have authority to make a warrantless arrest if they observe the commission of a misdemeanor, even if it is not a breach of the peace); *In re Darryl P.*, 211 Md. App. 112, 134 (2013) (explaining that *Moore* made "emphatically clear that an arrest based on probable cause to believe that the arrestee committed the crime for which he is being arrested is a reasonable seizure of the person under the Fourth Amendment").

We agree with the State that a violation of the window tint statute is a misdemeanor punishable by a fine not to exceed $500 and is not a civil infraction.[7] That does not matter, however, because the evidence at the suppression hearing makes clear that Friday was not arrested for violating the window tint statute. He was stopped for that violation, and, as explained, he briefly was detained at gunpoint and handcuffed for officer safety, in a detention that was not a *de facto* arrest. Early in the course of that detention, at the exact same time that he was placed in handcuffs, the police smelled

[7] Pursuant to Transp. section 27-101(a), any violation of the Maryland Vehicle Law is a misdemeanor unless it is "punishable by a civil penalty" or is classified as a felony. Transp. section 22-406(i)(2) provides that if a police officer observes a vehicle being operated in violation of the window tint statute, he or she may "stop the driver of the vehicle and, in addition to a citation charging the driver with the offense, issue to the driver a safety equipment repair order." In contrast to other provisions of the Maryland Vehicle Law that specify a civil penalty for a violation, *see* Transp. § 21-202.1 (red light cameras), Transp. Section 22-406(i) does not establish a civil penalty for a window tint violation. It is thus plain that a window tint violation is a misdemeanor.

marijuana and PCP emanating from his car. As Officer Bonturi told Friday, he was being arrested for "the odor of marijuana" and his car was being searched on that basis. It is clear from Officer Walls's testimony that, based on the odor of marijuana and PCP coming from his vehicle, Friday was arrested on probable cause that he was committing drug crimes. The search incident to that constitutionally valid arrest revealed the PCP Friday was charged with possessing with intent to distribute. The arrest and vehicle search comported with the Fourth Amendment.

D.

As explained, the State also contends the PCP seized from Friday's car was not the fruit of the illegal arrest because Friday "failed to prove that either he or his car was searched incident to the unconstitutional arrest." The State asserts that the police "were in a position to smell the marijuana and PCP in [Friday]'s car regardless of any unwarranted display of force during the course of an otherwise lawful traffic stop" and, thus, any illegality did not taint the search of Friday's vehicle.

We have held that the hard take down of Friday at the inception of the traffic stop was reasonable under the Fourth Amendment and that Friday was arrested on probable cause that he was committing drug violations, not for the tint violation. Accordingly, this contention is moot.

ORDER OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY THE APPELLEE.