Circuit Court for Baltimore City
Case No. 11627009

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 891

September Term, 2017

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OMANUEL JOHNSON

v.

STATE OF MARYLAND

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Meredith,
Fader,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Fader, J.

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Filed: May 23, 2018

The appellant, Omanuel Johnson, challenges the denial of his motion to suppress drugs and a handgun seized from him following a traffic stop. The officers who stopped the car, in which Mr. Johnson was a passenger, had received a tip that there was a man with a gun in the car. Two officers conducted simultaneous searches for weapons, one of Mr. Johnson's person and the other of the passenger compartment of the vehicle. The first officer found a bag of heroin capsules in Mr. Johnson's pocket. Approximately 12 seconds later, the second officer found the gun under a purse on the floor of the front passenger seat, which Mr. Johnson had just vacated. Mr. Johnson argues that: (1) the drugs should have been suppressed because the search of his person went beyond what was necessary to look for weapons; and (2) the gun should have been suppressed because, especially once the drugs were found, there was no safety justification for the search.[1] The motions court denied the motion to suppress. We affirm.

## BACKGROUND

### *The Traffic Stop and Searches*[2]

On August 31, 2016, at approximately 9:30 p.m., a registered confidential informant called the cell phone of Officer Kevin Chan of the Baltimore Police Department and

[1] Mr. Johnson states his question presented as: "Whether the police violated Omanuel Johnson's Fourth Amendment Rights by 'squeezing' and 'grabbing' the contents of Mr. Johnson's pockets during a *Terry* frisk and conducting a warrantless search of his car though he was already handcuffed and surrounded by police officers with guns drawn, including aerial surveillance in a helicopter overhead?"

[2] In a challenge to a ruling on a motion to suppress, we are limited to considering the facts presented at the motions hearing, *Nathan v. State*, 370 Md. 648, 659 (2002), and we must view those facts in the light most favorable to the prevailing party, *Belote v. State*,

notified him that a male sitting inside a gray Chevrolet Impala at a specific location was armed with a handgun. Officers Chan, Brandon A. Sanchez, William J. Quigley, and Roberto J. Arena responded to the location, which the officers knew to be a "high crime, high drug area." "As soon as [the officers] arrived," they spotted a female driver and a male passenger sitting in the front seat of a gray Impala. Based on the information that the individual may be armed, Officer Quigley called for backup and requested a police helicopter.

When they noticed that the left taillight of the Impala was not functioning properly, the officers initiated a traffic stop. As the Impala pulled over, the helicopter had positioned itself overhead, a backup unit stopped in front, and the car with Officers Chan, Sanchez, Quigley, and Arena stopped behind. Mr. Johnson, who had been riding in the front passenger seat, then "flung open" the passenger door, turned as though ready to run, and immediately bumped into Officer Sanchez, who was approaching from behind. Not knowing whether Mr. Johnson was armed and believing Mr. Johnson's immediate exit "caus[ed] a very high risk," Officer Sanchez drew his gun. Officer Sanchez handcuffed Mr. Johnson and moved him toward the rear passenger side of the Impala. Officer Quigley and one of the backup officers then approached the driver's side of the car, asked the driver to step out, and directed her to sit on the curb.

411 Md. 104, 120 (2009). Our discussion of the background facts of the traffic stop, searches, arrest, and the motion to suppress adheres to these principles.

While Officer Sanchez initiated a pat down frisk of Mr. Johnson and the driver was being directed out of the vehicle, Officer Chan approached the front passenger side of the Impala and, with the assistance of a flashlight, began to look inside through the open passenger door. In close succession, both of these simultaneous searches proved fruitful. First, upon touching Mr. Johnson's right pants pocket, it became "immediately apparent" to Officer Sanchez that the pocket contained a plastic bag of gel caps containing illegal drugs. Officer Sanchez reached inside the pocket and pulled out a clear plastic bag containing 50 gel caps of suspected heroin. He then held the drugs up for the other officers, including Officer Chan, to see. Approximately 12 seconds later, Officer Chan lifted a purse that was sitting on the front passenger floorboard and found the handgun, which was loaded, with one round in the chamber.

***The Suppression Hearing***

Mr. Johnson moved to suppress the drugs and gun seized by the officers. At the suppression hearing, Officers Chan, Sanchez, and Quigley testified as witnesses to the facts set forth above. With respect to the seizure of the drugs, Officer Sanchez testified that he started the frisk by patting down Mr. Johnson's "waist area and his pockets," and then moved to a "bulge" he had noticed in Mr. Johnson's pocket. Officer Sanchez testified, "As soon as I touched [Mr. Johnson's] right pants pocket, it was immediately apparent that [Mr. Johnson] had a bag full of gel caps in his pocket." He knew they were gel caps because they "were in a large quantity so I could feel the actual gel caps in the bag. After a thousand pat downs I've done in my career itself, it was immediately apparent to me." On cross-examination, when asked what he "did with his hands" during the pat down, Officer

Sanchez replied "Well, I grabbed it like this and I could feel the gel caps in the plastic bag inside of his pocket." The transcript does not provide any indication of what gestures Officer Sanchez may have made while testifying.

In response to a question from the court as to what a "pack of drugs" feels like, Officer Sanchez identified a number of factors, including: (1) whereas legal drugs are generally contained in pill bottles, illegal drugs are not; (2) gel caps containing illegal drugs are generally wider and larger than gel caps from a doctor's office; and (3) he described the feel and sound of a "clear plastic bag" when "squeeze[d]," which allowed him to realize that what he felt were large heroin gel caps contained in a plastic bag. Indeed, he testified, the gel caps have a "very distinctive feel unlike any other." Defense counsel then asked, "Once you squeezed it and grabbed it, you believed that you had found illegal drugs; is that right?"; Officer Sanchez responded, "Correct."

After hearing testimony from Officers Sanchez, Quigley, and Chan, and watching their body camera video footage, the court denied the motion to suppress. The court first determined that the confidential informant's information was sufficiently credible to give the officers reasonable suspicion that a person in the Impala was armed with a gun. Then, after determining that the searches were effectively simultaneous, the court analyzed them separately.

As to the gun, the court held that although it was not in plain view, Officer Chan's lifting of the purse was reasonable under the circumstances as "part of the frisk" and was minimally intrusive. Moreover, "[h]ad they not found anything in the frisk and he had

gotten back in the car, he would have had a gun ready to hand that could have been a danger to the police or to himself or to others."

Although the court considered the seizure of the drugs to present a "very close question," it found the search justified under the plain feel doctrine. Acknowledging the governing standard from *Minnesota v. Dickerson*, 508 U.S. 366 (1993), the court relied in particular on Officer Sanchez's "quick identification" of the gel caps; his testimony about their distinctive shape, size, and feel; and their containment in a plastic bag that he could feel "very readily." The court also found "that this frisk really was a matter of seconds. It wasn't – it wasn't something where he sat there and kind of was feeling around to see what it was. It was a very quick identification of the something in his pocket. . . ."[3] Moreover, the court held, once the gun was discovered, the discovery of the drugs was inevitable because Mr. Johnson would have been searched pursuant to a lawful arrest on the gun charge.

A jury convicted Mr. Johnson of possession of a controlled dangerous substance with intent to distribute, firearm possession with a felony conviction, transportation of a handgun in a vehicle, and possession of ammunition. The court sentenced Mr. Johnson to ten years' imprisonment for possession with intent to distribute, three years' imprisonment on each of the firearms charges, and one year on the ammunition charge, all to be served concurrently. This appeal followed.

[3] Although the video from Officer Sanchez's body camera does not show the frisk itself, it does show that the bag of drugs was retrieved no more than nine seconds after the frisk began.

## DISCUSSION

When reviewing a ruling on a motion to suppress evidence, we defer to the suppression court's findings of fact unless clearly erroneous. *Holt v. State*, 435 Md. 443, 457 (2013); *Longshore v. State*, 399 Md. 486, 498 (2007). We only consider the facts presented at the suppression hearing, *Nathan v. State*, 370 Md. 648, 659 (2002), and we view those facts in the light most favorable to the prevailing party, *Crosby v. State*, 408 Md. 490, 504 (2009). "[W]e review the hearing judge's legal conclusions *de novo*, making our own independent constitutional evaluation as to whether the officer's encounter with the defendant was lawful." *Sizer v. State*, 456 Md. 350, 362 (2017). Each encounter is unique, and our review looks to the totality of the circumstances on the specific facts of the case before us. *Id.* at 363; *Bailey v. State*, 412 Md. 349, 365 (2010).

### I. THE SUPPRESSION COURT DID NOT ERR IN DENYING MR. JOHNSON'S MOTION TO SUPPRESS THE DRUGS.

#### A. Contraband That Is Not a Weapon May Be Seized During a *Terry* Frisk if Its Identity Is Immediately Apparent by the Time the Officer Realizes It Is Not a Weapon.

Mr. Johnson does not question the propriety of the traffic stop itself, nor does he challenge whether the officers had reasonable suspicion to conduct a frisk of his person to determine whether he possessed a weapon. His challenge is to the scope of that frisk. In particular, Mr. Johnson contends that Officer Sanchez impermissibly grabbed and squeezed his pocket before identifying that it contained drugs. The State responds that the frisk was valid because Officer Sanchez immediately recognized that the pocket contained

a bag of drugs as soon as he touched it. Viewing the evidence in the light most favorable to the State, as we are required to do, we agree with the State.

"[O]ur analysis begins, as it should in every case addressing the reasonableness of a warrantless search, with the basic rule that 'searches conducted outside the judicial process . . . are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).[4] The Supreme Court established such an exception in *Terry v. Ohio*, 392 U.S. 1 (1968). There, the Court first held that police may stop and briefly detain a person for purposes of an investigation if the officer has a reasonable suspicion supported by articulable facts that criminal activity may be afoot. *Sellman v. State*, 449 Md. 526, 541 (2016). During such a detention, if the officer has "reasonable suspicion that an individual is armed and dangerous," the officer may conduct a frisk for the sole purpose of identifying any weapons that might constitute a threat to the officer or others. *Id.* at 543. The scope of a *Terry* frisk is "strictly circumscribed" to what is necessary to identify weapons. *Terry*, 392 U.S. at 26. "The purpose of a *Terry* frisk is not to discover evidence of crime," but to protect police officers and the public from danger. *In re David S.*, 367 Md. 523, 544 (2002).

[4] The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The Court of Appeals has identified similar protections in Article 26 of the Maryland Declaration of Rights. *Byndloss v. State*, 391 Md. 462, 465 n.1 (2006).

Although a *Terry* frisk is invalid if it "goes beyond what is necessary to determine if the suspect is armed," *Dickerson*, 508 U.S. at 373, a law enforcement officer who identifies contraband without exceeding that scope may seize it under the plain feel doctrine, *id.* at 375. Thus, if an officer conducting a valid *Terry* frisk "comes upon an item that by mere touch is immediately apparent to the officer to be contraband or of 'incriminating character,' then the officer is authorized to seize that item immediately." *McCracken v. State*, 429 Md. 507, 510-11 (2012) (quoting *Dickerson*, 508 U.S. at 375). That is because if the identity of the object is "immediately apparent" upon touch, then "there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons." *Dickerson*, 508 U.S. at 375. The character of an item is "immediately apparent" only if "the officer, upon seeing or feeling the item, [has] probable cause to believe that the item is contraband or evidence of a crime." *McCracken*, 429 Md. at 513-14.

In *Dickerson*, the case in which the Supreme Court established the plain feel doctrine, the officer conducting a *Terry* frisk found a "small lump" in the suspect's pocket that he determined to be crack cocaine only after "squeezing, sliding, and otherwise manipulating" it. 508 U.S. at 369, 378. The Court concluded that the seizure was invalid because the officer only identified the substance after a "continued exploration" of the pocket *after* realizing that it "contained no weapon." *Id.* at 378. However, the Court also expressly recognized that the seizure would have been valid *if* the illicit nature of the substance had been immediately apparent to the officer's touch. *Id.* at 378-79.

The Court of Appeals examined the plain feel doctrine most recently in *McCracken*. There, an officer came across a man fighting with a woman who accused him of threatening to shoot her and of having "hacked" her to their current location.[5] 429 Md. at 511-12. While patting down the suspect's pants pocket, the officer "immediately discerned" a set of keys and a car remote in the pocket and seized them. *Id.* at 512. The officer then used the remote to identify the car and, when he peered into the car with his flashlight, he saw a gun. *Id.* at 512-13. The Court found the search valid. The officer, of course, did not *know* when he first felt the keys and remote that they were evidence of a crime, that they would operate a car nearby, or that the suspect was guilty. *Id.* at 518-19. However, the Court held, he nonetheless had sufficient information that it was "immediately apparent" to him that the keys and remote might be "evidence of [the suspect's] involvement in hacking a short time earlier." *Id.* at 519. Thus, an objectively reasonable officer would have had probable cause to believe that the items he felt, "merely from the sense of touch while patting down," belonged to the vehicle "just used as the 'hack' in which to transport the woman to their present location." *Id.* at 520-21.

The core principle behind the plain feel doctrine is that where an officer has obtained probable cause that an object is illicit or evidence of a crime through a search that goes no further and lasts no longer than what *Terry* already authorizes, no unauthorized search has occurred. *Bailey*, 412 Md. at 368-69. The critical issue is thus not whether there was any manipulation of an object or of clothing, but whether any such manipulation goes "beyond

[5] "Hacking" refers to the crime of providing taxi services without a license. *McCracken*, 429 Md. at 516 n.1; Article 19, § 52-2 of the Baltimore City Code (2016).

what [i]s necessary to determine if [the suspect] [i]s armed." *Sykes v. State*, 166 Md. App. 206, 229 (2005). We therefore upheld a search under the plain feel doctrine in *Sykes* even though the frisk involved "work[ing] down the shoulders and arms, grabbing and crumbling the clothes as we check[ed] for weapons." *Id.* at 212. When the officer reached the right outer coat pocket, he "'grabbed, crumbled, rolled [his] hand slightly,'" at which point he "heard a plastic bag sound and felt two objects that, based upon his knowledge, training, and experience as a narcotics officer, he recognized by feel as 'decks' of illegal drugs." *Id.* (quoting officer's testimony). Deferring to the motions court's finding that the officer "had not ruled out the presence of a weapon" by the time he "immediately recognized" the cocaine, we affirmed the denial of the suppression motion. *Id.* at 230.

The corollary of the principle that an officer may seize an object if she or he obtains probable cause without exceeding the allowable scope of a *Terry* search is that she or he may *not* seize the object if its illicit nature is not apparent by the moment the officer concludes it is not a weapon. Thus, in *Bailey*, the seizure of a glass vial of PCP resulting from a *Terry* frisk violated the suspect's rights because, although it was immediately apparent that the object the officer felt was a glass vial, it was not immediately apparent that the vial contained PCP. 412 Md. at 370. Similarly, in *State v. Smith*, an officer exceeded the permissible scope of a *Terry* frisk when he "looked beneath" the suspect's outer clothing without reasonable suspicion that there might be a weapon. 345 Md. 460, 468-70 (1997). And in *Madison-Sheppard v. State*, we found unconstitutional a search in which an officer detected "blunt objects" that he recognized as crack cocaine only after he "squeeze[d]," "grabb[ed]," and "grasp[ed]" them. 177 Md. App. 165, 169 (2007). Because

the identity of the contents were not "immediately apparent" to the officer absent that further manipulation, we found the search improper. *Id.* at 187.[6]

From these cases, we discern the following principles behind the plain feel doctrine: (1) a *Terry* frisk is permissible only when an officer possesses reasonable suspicion that a suspect who has been legitimately stopped might possess a weapon; (2) the scope of a *Terry* frisk is limited to what is necessary to determine if a weapon is present; (3)(a) once an officer conducting a *Terry* frisk is satisfied that an object is not a weapon, she or he must immediately move on without any further touching or manipulation of the object, (b) *unless* it is immediately apparent, by the time she or he realizes that the object is not a weapon, that there is probable cause to believe that it is illicit or evidence of a crime.

### B. Viewed in the Light Most Favorable to the State, the Scope of the Frisk Was Valid Under the Plain Feel Doctrine.

Officer Sanchez's search of Mr. Johnson did not exceed the permissible scope of a *Terry* frisk. A five-year veteran of the Baltimore Police Department who had been involved in more than 200 drug arrests, Officer Sanchez was accepted by the court, without objection,[7] as an expert in "street level narcotics and specifically their packing, their

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[6] Mr. Johnson's reliance on *Madison-Sheppard* is misplaced. Mr. Johnson is correct that: (1) the State had argued that the officer had testified that he "immediately identified the object . . . as crack cocaine," 177 Md. App. at 187; and (2) we rejected that argument, *id*. But Mr. Johnson misunderstands *why* we rejected that argument. We did not hold, as Mr. Johnson argues, that such testimony would have been insufficient to support admission of the crack cocaine. To the contrary, we simply observed that the officer had not, in fact, given that testimony. *Id*.

[7] Mr. Johnson's counsel initially objected to the State's proffer of Officer Sanchez as an expert. Officer Sanchez, who had been qualified as an expert in street-level narcotics distribution, sale, and packaging on four prior occasions, then testified about training he had received regarding the packaging and sale of drugs and about a variety of different

distribution and sale." After describing his interaction with Mr. Johnson, Officer Sanchez testified that it was "immediately apparent" to him, "[a]s soon as [he] touched" the pants pocket, that the objects he felt inside were gel caps containing illegal narcotics. He also explained why that was immediately apparent, citing the "thousand pat downs" he had done, the distinctive size and feel of the gel caps, and the fact that they were contained in a plastic baggie rather than a pill bottle. This testimony, accepted by the motions court, is sufficient to support the conclusion that the seizure of the gel caps was permissible under the plain feel doctrine.

Mr. Johnson does not argue to the contrary. Instead, he argues that this testimony cannot be viewed in isolation, but must instead be read in conjunction with later testimony in which, he asserts, Officer Sanchez admitted that he "grabbed" and "squeezed" the drugs before identifying them. For two reasons, we disagree. First, even if we were to assume that Officer Sanchez's later testimony was inconsistent with his statements that the identity of the heroin gel caps was immediately apparent to him, the motions judge, as the assessor of the credibility of the evidence and finder of fact, was free to accept the testimony he believed and disregard the testimony he did not. *Jones v. State*, 343 Md. 448, 460 (1996) ("In performing its fact-finding role, the trier of fact decides which evidence to accept and which to reject . . . . [I]t is not required to assess the believability of a witness's testimony

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ways in which heroin is packaged for sale in Baltimore City. He testified that he has been involved in over a hundred heroin arrests, including approximately 75 as the primary officer, and that he had been the affiant in search warrants for narcotics more than 60 times. After this testimony, Mr. Johnson's counsel dropped her objection to his qualification as an expert.

on an all or nothing basis; it may choose to believe only part, albeit the greatest part, of a particular witness's testimony, and disbelieve the remainder."). He was thus free to accept Officer Sanchez's statements that the identity of the drugs was immediately apparent to him as soon as he touched the pocket and not later testimony that he manipulated the pocket before making that determination. Because Officer Sanchez's initial testimony clearly supports the motions court's findings, we must defer to those findings even if other testimony is in conflict.

Second, we do not agree with Mr. Johnson's characterization of Officer Sanchez's later testimony. Officer Sanchez used the word "grabbed" only once. When responding to a question about what he "did with his hands" during the search, he said, "Well, I grabbed it like this and I could feel the gel caps in the plastic bag inside of his pocket." From the use of "like this," it appears that Officer Sanchez was making a gesture to demonstrate for the motions judge exactly what he was actually doing with his hand, but the transcript does not contain any description of the gesture he made. We do not know what movement Officer Sanchez demonstrated, and thus have no cause to question the trial judge's conclusion that it was within the permissible bounds of a *Terry* frisk.

Officer Sanchez also used the word "squeeze" only once. In the course of explaining how he identified the contents of Mr. Johnson's pocket, Officer Sanchez discussed what a plastic baggie feels and sounds like: "I could feel the plastic when I touched it, almost like a (making a sound) kind of crushing noise when you touch the plastic, when you squeeze plastic itself and the size you could feel the large gel caps inside of the plastic bag." On a cold record, we cannot discern whether Officer Sanchez's use of

"when you squeeze plastic itself" came across as a generic reference to the sound plastic makes when squeezed in any way, as a specific reference to the type of squeezing that would have occurred if he had pressed gently with a flat hand against the filled plastic bag that resided in Mr. Johnson's pocket, or as a specific reference to the type of squeezing that would have occurred if he had wrapped his whole hand tightly around the bag. Because all three possibilities are conceivable inferences from Mr. Johnson's testimony, we must accept that it was one of the two that would support the motions court's findings.

It is against the backdrop of these questions and responses that Officer Sanchez responded affirmatively to two questions in which Mr. Johnson's counsel used the words "grabbed" and "squeezed." Viewing the facts in the light most favorable to the State and with deference to the findings of the motions court, as we are required to do, *Crosby*, 408 Md. at 504, we cannot conclude that this testimony establishes that Officer Sanchez did more than was necessary to identify whether Mr. Johnson had a weapon in his pocket. We therefore conclude that the search of Mr. Johnson's pocket and the seizure of drugs that were immediately apparent to Officer Sanchez when he touched them were constitutional under the plain feel doctrine.

### C. The Drugs Would Also Have Been Admissible Under the Inevitable Discovery Doctrine.

Even if we were to have found that the seizure of the drugs was not permissible under the plain feel doctrine, we would still affirm under the inevitable discovery doctrine. Inevitable discovery applies if evidence seized illegally would have been discovered through lawful means. *Nix v. Williams*, 467 U.S. 431, 444 (1984). Its purpose is to "purg[e]

the primary taint" of illegally obtained evidence where it inevitably would have been found "notwithstanding a constitutional violation." *Myers v. State*, 395 Md. 261, 285 (2006). It is the State's burden to "show, by a preponderance of the evidence, that the lawful means which made discovery inevitable was being actively pursued prior to the illegal conduct." *Hatcher v. State*, 177 Md. App. 359, 397 (2007).

As described in the next section, we conclude that the search of the vehicle that had begun prior to the seizure of the drugs was permissible. Thus, even if the drugs had not been found first, they would inevitably have been discovered in a search incident to arrest upon discovery of the handgun.

This case is similar to *Hatcher v. State*, 177 Md. App. 359 (2007). There, police initiated a lawful traffic stop. *Id.* at 382. Once the vehicle was pulled over, Mr. Hatcher, a passenger, was searched, found to be in possession of drugs, then arrested and detained in the back of the police car. *Id.* at 369. Only later, but still during the stop, did the officers learn that Mr. Hatcher had an outstanding warrant for the theft of the vehicle. *Id.* at 382. We upheld the permissibility of the search in its own right, but, like here, proceeded to assess whether, "assum[ing] hypothetically that the arrest and search were unlawful," the drugs would still be admissible under the inevitable discovery doctrine. *Id.* at 382. We held that they would because even if the officers had not initially searched Mr. Hatcher, they would have done so, incident to a lawful arrest, once they had received word of the warrant. *Id.* at 402.

*Stokes v. State*, 289 Md. 155 (1980), on which Mr. Johnson relies, is inapposite. There, the Court of Appeals rejected application of the inevitable discovery doctrine to

validate the seizure of drugs found in a suspect's bedroom ceiling based on the suspect's illegally procured statement. *Id.* at 164-66. The Court held that the police had failed to demonstrate that, absent the statement, the drugs would necessarily have been found pursuant to "a prescribed and utilized department procedure." *Id.* at 166. Whereas it could reasonably be doubted that the police would routinely have searched inside Mr. Stokes's ceiling, it is inconceivable that any search incident to arrest would not have uncovered the bulging bag of drugs located rather conspicuously in the front pocket of Mr. Johnson's pants. *See United States v. Robinson*, 414 U.S. 218, 227 (1973) (establishing that a search incident to arrest can involve a "relatively extensive exploration of the person" to locate weapons or evidence that could be concealed or destroyed); *State v. Nieves*, 383 Md. 573, 585 (2004) (same; discussing *Robinson*, 414 U.S. at 227). Discovery of the drugs was inevitable.

## II. THE SUPPRESSION COURT DID NOT ERR IN DENYING MR. JOHNSON'S MOTION TO SUPPRESS THE HANDGUN.

### A. The Search of the Vehicle Was, at Its Inception, a Valid Search.

Mr. Johnson's second argument requires us to explore yet another branch of the *Terry* analysis.[8] In *Michigan v. Long*, the Supreme Court extended the permissible scope of a *Terry* frisk to the passenger compartment of a vehicle. 463 U.S. 1032, 1049 (1983). The Court found support for this extension from cases indicating "that protection of police

[8] The State argues that Mr. Johnson lacks standing to challenge the seizure of his gun because he did not own the vehicle and he abandoned the vehicle by exiting it as soon as it was stopped. Given our conclusion that his claim lacks merit even if he has standing to raise it, we assume, without deciding, that he has standing.

and others can justify protective searches when police have a reasonable belief that the suspect poses a danger, that roadside encounters between police and suspects are especially hazardous, and that danger may arise from the possible presence of weapons in the area surrounding a suspect." *Id*. Thus, the Court held, police officers may search the areas of an automobile's passenger compartment where "a weapon may be placed or hidden" if the officer has a reasonable, articulable belief based on facts and rational inferences that "the suspect is dangerous and the suspect may gain immediate control of weapons." *Id.* The Court rejected the defendant's argument that he posed no danger at the time of the search because he was under police control, for two reasons: (1) even a suspect under the control of officers has the potential to break away and gain access to the vehicle; and (2) "if the suspect is not placed under arrest, he will be permitted to reenter his vehicle, and he will then have access to any weapons inside." *Id.* at 1051-52.

Mr. Johnson argues that the *Long* frisk of the vehicle was nonetheless invalid. Conflating the analysis under *Long* with the analysis applied to a search incident to arrest under *Arizona v. Gant*, he claims that Officer Chan lacked any justification for searching the vehicle because Mr. Johnson was handcuffed, supervised by multiple officers with guns drawn, under *de facto* arrest, and not under any circumstances going to be allowed back in the vehicle.

Mr. Johnson's reliance on *Gant* is misplaced in light of significant differences between the context of *Gant*—a search incident to arrest—and the context here—a protective search for weapons under *Long*. Mr. Gant was arrested for driving on a suspended license, handcuffed, and locked in the backseat of a patrol car. 556 U.S. at 335.

Officers then proceeded to search Mr. Gant's vehicle, where they discovered cocaine and a gun. *Id.* The Court analyzed whether the vehicle search was justified as a search incident to arrest, and held that it was not. The Court explained that there are two different justifications for the search incident to arrest exception to the warrant requirement: officer safety and evidence preservation. *Id.* at 339. The officer safety rationale only justifies searches "when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Id.* at 343. As Mr. Gant was locked in the backseat of a patrol car, arrested, and headed for the police station, he had neither immediate nor prospective control of the vehicle. *Id.* at 344.

The Court also held that the evidence preservation rationale, which applies when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle," *id.* at 343 (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring in judgment)), did not justify the search in *Gant*. That is because, in notable contrast to cases in which individuals "were arrested for drug offenses, Gant was arrested for driving with a suspended license—an offense for which police could not expect to find evidence in the passenger compartment of Gant's car." *Id.* at 344.[9] Because neither justification applied, the Court held that the search of Mr. Gant's vehicle could not be justified as incident to his arrest.

[9] In contrasting Mr. Gant's case with cases in which individuals were arrested for drug offenses, the Court specifically referenced its prior decisions in *Thornton* and *New York v. Belton*, 453 U.S. 454 (1981).

The decision in *Gant* was thus driven by the Court's analysis of whether the search was justified by either of the permissible purposes of a search incident to arrest. Mr. Johnson argues that we should apply the same analysis here because he was essentially in the same position as Mr. Gant, i.e., effectively under arrest, under complete police control, and not under any circumstances going to be permitted to reenter the vehicle. But that misstates the factual circumstances, as we must construe them, when Officer Chan initiated the search. Although Mr. Johnson makes much of the fact that he was handcuffed and in the presence of multiple officers who had drawn their guns, those were safety measures taken when Mr. Johnson, who the officers had reason to believe might be armed, attempted to flee. He had not been placed under arrest. *See, e.g.*, *Chase v. State*, 449 Md. 283, 311 (2016) (concluding the use of handcuffs during a *Terry* stop does not necessarily elevate a detention into an arrest); *Trott v. State*, 138 Md. App. 89, 118 (2001) (stating that the fact that a person was handcuffed during a lawful stop was "justifiable as a protective and flight preventative measure" and "did not necessarily transform that stop into an arrest").

Nor was it by any means certain that Mr. Johnson would not be returning to the vehicle at the time Officer Chan initiated his search. Not yet having located either the drugs or the gun, the officers lacked probable cause to arrest and could not be certain that probable cause would emerge. But the officers did have reasonable suspicion that Mr. Johnson might be armed based on the tip they had received from the confidential informant as well as Mr. Johnson's flight attempt. As a result, at the time it was initiated, Officer Chan's search of the passenger compartment of the vehicle was justified under *Long* as a protective search for weapons by an officer with a reasonable, articulable belief that Mr.

Johnson would have been able to gain access to any weapons there if he were permitted to reenter the vehicle. 463 U.S. at 1051-52.[10]

The conclusion that Officer Chan's search was justified at its inception does not resolve the ultimate question of whether the handgun should have been suppressed, because we must also resolve whether Officer Sanchez's discovery of the drugs 12 seconds before Officer Chan's discovery of the gun rendered the continuation of Officer Chan's search impermissible.

**B. The Search of the Vehicle Remained a Valid Search.**

Mr. Johnson contends that, at least once the drugs were discovered, the basis for Officer Chan's search evaporated. Although there is some facial appeal to his argument, we reject it for two reasons.

First, officers who are conducting searches for weapons to ensure their protection and the protection of others have to make snap decisions in response to fast-developing situations. *United States v. Sokolow*, 490 U.S. 1, 13 (1989) (observing that when faced with "ongoing or imminent criminal activity," strict compliance with the Fourth Amendment is impractical); *Terry*, 392 U.S. at 20 (noting that police conduct necessarily involves "swift action predicated upon on-the-spot observations"). We are reticent to

[10] The motions court concluded that the scope of the vehicle search was permissible because: (1) had Mr. Johnson returned to the car, a gun on the floor of the passenger seat of the vehicle (where he had been sitting) would have been "readily available to him" and so "could have been a danger to the police or to himself or to others;" and (2) moving the purse was "minimally intrusive" and so reasonable under the circumstances. *Cf. Goodwin v. State*, 235 Md. App. 263, 286 (2017), *cert. denied*, 2018 WL 1635031 (Mar. 23, 2018) (upholding search in which contraband was found under a vehicle's floormat). Mr. Johnson does not contest that aspect of the motions court's ruling on appeal.

second-guess decisions made under those circumstances. Even if we otherwise agreed with Mr. Johnson, we would not conclude that it would be objectively reasonable to impose on an officer in Officer Chan's position the obligation to immediately stop his search for a weapon upon the discovery of drugs on Mr. Johnson's person during a separate, simultaneous search.[11] Nor do we believe that a reasonable officer in Officer Chan's position would have immediately concluded that the situation became *less* dangerous once Officer Sanchez found the drugs.

The reasonable suspicion standard purposefully is "somewhat abstract[,]" and the Supreme Court has "deliberately avoided reducing it to a neat set of legal rules." *United States v. Arvizu*, 534 U.S. 266, 274 (2002) (internal quotations omitted); *see Taylor v. State*, 224 Md. App. 476, 490 (2015), *aff'd*, 448 Md. 242 (2016) (rejecting that reasonable suspicion depends on a categorical rule). If an officer engaged in a search for weapons were required to stop searching immediately in response to every new data point, and reassess the basis for the search before continuing, it would hamper the ability of law enforcement officers to protect themselves and others. That is not to say that we would necessarily reach the same conclusion if Officer Chan had found the handgun 12 minutes after the discovery of the drugs, instead of 12 seconds later. But in the totality of the

[11] The motions court, finding the searches to have been conducted simultaneously, concluded that they should be analyzed entirely separately from one another. Because the testimony and body camera footage make clear that Officer Chan did, in fact, see the drugs seconds before finding the gun, we will not pretend that he did not have that information when he completed the search. Nonetheless, we agree with what we believe to be the spirit of the motions court's finding, which is that it would be unreasonable under the circumstances to assess Officer Chan's vehicle search as though it followed in series to Officer Sanchez's search of Mr. Johnson.

circumstances present here, we cannot conclude that Officer Chan's continued search of the vehicle was unreasonable.

Second, *if* Officer Chan had immediately processed the significance of the discovery of the drugs, he would then have had an entirely separate rationale for proceeding with the vehicle search. At that point, because it would have been clear that Mr. Johnson was going to be arrested for possession of drugs, Officer Chan's *Long* vehicle search could have transformed immediately into a search incident to arrest which, under *Gant*, could clearly have been justified by a search for further evidence of the crime of possession of drugs. Although Mr. Johnson correctly observes that an officer must generally articulate why she or he believes evidence of a crime may be located in the vehicle to justify such a search incident to arrest, *Taylor*, 224 Md. App. at 490-91, we find it difficult to conceive of the situation in which such a search would not be justified upon discovery of a significant quantity of illegal drugs on an individual's person. Indeed, that was precisely the basis on which the Supreme Court distinguished its decisions in *Belton* and *Thornton*, in which the defendants were arrested for drug crimes, from *Gant*. 556 U.S. at 343-44.

In sum, we hold that the search of Mr. Johnson's person that produced the drugs was valid under the plain feel doctrine, and that the search of the vehicle in which Mr. Johnson was a passenger was valid under *Long*. We therefore affirm.

**JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.**