Circuit Court for Harford County
Case No. 12-K-18-0212

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 998

September Term, 2019

BRANDON WARFIELD

v.

STATE OF MARYLAND

Fader, C.J.,
Arthur,
Gould,

JJ.

Opinion by Gould, J.

Filed: August 31, 2020

Appellant Brandon Warfield challenges his convictions for possession of cocaine as well as possession of cocaine with the intent to distribute. According to Mr. Warfield, the trial court erroneously found that his seizure was merely an investigatory stop that required only a reasonable articulable suspicion that criminal activity was afoot. He maintains that he was subjected to a de facto arrest without probable cause, and therefore the evidence obtained as a result of the unlawful arrest should have been suppressed. We agree with Mr. Warfield that the seizure was a de facto arrest requiring probable cause. However, because we conclude that the police *did* have probable cause to arrest him, we affirm the denial of his motion to suppress.

Mr. Warfield also claims that the court erred in two other respects: 1) by failing to dismiss his case after 180 days had passed since his initial appearance in court; and 2) by failing to declare a mistrial after one of the jurors expressed his view to his co-jurors, during trial, that Mr. Warfield was guilty. For the reasons explained below, we find no error and therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2017, Detective David Waldsmith of the Harford County Narcotics Task Force began investigating Mr. Warfield. Early in his investigation, Detective Waldsmith was made aware of information that, in his experience, indicated Mr. Warfield was involved in illegal drug transactions. For example, conversations with Mr. Warfield were found on the cell phone of an individual who had suffered a non-fatal heroin overdose. Also, Detective Waldsmith noticed from his review of other police records that Mr. Warfield had been in the same car with another individual who had overdosed.

In September, Detective Waldsmith observed Mr. Warfield park his car in the parking lot of a Planet Fitness gym and then meet with another man in his car. After about five minutes, the other man exited Mr. Warfield's car. Detective Waldsmith believed that he had just witnessed a drug transaction.

In October, Detective Waldsmith was informed that Mr. Warfield had been pulled over by the Aberdeen Police Department and that the officers had found "suspected cocaine residue," marijuana, and drug paraphernalia in his car. The detective also learned that Mr. Warfield became ill and vomited in route to the police station, and that his vomit contained plastic baggies filled with what was suspected to be cocaine and marijuana.

In November, the police observed Mr. Warfield engage in what they believed to be a drug transaction, where a woman leaned into Mr. Warfield's stopped car for a brief time and subsequently retreated. Mr. Warfield then drove to a gas station, pulled up to a gas pump, and waited in the car for five minutes without pumping any gas. Then, another car pulled up next to Mr. Warfield, and the driver, who the police knew to be a drug user, exited his car and approached Mr. Warfield's vehicle. The two shook hands. Mr. Warfield then retrieved an item from his car and went back to the other individual.

Believing that he had just witnessed a drug transaction, Detective Waldsmith activated his emergency lights and converged on the gas station along with at least three other police vehicles. Detective Waldsmith drew his service weapon and ordered Mr.

Warfield out of his car.[1] As Mr. Warfield exited his car, another officer on the scene, Corporal Ryan Wolfe, smelled marijuana. Corporal Wolfe immediately handcuffed Mr. Warfield and searched the car. Corporal Wolfe discovered a bag of suspected marijuana, a bag of suspected cocaine, and a bag containing pills. Mr. Warfield was charged with possession of cocaine with the intent to distribute, possession of cocaine, possession of marijuana with the intent to distribute, and possession of Xanax.

Mr. Warfield's trial began in April 2019. After the first day of trial, the judge received a note from the jury foreperson stating that one of the jurors, "Juror 59," had "expressed his guilty verdict openly to the group." The trial court proceeded to question each juror. The foreperson testified that Juror 59 had stated two or three times "that this case needs to be over" and that Mr. Warfield was "guilty." When his turn came to be questioned by the court, Juror 59 admitted to openly saying to his co-jurors that "it is pretty obvious how it [is] going to go down." Six of the jurors recalled hearing Juror 59's statements.

The State moved for a mistrial, which Mr. Warfield ultimately joined. The court denied the motion, dismissed Juror 59, and replaced him with an alternate. The trial

[1] The State argues that Detective Waldsmith's weapon was not "drawn" because, though he had taken the gun of his holster, it was pointed at the ground. Although we are not persuaded by this narrow definition of "drawn," whether the gun was technically drawn is, under the circumstances, a distinction without a difference.

(continued)

resumed and Mr. Warfield was found guilty of possession of cocaine with the intent to distribute and simple possession.[2] This appeal promptly followed.

DISCUSSION

I.
The Motion to Suppress

Our review of a court's ruling on a motion to suppress is limited to the evidence adduced at the suppression hearing. Chase v. State, 224 Md. App. 631, 640 (2015) (quotation omitted), aff'd, 449 Md. 283 (2016). We review the evidence and any reasonably drawn inferences from the evidence in the light most favorable to the prevailing party. Id. We accept the court's factual findings and conclusions unless they are clearly erroneous. Id. And "we undertake our own constitutional appraisal of the record by reviewing the law and applying it to the facts of the present case." Id.

The Fourth Amendment protects individuals from unreasonable searches and seizures. "Seizures" fall under two categories: "(1) an arrest—whether formal or de facto—requiring the police to have probable cause to believe that the arrestee has been involved in criminal activity; or (2) a more limited restraint of the person based on the officer's reasonable suspicion that criminal activity is afoot." Barnes v. State, 437 Md. 375, 390 (2014) (cleaned up). The latter category is often referred to as an investigatory or "Terry" stop. See Terry v. Ohio, 392 U.S. 1, 30-31 (1968).

[2] Mr. Warfield was found not guilty of possession of marijuana with the intent to distribute, and the State *nol prossed* the charge alleging the possession of Xanax.

"[W]hile a formal arrest occurs when an officer informs the suspect that he or she is under arrest, a *de facto* arrest occurs when the circumstances surrounding a detention are such that a reasonable person would not feel free to leave." Reid v. State, 428 Md. 289, 299-300 (2012). The Court of Appeals has explained:

> It is generally recognized that an arrest is the taking, seizing, or detaining of the person of another (1) by touching or putting hands on him; (2) or by any act that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest; or (3) by the consent of the person to be arrested. It is said that four elements must ordinarily coalesce to constitute a legal arrest: (1) an intent to arrest; (2) under a real or pretended authority; (3) accompanied by a seizure or detention of the person; and (4) which is understood by the person arrested.

Belote v. State, 411 Md. 104, 114 (2009) (quotation omitted). "Thus, generally, a display of force by a police officer, such as putting a person in handcuffs," or drawing his firearm, "is considered an arrest." See Longshore v. State, 399 Md. 486, 502 (2007); see also Elliott v. State, 417 Md. 413, 430 (2010) (holding that defendant was under arrest when approached by officers openly carrying their weapons).

With these factors in mind, we agree with Mr. Warfield that this was more than a mere Terry stop. At least "four or five," but as many as eight, police vehicles were involved in the seizure, one or more with emergency lights activated. These vehicles blocked Mr. Warfield's car from leaving. When the officers arrived, Detective Waldsmith "drew" his weapon and ordered Mr. Warfield out of his car. Another officer immediately handcuffed

him. Under these circumstances, a reasonable person would certainly not feel free to leave, and Mr. Warfield was therefore under de facto arrest.[3] See Reid, 428 Md. at 299-300.

Having found that Mr. Warfield was arrested, we next determine whether the police had probable cause.[4] "To determine whether probable cause exists, we consider the totality of the circumstances, in light of the facts found to be credible by the trial judge, factoring in the variables of the information leading to police action, the environment, the police purpose, and the suspect's conduct." Haley v. State, 398 Md. 106, 132-33 (2007). "Probable cause exists where the facts and circumstances within the knowledge of the officer at the time of the arrest, or of which the officer has reasonably trustworthy information, are sufficient to warrant a prudent person in believing that the suspect had committed or was committing a criminal offense." Id. at 133. "While probable cause requires less evidence than that which is essential to sustain a conviction, a factual basis

[3] Citing to Cotton v. State, 386 Md. 249 (2005), Lee v. State, 311 Md. 642 (1988), and Hatcher v. State, 177 Md. App. 359 (2007), the State argues that "if the situation warrants," police may "detain individuals for significant periods of time, may handcuff them, and may hold them under guard and even at gunpoint without changing the nature of the detention from a *Terry* stop to a full arrest." However, such actions are only permissible to "protect the officer" or "prevent a suspect's flight." See Longshore, 399 Md. at 509; see also Bailey v. State, 412 Md. 349, 372 n.8 (2010); In re David S., 367 Md. 523, 535 (2002). Here, the State has provided no basis to believe that Mr. Warfield was armed and dangerous or fleeing. The State's reliance on these cases, therefore, is unavailing.

[4] After determining that a seizure was a de facto arrest rather than a Terry stop, appellate courts conduct their own probable cause analysis to decide whether the arrest was legal. See, e.g., Bailey, 412 Md. at 374; Elliott, 417 Md. at 433-34; Longshore, 399 Md. at 527-28.

must be shown to justify a reasonable belief that the arrestee is guilty of the crime for which the arrest is made." Collins v. State, 322 Md. 675, 681 (1991).

We addressed a somewhat analogous set of circumstances in Williams v. State, 188 Md. App. 78 (2009). In that case, a police detective was monitoring cameras set up in an "open-air drug market" and witnessed the defendant engage in what he believed to be a drug sale. Id. at 83-84. Specifically, the detective observed the defendant retrieve a small object from his clothing and give the item to an individual to whom he was talking, at which point that individual gave something fist-sized (consistent with cash) to the defendant, which the defendant put into his clothing. Id. The defendant was arrested and drugs were found in his left sleeve. Id.

The defendant argued that the officers did not have probable cause to arrest him because the detective could not affirmatively identify the objects in the video as narcotics. Id. at 88-89. Rejecting the defendant's argument, we pointed out that the "experience and special knowledge" of police officers may be taken into consideration when evaluating probable cause. Id. at 92. Thus, we held that the arrest was lawful:

> Detective Green testified as an expert in CDS transactions. As we noted, he had "observed thousands and thousands of street distribution methods," and had made over 5,000 arrests for illegal drug transactions. In addition, when Detective Green observed the two men on closed circuit television through the police department's pole cameras, his specific purpose was to monitor a City block that was well known for its illicit drug trafficking activity. . . . Based on Detective Green's extensive experience and expertise, he believed that appellant was engaged in a CDS transaction, and that appellant was the seller.
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> * * *

> In sum, Detective Green did not need absolute certainty in regard to the objects that were exchanged here in order to obtain probable cause. As the Court said in *Tobias, supra*, 375 A.2d at 494, "[e]ven though there might have been innocent explanations for appellant's conduct, it is not necessary that all innocent explanations for a person's actions be absent before those actions can provide probable cause for an arrest."

Id. at 96-97.

Here, as in Williams, based on Detective Waldsmith's knowledge and experience regarding illegal drug transactions, as well as the cumulative impact of the facts and circumstances that indicated Mr. Warfield's involvement in illegal drug transactions, the police officers had probable cause to believe that Mr. Warfield was engaging in a drug sale. Those facts included:

- Detective Waldsmith had been a member of the Harford County Sheriff's Office for thirteen and a half years and prior to that, he had been a member of two other police departments. He also previously ran the Rankin Police Department's drug enforcement task force. He had hundreds of hours of training in narcotics enforcement, and had investigated hundreds of drug cases. He had witnessed thousands of interactions between drug dealers and purchasers.

- A prior investigation of Mr. Warfield showed that he was an acquaintance of several individuals who had overdosed on drugs.

- Two months prior to his arrest, Mr. Warfield was observed having a brief interaction, which Detective Waldsmith believed to be a drug transaction, in the parking lot of a gym. Detective Waldsmith's belief was based on his understanding that it was common practice among drug dealers to conduct business in busy parking lots so as to blend in and avoid police detection.

- One month prior, Mr. Warfield was stopped by police and marijuana, a grinder, a scale, suspected cocaine residue, baking soda, and five cell phones were found in his car. On the way to the police station, Mr. Warfield vomited up plastic bags containing what was believed to be marijuana and cocaine.

- On the day of the arrest, Mr. Warfield made several brief stops in his car with no identifiable legal purpose, including some stops in high-crime areas known for drug activities.

- Mr. Warfield went to a local gas station where drug transactions were known to occur. Mr. Warfield stopped and remained at a gas pump, yet did not purchase any gas. Another individual—a known drug user—then arrived, at which time Mr. Warfield shook hands with him, reached into his car and "retrieved an unknown item," and then again engaged the man. Detective Waldsmith described this behavior as consistent with a drug transaction.

Under these circumstances, the arrest was supported by probable cause. As such, the court committed no reversible error in denying Mr. Warfield's motion to suppress.[5]

II.
Juror Misconduct

An accused's right to an impartial jury is a bedrock principle of our judicial system. See Summers v. State, 152 Md. App. 362, 375 (2003) (quotations omitted). "The potency of the Sixth Amendment right to a fair trial relies on the promise that a defendant's fate will be determined by an impartial fact finder who depends solely on the evidence and argument introduced in open court." Id. To further this right, courts prohibit jurors from discussing

[5] Mr. Warfield contends that Detective Waldsmith impermissibly relied on "hearsay about police reports" as opposed to facts of which he had personal knowledge. We are not persuaded. First, probable cause may be based upon hearsay. See Dawson v. State, 11 Md. App. 694, 697 (1971) ("It is equally well-established that probable cause may be based upon hearsay information alone and need not reflect the direct personal observation of the affiant"); see also Matoumba v. State, 390 Md. 544, 550 (2006) (quotation omitted) ("At a suppression hearing, the court may rely on hearsay and other evidence, even though that evidence would not be admissible at trial"). Second, "[i]n Maryland, probable cause may be based on information within the *collective knowledge* of the police." Ott v. State, 325 Md. 206, 215 (1992) (emphasis added).

the case amongst themselves before they are sent to the jury room to reach a verdict. See Jones-Harris v. State, 179 Md. App. 72, 88 (2008). This prohibition serves "to avoid having the jurors form opinions regarding the verdict before they have heard all of the evidence in the case." Id. (quoting Summers, 152 Md. App. at 379).

That said, a mistrial is an extreme remedy reserved only for those situations where no other sanction will cure the prejudice to the aggrieved party. Rutherford v. State, 160 Md. App. 311, 323 (2004). And the decision is committed to the sound discretion of the trial judge.[6] See, e.g., Dillard v. State, 415 Md. 445, 454 (2010).

We have previously stated that "discussions among fewer than all jurors or before final deliberations do not require a mistrial unless there is prejudice to the defendant." Summers, 152 Md. App. at 379-80. In Summers, among other irregularities, two jurors had discussed the case at lunchtime (though it was unclear whether this occurred before or after deliberations had begun). Id. at 379. We explained that "when the record is silent with respect to whether intentional and inappropriate juror contact was prejudicial, prejudice may be presumed if the nature of such contacts raises fundamental concerns on

[6] This is particularly true when the trial court is tasked with determining how to respond to a note from the jury. See Nash v. State, 439 Md. 53, 68-70 (2014). A circuit court "has a duty to fully investigate allegations of juror misconduct before ruling on a motion for a mistrial, and that failure to conduct a *voir dire* examination of the jurors before resolving the issue of prejudice is an abuse of the trial judge's discretion" where it does not have enough information, on the face of the allegations, to determine whether impartiality has been compromised. Johnson v. State, 423 Md. 137, 151 (2011) (quotation omitted). Here, the trial court questioned each member of the jury, and gave defense counsel as well as the State the opportunity to question the jurors. The court's investigation was sufficient, and Mr. Warfield doesn't argue to the contrary. The issue, therefore, is whether the court, informed by its investigation, abused its discretion in denying the motion for a mistrial.

whether the jury would reach their verdict based solely upon the evidence presented at trial or whether it would be improperly influenced by the inappropriate contacts." Id. at 375 (cleaned up). We found, however, that the presumption of prejudice had been rebutted by the jurors' answers to the court's voir dire, in which all of the jurors confirmed that they could reach a fair and impartial verdict. Id. at 372-74, 377. We also noted that, when the improper conversation occurs between jurors (and not between a juror and a third party), the risk that the jury will decide the case based on extrinsic information rather than admitted evidence, is greatly diminished. Id. at 379. Accordingly, we held that the circuit court did not abuse its discretion in denying the motion for a mistrial. Id. at 381.

This case, like Summers, involved internal juror communications. Likewise, here the court investigated the alleged misconduct by questioning the jurors about Juror 59's comments. Only six of the thirteen jurors stated that they even heard the comments. Each juror, including the six that heard the improper comments, confirmed that he or she would keep an open mind and had not yet decided whether Mr. Warfield was guilty.

The court was "entitled to take [the jurors] at [their] word." See Summers, 152 Md. App. at 379. Further, the court mitigated the potential for prejudice by removing Juror 59 from the panel. Mindful that the trial court has its "finger on the pulse of the trial," State v. Hawkins, 326 Md. 270, 278 (1992), we hold that the court did not abuse its discretion in denying Mr. Warfield's motion for a mistrial.

III.
The Hicks Rule

Usually, "trial in a circuit court criminal prosecution must commence within 180 days of arraignment or the initial appearance of defense counsel, whichever occurs earlier." Curley v. State, 299 Md. 449, 451 (1984); see also Md. Code Ann., Crim. Proc. § 6-103(a)(2) (2001, 2018 Repl. Vol.); Md. Rule 4-271. This rule is colloquially known as the "Hicks" rule. See State v. Hicks, 285 Md. 310 (1979). A violation of the Hicks rule usually warrants dismissal of all charges. Id. at 318. However, as Mr. Warfield himself concedes, dismissal is not proper "where the defendant, either individually or by his attorney, seeks or expressly consents to a trial date" outside of the time period. State v. Brown, 307 Md. 651, 658 (1986) (quoting Hicks, 285 Md. at 335). This is not because such action by the defendant waives the requirements of the Rule, but rather because it would be "entirely inappropriate for the defendant to gain advantage from a violation of the rule when he was a party to that violation." Id.

Here, Mr. Warfield initially appeared in the circuit court on February 26, 2018. In lieu of appearing in court for a scheduling conference, on March 16, counsel for both parties spoke by phone and agreed to a trial date of August 28, 2018. Thus, under Brown and Hicks, Mr. Warfield's consent would normally make a dismissal inappropriate.

Mr. Warfield, however, argues that "[s]omething more is required than a phone call between the prosecutor and defense counsel to consent to a date beyond the 180-day requirement." Mr. Warfield provides no authority for this proposition. To the contrary, in State v. Lattisaw, 48 Md. App. 20, 28-29 (1981), we held that a defense attorney's telephonic agreement to a trial date outside the 180-day time frame constituted consent on

the part of his client. As such, we reject Mr. Warfield's claim that his case should have been dismissed for violation of the Hicks rule.

JUDGMENTS OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.