Circuit Court for Baltimore City
Case No. 118311009

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0561

September Term, 2019

JAMES MITCHELL

v.

STATE OF MARYLAND

Graeff,
Reed,
Gould,

JJ.

Opinion by Reed, J.
Concurring Opinion by Graeff, J.

Filed: April 9, 2021

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

James Mitchell ("Appellant") was convicted of possession of a firearm while being a prohibited person and wearing, carrying, or transporting a handgun following a two-day trial before a jury for the Circuit Court for Baltimore City. The jury acquitted Appellant of other related charges, including: (1) possession with intent to distribute cocaine, (2) possession of cocaine, (3) possession of firearm in relation to drug trafficking, and (4) possession of ammunition while being a prohibited person. Appellant was sentenced to five years' incarceration without the possibility of parole and then noted this timely appeal. Appellant presents the following question for our review:

> I. Did the Circuit Court err in denying Appellant's motion to suppress the handgun?

For the following reasons, we answer in the affirmative and reverse the circuit court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On October 10, 2018, Officer Luis Garcia of the Baltimore Police Department ("BPD") was on patrol at Mondawmin Mall in the Western District of Baltimore City. Officer Garcia observed Appellant, noting a large object hanging from the right pocket of Appellant's slim fitted cargo shorts. The object appeared to slide back and forth as Appellant walked with a stiff arm in an effort to "make sure that whatever was there [in his pocket] wasn't moving." Officer Garcia also observed Appellant tap the object in his right pocket as if to "make sure it was still there." Based on his observations, Officer Garcia believed that Appellant "possibly could have been armed."

Appellant had walked into Last Stop, a retail store in the mall, when Officer Garcia first approached him. As he walked toward Appellant and the other people in the store Officer Garcia stated: "What's going on guys? How you all doing?" According to Officer Garcia, Appellant "[b]laded to the opposite side," as if to conceal something. When probed by the suppression judge about what he meant by "bladed," Officer Garcia explained that Appellant had turned around. Officer Garcia's body worn camera ("BWC") showed that Appellant was faced forward toward the store's cash register then turned his head back when Officer Garcia spoke. Appellant then continued to walk forward, facing the cash register. Officer Garcia reached out for Appellant's arm and immediately handcuffed him, saying: "Hey come here man. Man, cover over here. Relax. Relax for a minute. Put your hands in the air."

Once handcuffed, Officer Garcia frisked Appellant's right pants pocket. The BWC depicts Officer Garcia squeezing and manipulating the object in Appellant's pants pocket for a couple seconds. Appellant asked Officer Garcia, "You want to see my ID?" to which Officer Garcia responded, "You got your ID with you? Where is that?" Appellant answered, "In my back pocket in my wallet." Officer Garcia retrieved Appellant's wallet and put it on the store counter. He asked, "You don't got anything on you, man?" to which Appellant gave an inaudible response. Officer Garcia frisked Appellant's right pocket for a second time, squeezing and manipulating the object. As he frisked Appellant's pocket, Officer Garcia asked whether the object was "[c]igarettes or something?" He then expanded the scope of his frisk to Appellant's front waistband and groin area. Officer

Garcia squeezed an item on Appellant's hip then lifted his shirt revealing a handgun in Appellant's waistband.

Officer Garcia placed Appellant under arrest and continued to search his person when other unit officers arrived. Officers also retrieved a host of suspected narcotics, including marijuana, Xanax, and crack cocaine. Appellant was subsequently charged with (1) possession of a firearm while being a prohibited person; (2) possession of a firearm after a disqualifying conviction; (3) possession of ammunition while being a prohibited person; (4) wearing, carrying, or transporting a handgun on person; (5) wearing, carrying, or transporting a loaded handgun on person; (6) using, wearing, carrying, or transporting a firearm in relation to a drug trafficking crime; and other related drug possession offenses. The court held a suppression hearing upon defense counsel's motion to suppress the handgun that Officer Garcia retrieved during the frisk. Officer Garcia was the only testifying witness.

During the suppression hearing, Officer Garcia testified that he suspected that the object was a gun "[b]ecause guns are usually heavy, they will move back and forward…if you got it loose in your pocket, once you are walking, it will swing." When asked by the suppression judge, "what makes you think it was a gun and not a telephone," Officer Garcia answered, "[w]ell usually if you've got a phone in your pocket, you're going to relax, act normal, not try to, you know, make sure it's there, not do, like, a security check of your phone…." Based upon these observations, Officer Garcia believed that Appellant was carrying a gun. Consequently, the circuit court found that the frisk was based on reasonable articulatable suspicion and denied Appellant's motion to suppress the handgun.

STANDARD OF REVIEW

In matters concerning a trial court's ruling on a motion to suppress evidence, we limit our review to the motion court's record. *Carter v. State*, 243 Md. App. 212, 224 (2019). We accept the factual finding of the motion court, unless proven to be clearly erroneous, and we view the evidence in the light most favorable to the party that prevailed at the hearing. *Id.* However, if the trial court's ruling concerns a mixed question of law and fact, we draw our own conclusions *de novo*. Any evidence found to be the product of an unlawful search is inadmissible and generally must be suppressed. *See Bailey v. State*, 412 Md. 349, 369 (2010).

DISCUSSION

A. Parties' Contentions

In bringing this appeal, Appellant contends that Officer Garcia's frisk transgressed *Terry*'s Fourth Amendment boundaries in three separate respects. His arguments and the State's responses are set forth below:

1. The frisk was not predicated on a *Terry* stop.

Relying on *Ames v. State*, 231 Md. App. 662 (2017), Appellant argues that Officer Garcia's frisk was unconstitutional because it did not derive from an investigative stop. In *Ames*, we explained that "[a] *Terry* frisk is neither a self-contained nor free-standing police prerogative," rather it is "a mere adjunct of a *Terry* stop that does not exist outside the universe of the *Terry* stop." *Id.* at 676. In other words, "[a] *Terry* stop is an indispensable prerequisite to a *Terry* frisk." Upon this premise, we explained that:

> A vigilant officer may not observe the passing parade of life go by, develop reasonable Terry-level suspicion that certain members of the passing parade are armed, and presume to frisk them. It is only when duty requires an officer to go in harm's way that the additional protection becomes necessary. Short of that point, the officer is adequately protected simply by staying out of harm's way. The police cannot, in a word, get to Beta without passing through Alpha.

Id. at 676. Appellant argues that Officer Garcia's frisk derived from the kind of "passing parade" observation described in *Ames* and that Officer Garcia skipped over the required precursor to a *Terry* frisk. To the contrary, the State argues that Appellant was subjected to a valid *Terry* stop when Officer Garcia told him to "come here…put your hands in the air," and handcuffed Appellant. Moreover, the State argues that "[the] stop was justified, as Officer Garcia had reasonable suspicion that [Appellant] was carrying a handgun, in violation of Maryland law."

2. The Frisk.

Officer Garcia testified that he observed Appellant, with a stiff arm, tap what appeared to be a "bulge" or "real heavy object" swinging back and forth from Appellant's right shorts pocket as if to make sure the object was still there. Based on his observation, Officer Garcia believed that Appellant "might have a gun in his pocket." Appellant contends that Officer Garcia's testimony did not establish reasonable articulable suspicion to justify the *Terry* frisk and cites three cases to support his argument.

The first case is *Ransome v. State*, 373 Md. 99 (2003). In *Ransome*, the Court of Appeals held that no reasonable suspicion existed, where officers testified that Ransome was in a "high-crime area," had a large bulge in his front pocket, looked at an unmarked police car, and appeared nervous as officers approached him. In holding so, the Court

deemed that the officer's actions "crossed the line," and the Court took judicial notice of the fact that "most men do not carry purses, they, of necessity, carry innocent personal objects in their pants pockets—wallets, money clips, keys, change, credit cards, cell phones, cigarettes, and the like—objects that, given the immutable law of physics that matter occupies space, will create some sort of bulge." Considering these norms, the Court reasoned that:

> If the police can stop and frisk any man found on the street at night in a high-crime area merely because he has a bulge in his pocket, stops to look at an unmarked car containing three un-uniformed men, and then, when those men alight suddenly from the car and approach the citizen, acts nervously, there would, indeed, be little Fourth Amendment protection left for those men who live in or have occasion to visit high-crime areas.

Id. at 111. Appellant argues that his present appeal is similar to *Ransome* in that Officer Garcia's frisk was based on a mere hunch, and the officer did not establish reasonable articulable suspicion that he was armed.

Next, Appellant cites *In re Jeremy P.*, 197 Md. App. 1 (2011). In *In re Jeremy P.*, we held that no reasonable suspicion existed where the officer observed the defendant repeatedly adjusting his "waistband area" in a high crime area. *Id*. at 3–7. We explained "that a police officer's observation of a suspect making an adjustment in the vicinity of his waistband does not give rise to reasonable suspicion sufficient to justify a *Terry* stop." *Id*. at 14. We further elaborated that "a bulge may be created by a wide variety of objects other than a weapon, so, too, can a person touching the area of his waistband be indicative of a wide variety of causes other than adjusting a concealed weapon." *Id*. at 13. Therefore, we held that "mere conclusory statements by the officer that what he saw made him believe

the defendant had a weapon are not enough to satisfy the State's burden of articulating reasonable suspicion that the suspect was involved in criminal activity," instead, "the officer's account of the stop must include specific ***facts*** from which the court can make a meaningful evaluation of whether the officer's suspicion was objectively reasonable under the totality of the circumstances." *Id*. at 15.

Appellant argues that the reasoning of *In re Jeremy P.* should be applied in the present case, given that Officer Garcia had fewer indicators to reasonably believe he was armed. Appellant highlights the fact that unlike in *Jeremy P.* and *Ransome*, the State presented no evidence that Mondawmin Mall was known as a high crime area, and Officer Garcia testified that he observed Appellant touching his right pants pocket instead of his waistband. Moreover, Appellant contends that Officer Garcia was unable to recount specific facts, "such as a distinctive bulge, consistent with the appearance of a gun." *See In re Jeremy P.*, 197 Md. App. at 15 ("the officer must be able to recount specific facts, in addition to the waistband adjustment, that suggest the suspect is concealing a weapon in that location, such as a distinctive bulge consistent in appearance with the presence of a gun.")

Finally, Appellant draws our attention to *Thornton v. State*, 465 Md. 122 (2019), in which the court considered whether the officers' observation during their brief detention of Thornton established reasonable articulatable suspicion to frisk him. In the underlying case, officers approached Thornton to inform him that his vehicle was illegally parked. *Id*. at 130. The officers testified that "Thornton appeared to be 'manipulating something, that he was obviously uncomfortable with'" in his lap and "touched his waistband four to five

times" during the 30-40 second encounter. *Id*. at 133. Although Thornton showed "no indication of verbal aggressiveness, disobedience, [or] false identification, …both officers testified that [] Thornton showed characteristics of an armed individual." *Id*. at 132.

The Court of Appeals ultimately held that the officer's purported basis for frisking Thornton was insufficient. *Id*. at 146–47 ("the purpose of a frisk is 'not to discover evidence of a crime, but rather to protect the police officer and bystander from harm by checking for weapons.'" (citing *Sellman v. State*, 449 Md. 526, 542 (2016)). The Court explained that "[t]he officers' testimony was not particularized and could fit a very large category of presumably innocent travelers, who would be subject to virtually random searches and seizures were this Court to conclude that as little foundation as there was in this case could justify a frisk." *Thornton*, 465 Md. at 149 (internal citation, marks, and brackets omitted). Appellant contends that, like the officer's testimony in *Thornton*, Officer Garcia's rationale for suspecting that he was armed was not particularized and could apply to a "large category of presumably innocent travelers." Thus, he asks this Court to reverse the suppression court's ruling.

The State argues that the suppression court rightfully denied the motion. According to the State, "Officer Garcia observed [Appellant] carrying a large, heavy object in his pocket, exhibiting behaviors as he walked that indicated he may be armed, and engaging in a furtive attempt at concealing the heavy bulge in response to the officer's presence." The State contends that the officer's observations, considered as a whole, provided a particularized and objective basis to believe [Appellant] was armed, justifying a *Terry* stop and a protective frisk. Moreover, the State asks this Court to disregard the precedent

established in *Thornton*, *Ransome*, and *In re Jeremy P.*, arguing that the cases are distinguishable from the present matter, as none of the prior cases involved the "combination of factors…that, collectively, supported" Officer Garcia's belief that Appellant was armed with a handgun. The State concedes "[u]nder these precedents, each of the officer's observations, standing alone, would be admittedly insufficient to justify a frisk" but asserts the observations of Officer Garcia are sufficient when viewed under the totality of the circumstances. The State asserts "this case does not depend on either a suspicious bulge (*Ransome*), furtive movements in the officer's presence (*Thornton*), or characteristic adjustments before the officer's approach (*Jeremy P.*), standing on its own" but "instead stands at the intersection of these three cases."

3. Was the frisk excessive?

Appellant's final contention is that Officer Garcia's series of frisks exceeded the permissible scope of a *Terry* frisk. During the hearing, the officer acknowledged that the bulge "was something in the shape of cigarettes" and that it was "immediately apparent to [him] that the object in [Appellant's] pocket was not a weapon." Nonetheless, Officer Garcia frisked Appellant's pants pocket multiple times. Citing *Ames*, Appellant notes that Officer Garcia was only permitted to search the area "necessary to serve the purpose of the particular search—but not one little bit more." *Ames*, 231 Md. App. at 679. Moreover, he notes that Officer Garcia's pat down was restricted to his exterior and limited to either confirm or dispel "the presence of a large and palpable weapon[], such as [a] gun[]." *Id.* (internal citation omitted). Appellant argues that even if Officer Garcia had "a constitutional basis to perform a limited frisk…*Terry* required him to cease the frisk when

his tactile manipulation of the object revealed [the bulge] was not a gun." He contends that "*Terry* did not allow [the officer] to continue frisking [his] pants pockets, let alone expand the frisk to [his] front waistband and groin area; and the fact that [the officer's] continued frisking led" to the accidental discovery of a weapon does not retroactively validate the frisk.

The State counterargues that Officer Garcia was not required to cease the frisk. Officer Garcia testified that as he checked Appellant's pocket the first time his forearm grazed a hard object on Appellant's waist. Relying on dicta by the Court of Appeals in *Ransom*[1], the State argues that because Officer Garcia found the cigarettes contemporaneously with his forearm touching the hard object believed to be a gun, Officer Garcia had sufficient articulable suspicion to continue the search.

B. Analysis

1. Terry Stop

As a general rule, the Fourth Amendment allows an officer to conduct brief investigatory detentions known as *Terry* stops when the officer has "reasonable suspicion

[1] In dicta, the *Ransome* Court stated

> We accept, as [Pennsylvania v. Mimms, 434 U.S. 106 (1977)] and our own knowledge of what occurs with alarming frequency on our streets require[s] us to do, that a noticeable bulge in a man's waist area may well reasonably indicate that the man is armed. Ordinarily, men do not stuff bulky objects into the waist areas of their trousers and then walk, stand, or drive around in that condition; regrettably, the cases that we see tell us that those who go armed do often carry handguns in that fashion.

Ransome, 373 Md. at 107.

that a person has committed or is about to commit a crime." *Carter*, 243 Md. App. at 227. Such a "stop is limited in duration and purpose and can only last as long as it takes a police officer to confirm or to dispel his suspicions." *Id.* Incident to a valid *Terry* stop, "a law enforcement officer may legitimately frisk an individual if the officer has reasonable articulatable suspicion that the person with whom the officer is dealing is armed and dangerous." *Thornton*, 465 Md. at 142. However, an officer's "right to frisk…depends upon the reasonableness of a forcible stop to investigate a suspected crime." *Ames*, 231 Md. App. at 677. As it pertains to investigatory stops of individuals suspected to be armed, we have explained in *Ames*:

> A vigilant officer may not observe the passing parade of life go by, develop reasonable *Terry*-level suspicion that certain members of the passing parade are armed, and presume to frisk them. It is only when duty requires an officer to go in harm's way that the additional protection becomes necessary. Short of that point, the officer is adequately protected simply by staying out of harm's way. The police cannot, in a word, get to Beta without passing through Alpha.
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> [A] frisk for self-protection cannot be undertaken when the officer has unnecessarily put himself in a position of danger by not avoiding the individual in question. This means that in the absence of some legitimate basis for the officer being in immediate proximity to the person, a degree of suspicion that the person is armed which would suffice to justify a frisk if there were that basis will not alone justify such a search. For example, if a policeman sees a suspicious bulge which possibly could be a gun in the pocket of a pedestrian who is not engaged in any suspicious conduct, the officer may not approach him and conduct a frisk.

Id. at 676–78.

In this case, Officer Garcia skipped over the required precursor to a *Terry* frisk when he immediately handcuffed and frisked Appellant. The facts articulated by Officer Garcia

did not give rise to the level of reasonable suspicion necessary to believe Appellant had committed or was about to commit a crime. Officer Garcia's testimony consisted of the observation of a man walking the mall with a bulge in his pants. He testified that because the object appeared to be "moving constantly as [Appellant] walked," that he walked "with a stiff arm" as if to make "sure that whatever was there wasn't moving," and he "tapped" his right leg as if conducting a "security check" "to make sure [the object] was still there" that Appellant was carrying a gun and not some other innocent object. However, these facts alone are insufficient to provide an objective officer with reasonable articulable suspicion that a crime has occurred or was about to occur. Officer Garcia did not articulate that Appellant was engaging in threatening conduct, reaching to grab the object from his waistband, or any other conduct that would suggest Appellant was involved in criminal activity. As we articulated in *Graham v. State*,

> "The respective interests served by stops and by frisks are distinct. The stop is crime-related. What is, therefore, required is reasonable suspicion that a crime has occurred, is then occurring, or is about to occur."

146 Md. App. 327, 358-59 (2002). By his own admission, Officer Garcia confirmed Appellant was not nervous and he made no attempt to flee or walk faster as the officer approached him. Nor did Officer Garcia articulate the bulge itself appeared to be the shape of a gun or that Appellant was in a high crime area. He did say that he turned away or was blading but this would not necessarily indicate criminal activity. The lack of specific facts pointing to criminal activity convinces us that the officer's suspicions were no more than a mere hunch; thus, we agree that the frisk was not predicated by a valid *Terry* stop.

2. Terry Frisk

Because a "reasonable stop is a necessary predecessor to a reasonable frisk," it stands to reason that a frisk based on an unreasonable stop is also unreasonable. *Ames*, 231 Md. App. at 672 (internal citation omitted). Thus, we hold as an initial matter that Officer Garcia's frisk of Appellant's person was unreasonable. Moreover, we agree with Appellant that the frisk was not based on reasonable articulable suspicion that Appellant was armed.

As the Court of Appeals has previously stated, "a law enforcement officer may legitimately frisk an individual if the officer has reasonable articulable suspicion that the person with whom the officer is dealing is armed." *Thornton*, 465 Md. at 142. A court may determine whether an officer acted with reasonable suspicion based on the totality of circumstances. *Crosby v. State*, 408 Md. 490, 507 (2009). The Court of Appeals recognized that "context matters," thus, "actions that may appear innocuous at a certain time or in a certain place may very well serve as a harbinger of criminal activity under different circumstances." *Id*. at 508 (internal citations omitted). In making our assessment, we "give due deference to the training and experience of the law enforcement officer who engaged the stop at issue." *Id*. Nonetheless, "the officer must explain how the observed conduct, when viewed in the context of all of the other circumstances known to the officer, was indicative of criminal activity." *Id*. Appellate rightfully relies on *Ransome*, *In re Jeremy P.*, and *Thornton* to support his contention that Officer Garcia's frisk of Appellant was not based on reasonable suspicion that Appellant was armed.

In *Ransome*, the State asked the Court of Appeals to give due deference to the officer's:

> observation and concern about the bulge in petitioner's left front pocket, but also the fact that this was a high-crime area from which complaints about drug activity, loitering, and shootings had come, that it was late at night and the lighting was poor, that petitioner gazed upon the police car as it approached the pair but then declined to keep eye contact when confronted by [the officer], and that petitioner appeared nervous when the officer briefly questioned him.

Ransome, 373 Md. at 105. The State argued that in view of the totality of circumstances, Officer Moro "had reasonable suspicion to believe that [Ransome] was armed and dangerous and that the pat-down for weapons was therefore justified." *Id*. The Court disagreed noting that "[Ransome] had done nothing to attract police attention other than being on the street with a bulge in his pocket at the same time Officer Moro drove by." *Id*. at 109. The Court acknowledged that while "conduct that would seem innocent to an average layperson may properly be regarded as suspicious by a trained or experienced officer," officers must still specify why he or she considered the conduct to be suspicious. *Id*. at 111. The Court held that the officer's basis for frisking Ransome was inadequate and the evidence recovered as a result of the search was inadmissible.

Officer Garcia's observation in the present matter is similar to that of Officer Moro's in *Ransome*. Officer Garcia did not witness Appellant engaging in criminal activity nor did he have reason to suspect criminal activity was afoot. Like Ransome, Appellant did nothing to attract the officer's attention other than being at the mall with a bulge in his pocket at the same time Officer Garcia was there on patrol. Additionally, Officer Garcia admitted to the court that, during his investigation, Appellant "wasn't nervous, he wasn't looking around," and "he didn't move faster when he saw" Officer Garcia. Thus, it is unlikely that Officer Garcia had a sufficient basis to suspect that Appellant was carrying a weapon.

This Court came to a similar conclusion in *In re Jeremy P.* The State contended that Detective Lee observed "[Jeremy P.'s] behavior 'through the lens of a law enforcement officer who's familiar with how weapons are carried,' who had prior contacts with [Jeremy P.], who had made arrests in that high crime area, and who was on patrol that night 'to see if anything [was] happening.'" *In re Jeremy P.*, 197 Md. App. at 8. The State argued that, "'as a result of [Lee's] prior training and experience...as to how the weapons that are unholstered are carried,' he reasonably believed "that the motions he saw were characteristic of a gun being carried in an unholstered manner." *Id*. Having considered the totality of the circumstances, we were not convinced that Detective Lee had the requisite suspicion to conduct the frisk. We explained that an "officer must be able to recount specific facts, in addition to the waistband adjustment, that suggest the suspect is concealing a weapon in that location, such as a distinctive bulge consistent in appearance with the presence of a gun." *Id.* at 14. "[T]he mere presence of any large bulge in any man's pocket does not justify a *Terry* stop." *Id.* at 10 (internal citation and marks omitted). We recognized that "just as a bulge may be created by a wide variety of objects other than a weapon, so, too, can a person touching the area of his waistband be indicative of a wide variety of causes other than adjusting a concealed weapon." *Id*. at 13

In the present matter, Officer Garcia testified that the object appeared to be "moving constantly as he walked" and that Appellant walked "with a stiff arm" as if to make "sure that whatever was there wasn't moving." Officer Garcia also alleged that Appellant tapped his right leg as if conducting a "security check" "to make sure [the object] was still there." Like Detective Lee in *In re Jeremy P.*, Officer Garcia did not recount any specific facts

about the bulge that would support his suspicion that Appellant was concealing a handgun, "such as a distinctive bulge consistent in appearance with the presence of a gun." *Id.* at 14. Addedly, when probed by the suppression judge as to why he believed the object "was a gun and not a telephone," Officer Garcia replied, "[w]ell usually if you've got a phone in your pocket, you're going to relax, act normal, not try to, you know, make sure it's there, not do, like, a security check of your phone…." Officer Garcia's response did not clarify why he believed the object was a gun, rather it explained his reason for suspecting the object was not a cell phone. Furthermore, his response contradicts his subsequent admission to the court that Appellant "wasn't nervous."

Thornton is also instructive to this matter before the Court. Appellant contends that like, *Ransome* and *In re Jeremy P.*, there were many circumstances missing in the current record than the circumstances that were present in *Thornton*. Appellant contends that these distinctions emphasize Officer Garcia's lack of reasonable suspicion. Specifically, in *Thornton*, officers testified that "Thornton appeared to be 'manipulating something, that he was obviously uncomfortable with'" in his lap and "touched his waistband four to five times" during the 30-40 second encounter. *Thornton*, 465 Md. at 133. Officer testified that Thornton "made allegedly 'furtive' movements while he was seated in his vehicle, which gave them reason to suspect that [he] was armed and dangerous." *Id*. at 145. The officers also testified that Thornton was parked in a high crime area. *See Id*. at 146.

Nonetheless, the Court determined that "the officers' testimony failed to set forth particularized facts that would warrant an objective officer to believe that he or she was in danger." *Id*. at 146. Not unlike the repeated adjustments of the waistband in *In re Jeremy*

P., the suppression court in *Thornton* also found that the officer's purported basis for suspecting Thornton was armed was solely based on the conduct of his hands. *See id.* at 146–47. Citing *In re Jeremy P.*, *Thornton* reminds us "that a suspect's furtive movements while in a high crime area, alone, [is] not sufficient to generate reasonable suspicion." Moreover, the Court notes that "the officers failed to explain 'why [they] interpreted [[Thornton's]] conduct to indicate the presence of a weapon, rather than merely [possession of] a cell phone or another innocent object.'" *Id.* at 149 (*citing In re Jeremy P.*, 197 Md. App. at 2). For these reasons, the *Thornton* Court concluded "that the officers did not have reasonable suspicion to lawfully frisk [Thornton]." *Thornton*, 465 Md. at 149.

Appellant argues, and we agree, that the totality of the circumstances in the present case are sufficiently similar, yet weaker than those presented in *Thornton* and *In re Jeremy P.* Unlike *Thornton* and *In re Jeremy P.*, Appellant did not manipulate the contents of his pocket or waistband multiple times, rather Officer Garcia testified that he observed Appellant tap his right pocket once. There was no testimony that Appellant appeared uncomfortable as he walked the mall. Instead, according to Officer Garcia, Appellant was not acting "nervous" or "looking around," and he did not "move faster when he" noticed the officer. Lastly, as the suppression judge noted, there was no testimony that the encounter occurred in a high crime area or "if Mondawmin Mall has problems with guns."

Although officers in *Thornton,* similarly testified that Thornton made quick movements consistent with a "bladed stance," there is no Maryland precedent that categorizes "blading" or turning away from an officer as a type of furtive movement and we will not do so now. *See Thornton*, 465 Md. at 133. Even still, such movements while in

a high crime area is not enough to establish reasonable suspicion. For Officer Garcia's frisk to be considered lawful, he was required "to set forth particularized facts" that would cause "an objective officer to believe that" Appellant was armed and dangerous. *See id.* at 146. Instead, Officer Garcia failed to recount specific facts, "such as a distinctive bulge, consistent with the appearance of a gun," and his explanation as to why he suspected the object was a gun instead of a cell phone or some other innocent object was insufficient to establish reasonable suspicion to frisk Appellant. *See In re Jeremy P.*, 197 Md. App. at 14; *Thornton*, 465 Md. at 149. Hence, we hold that Officer Garcia unlawfully frisked Appellant, and the gun found as a result of the unlawful search must be suppressed.

3. Excessive Frisk

Evidence obtained as a direct result of an illegal search or seizure is inadmissible under the doctrine of the "fruit of the poisonous tree." *Thornton*, 465 Md. at 149., Based on our analysis, *supra*, we hold that Officer Garcia lacked reasonable articulatable suspicion to conduct both a *Terry* stop and frisk, and hold further that the frisk was excessive. The scope of a *Terry* frisk is limited to a pat down of the suspected individual's outer clothing for the sole purpose of protecting an officer who has a duty to stop the individual in the first place:

> "There is under the Fourth Amendment <u>an ever-present requirement for the police to minimize even necessary intrusions</u>. The permitted scope of an intrusion is whatever is necessary to serve the purpose of that particular intrusion, but nothing more.... The reason the Fourth Amendment permits a policeman to conduct a minimal search (a frisk) of a suspect upon such a lesser predicate is the necessity of protecting from harm the life and limb of the stopping officer. The danger is that the stoppee may be armed. <u>Because almost all weapons</u>—guns, knives, blackjacks, brass knuckles—<u>are hard,</u>

> palpable objects, their presence may be detected by a close pat-down of the exterior of the clothing surface. Because that is all that is necessary, that is all that is permitted."

Ames, 231 Md. App. at 680 (quoting *Anderson v. State*, 78 Md. App. 471, 477-78 (1989)). We articulated in *Ames*, that an Officer who "behave[s] as if he were thinking that, when he detected an unknown object other than a weapon, he was entitled to investigate further and/or to inquire further as to what that unknown object was," is crossing beyond the scope of what the *Terry* frisk, and its limitations, were designed for. *Id*. at 682.

From the outset of this *Terry* frisk, Officer Garcia did more than conduct a pat down. After Appellant was handcuffed, Officer Garcia could be seen on his BWC *squeezing* and *manipulating* the object in Appellant's pants pocket for a couple seconds. Once he removed Appellant's wallet from his back pocket, Officer Garcia proceeded to ask Appellant if he had anything on him before, *again*, squeezing and manipulating the object in his right pocket a second time. Officer Garcia even asked whether the object was "[c]igarettes or something" before expanding his frisk to Appellant's front waistband and groin area. Officer Garcia's frisk went well beyond the scope of a limited pat down to check for weapons. Removing Appellant's wallet, inquiring about possession of cigarettes, and returning to the pants pocket to intensively manipulate the area a second time turned Officer Garcia's protective search into an investigative search well before his assertion that he felt something "hard" as he was squeezing and manipulating Appellant's pocket the first time. The Court of Appeals has clearly explained

> "[T]he objective is to discover weapons readily available to a suspect that

> may be used against the officer, not to ferret out carefully concealed items that could not be accessed without some difficulty. General exploratory searches are not permitted, and police officers must distinguish between the need to protect themselves and the desire to uncover incriminating evidence."

Id. at 684 (*quoting* State v. Smith, 345 Md. 460, 465 (1997). Officer Garcia's initial approach to the frisk was indicative of an officer seeking to uncover incriminating evidence. He made up in his mind that Appellant had a gun in his pocket and he was going to go beyond a pat down; he went to grab and move around whatever was in Appellant's pocket to definitively make out a gun and, as a result of this intense search, he was able to feel more than he otherwise would have, granting him the justification he wanted to continue to Appellant's waistband. Limitations placed on *Terry* frisks were designed to prevent intrusions of this kind.

CONCLUSION

Accordingly, we conclude that Officer Garcia's testimony lacked specific facts to establish a sufficient basis to have stopped and frisked Appellant. As a result, we hold that the circuit court erred in denying Appellant's motion to suppress the handgun recovered from the unlawful search. We reverse the judgment of the circuit court and remand for further proceedings not inconsistent with this opinion.

JUDGMENT REVERSED AND CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE CITY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.

Circuit Court for Baltimore City
Case No. 118311009

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0561

September Term, 2019

JAMES MITCHELL

v.

STATE OF MARYLAND

Graeff,
Reed,
Gould,
JJ.

Concurring Opinion by Graeff, J.

Filed: April 9, 2021

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

I concur in the judgment only. I agree with the Majority that the circuit court erred in denying appellant's motion to suppress because the officer's actions exceeded the permissible scope of a *Terry* frisk. I write separately, however, because I respectfully disagree with the Majority's conclusion that the officer did not have reasonable suspicion to stop and frisk the appellant.

As the Majority notes, a brief investigatory stop is authorized when the police have "reasonable suspicion that a person has committed or is about to commit a crime[.]" *Carter v. State*, 243 Md. App. 212, 227 (2019). *Accord Nathan v. State*, 370 Md. 648, 660 (2002) ("[A] police officer who has reasonable suspicion that a particular person has committed, is committing, or is about to commit a crime may detain that person briefly in order to investigate the circumstances that provoked suspicion."), *cert. denied*, 537 U.S. 1194 (2003).

In assessing whether a police officer had reasonable suspicion to conduct an investigatory stop, we look at "the totality of the circumstances" to determine whether the officer had "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417–18 (1981). Reasonable suspicion requires "something more than an inchoate and unparticularized suspicion or hunch," *Sellman v. State*, 449 Md. 526, 543 (2016) (quoting *Crosby v. State*, 408 Md. 490, 507 (2009)), but it requires "'considerably less than proof of wrongdoing by a preponderance of the evidence,' and 'obviously less' than is necessary for probable cause." *Navarette v. California*, 572 U.S. 393, 396–97 (2014) (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989)).

A frisk of a person stopped is permitted "if the officer has a reasonable articulable suspicion that the person with whom the officer is dealing is armed and dangerous." *Thornton v. State*, 465 Md. 122, 142 (2019). As the Supreme Court explained in *Terry v. Ohio*, 392 U.S. 1, 27 (1968):

> The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or "hunch," but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.

As the Majority notes, the presence of a bulge in a man's pocket, or movements around a person's waistband, do not, in isolation, provide reasonable suspicion to justify a stop. *See Ransome v. State*, 373 Md. 99, 108 (2003); *In re Jeremy P.*, 197 Md. App. 1, 13 (2011). These facts, however, in combination with other facts that an officer testifies indicate possession of a handgun, can be sufficient to establish reasonable suspicion to stop and frisk.

Here, Officer Garcia, an expert "in the identification of characteristics of armed persons," testified to the reasons that he believed that appellant was carrying a handgun. First, he observed a "bulge" or "real heavy object" swinging back and forth in the right pocket of appellant's shorts, and he stated that guns are heavy and swing when a person walks. Second, although appellant's left arm swung freely, his right arm was "stiff," trying to prevent the object from moving around, and at one point, appellant conducted a "security check," i.e., he tapped the object to "make sure it was still there. Third, when Officer

Garcia approached, appellant "bladed" his body by turning away from the officer, indicating that he was trying to conceal something. Officer Garcia testified that the way appellant was awkwardly holding his arm and checking the large, heavy bulge in his pocket, in addition to an apparent attempt to conceal that side of his body when the officer approached, led him to believe, based on his expertise and training, that the object was a weapon.

In my view, this evidence supports the trial court's finding that there was reasonable suspicion to support the initial stop and frisk. *See Norman v. State*, 452 Md. 373, 387 (2017) ("[A] court must give due deference to a law enforcement officer's experience and specialized training, which enable the law enforcement officer to make inferences that might elude a civilian."); *Singleton v. United States*, 998 A.2d 295, 301–02 (D.C. 2010) (reasonable suspicion to support stop and frisk where police observed a bulge in the suspect's front pant pocket, the suspect moved with a "stiff gait" and made a "protective hand gesture over that pocket," the suspect appeared extremely nervous and repeatedly looked over his shoulder toward the officer, and the officer testified that his experience led him to believe that the suspect was carrying a gun); *Commonwealth v. DePeiza*, 868 N.E.2d 90, 94–96 (Mass. 2007) (Officers had reasonable suspicion to conduct a stop and frisk where the suspect was walking at night in a high crime area with his "right arm stiff and straight, pressed against his right side," the suspect appeared nervous and repeatedly hid his right side from the officers' view," and the suspect's "right jacket pocket appeared to hold a heavy object."); *State v. Murray*, 213 A.3d 571, 574, 579 (Del. 2019) (reasonable

suspicion where the suspect was walking in a high-crime area while holding his right arm "pinned" against the front-right side of his body, and when the suspect saw the police, he began "turning and blading" away from the officer, actions which were consistent with someone who is armed).