Circuit Court for Harford County
Case No. C-12-CR-20-000219

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1041

September Term, 2021

DWIGHT ADRIAN EPPES

v.

STATE OF MARYLAND

Arthur,
Friedman,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: October 28, 2022

*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.

The State indicted Dwight Adrian Eppes, in the Circuit Court for Harford County, on charges related to the possession of a firearm. After the circuit court denied his motion to suppress the firearm and a statement that he made to the arresting officer, Eppes entered a plea of not guilty. The case proceeded on an agreed statement of facts. The court convicted Eppes of one count of possessing a regulated firearm after being convicted of a crime of violence.

The court sentenced Eppes to 15 years of imprisonment, but suspended all but five years and gave him credit for 564 days of time served. In addition, the court imposed three years of supervised probation.

On appeal, Eppes presents one question for review, which we quote verbatim: "Did the circuit court err in denying the motion to suppress evidence?"

For the reasons discussed in this opinion, we conclude that the circuit court erred when it denied Eppes's motion to suppress.

FACTUAL AND PROCEDURAL BACKGROUND

The circuit court conducted a hearing on the motion to suppress on May 10, 2020. At the hearing, the State called Deputy Robert Witt, of the Harford County Sheriff's Office. On the date of the hearing, Deputy Witt had been employed by the Sheriff's Office for three years.

The deputy testified that at around 11:40 p.m. on Friday, February 14, 2020, he was driving down the 1800 block of Edgewater Drive, near the Lakeview Apartments, in Edgewood. When asked to describe that neighborhood, Deputy Witt responded that it

was a "high crime, high drug area." He had received multiple calls for service "for gang[-]related" conduct. The area has had "multiple shootings," including "drive-by shootings," some of which have been "fatal." "A lot of our top[-]tier offenders like to hang out at those apartments," the deputy testified. "[W]hen it comes to crime," he said, Edgewater Drive "is probably one of the more busier areas within Edgewood."

Deputy Witt testified that he had made "five handgun arrests in the Edgewood area." He had made "too many [arrests] to count" for controlled dangerous substances. He had seized heroin, crack cocaine, methamphetamine, and marijuana. He had never been accepted, however, as an expert in drug crimes or investigations.

As Deputy Witt passed the Lakeview Apartments in his marked patrol car that evening, he observed a car that was parked and running. One person was leaning into the right, front passenger window of the car, apparently speaking to the driver. His head, shoulders, and forearms were inside the car. Another person was standing behind and to the left of the person who was leaning into the car. Based on his experiences, the deputy suspected that he might be witnessing a drug transaction – that the person who was leaning into the car, was "retrieving the money" and that the other person was acting as a lookout. The deputy did not observe a hand-to-hand exchange.

The deputy turned around at the next intersection and drove back towards the parked car. As he passed the car, its engine was still running, but the people outside of the car "were no longer there." The deputy "determined" that they had "probably" gotten "inside the car."

The deputy turned around again and headed back to the apartment complex, where the car was parked, headfirst, in a parking space. As he approached the car, the deputy activated a floodlight, which he described as a "gianormous light bar," to "illuminate the car" and to allow him to "see any occupants inside of it." As he continued to approach the car, he was able to see that four people were inside.

The deputy stopped his patrol car, positioning it (in his words) to "[p]artially" block the parked car. His left front wheel was directly behind the rear license plate of the parked car. "If they turned their wheel all the way hard to the right, they would be able to clear my front end," he testified. His floodlight was still trained on the car. He insisted, however, that the occupants were free to leave. The deputy agreed that he did not have probable cause to conclude that a crime was being committed, but he asserted that he had reasonable articulable suspicion that criminal activity was afoot.

The deputy got out of his patrol car, called out on his radio that he was about to approach a car with four occupants, and walked towards the passenger side of the car. He knocked on the back, right passenger window. A passenger rolled down the window. The deputy immediately smelled the odor of marijuana. He asked the occupants for identification and informed them that he was going to search the car.

The deputy ordered the occupants out of the car and searched it. Under the passenger seat, where Eppes had been sitting, the deputy saw a fanny pack. When he picked up the fanny pack, the deputy noticed that it was heavy. He suspected that it might contain a firearm. He opened the fanny pack and found a revolver. He went to

arrest Eppes, because the weapon had been within his reach and grasp. As the deputy placed him under arrest, Eppes said, "I just got out of jail for gun charges."

In his search of the car, the deputy also found the butt of a marijuana cigarette. He issued a civil citation to one of the occupants.

In argument before the circuit court, the State conceded that this was a "close" case. The State began by arguing that the deputy did not seize the car and its occupants, because he "didn't fully" block them in and because Eppes did not testify (and thus did not testify that he felt unfree to leave).[1] In the State's view, the deputy acquired probable cause to search the car when as smelled the odor of marijuana, after one of the passengers opened a window. The State also argued, incorrectly, that even if the search were illegal, Eppes, as a passenger, had no standing to object to it.[2] In one brief sentence, the State advanced a factually undeveloped argument to the effect that "there was some reasonable articulable suspicion" that permitted the deputy to detain the car and its occupants. Finally, the State returned to its principal argument, which was that no seizure had

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[1] Contrary to the State's argument in the circuit court, we do not use a subjective test to determine whether a person has been seized within the meaning of the Fourth Amendment. "In determining whether the person has been seized, 'the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" *Swift v. State*, 393 Md. 139, 152-53 (2006) (quoting *Florida v. Bostick*, 501 U.S. 429, 437 (1991)) (further quotation marks omitted).

[2] In fact, "a passenger is seized . . . 'from the moment [a car stopped by the police comes] to a halt on the side of the road.'" *Arizona v. Johnson*, 555 U.S. 323, 332 (2009) (quoting *Brendlin v. California*, 551 U.S. 249, 263 (2007)). "A passenger therefore has standing to challenge a stop's constitutionality." *Id.*; *accord Pyon v. State*, 222 Md. App. 412, 435 (2015). The State does not pursue the "standing" argument on this appeal.

occurred before the passenger opened the window, released the marijuana fumes, and gave the officer probable cause to search the car.

The court denied the motion to suppress. It began, correctly, by rejecting the State's contention that the deputy had not seized the car. It reasoned, however, that the deputy had reasonable articulable suspicion to effectuate the seizure. It observed that the seizure occurred "at 11:30 at night" "in a high crime area" that was known for "violent offenses" and "drug dealing." Recognizing that some conduct might appear innocent to a layperson but not to a trained law enforcement officer, the court cited the deputy's observation of one person leaning into a parked car and another standing beside him. The court credited the deputy's testimony that this conduct often indicates that a drug transaction is taking place. Consequently, the court concluded that the deputy had "ample justification" to prevent the car and the passengers from leaving, as he did.

The court went on to reason that, once the deputy had properly prevented the car and passengers from leaving, he acquired probable cause to search it when he smelled the odor of marijuana wafting from the window that a passenger opened at his request. Hence, the court denied the motion to suppress the gun that the deputy found. The court did not expressly address the motion to suppress Eppes's subsequent statement to the deputy, but its reasoning implies that it denied or would have denied that motion as well.[3]

[3] The court suggested that Eppes lacked standing to challenge the stop and search of the car, but found it unnecessary to decide those issues in view of its decision on the merits. As previously stated, Eppes unquestionably has standing to bring his Fourth Amendment challenge. *See supra* n.2. It would have been reversible error to conclude otherwise.

After his conviction, Eppes noted this timely appeal. His sole challenge involves the denial of the motion to suppress.

STANDARD OF REVIEW

"Our review of a circuit court's denial of a motion to suppress evidence under the Fourth Amendment is limited to the information contained in the record of the suppression hearing." *Trott v. State*, 473 Md. 245, 253-54 (2021) (citing *Pacheco v. State*, 465 Md. 311, 319 (2019)). "'[W]e view the evidence adduced at the suppression hearing, and the inferences fairly deducible therefrom, in the light most favorable to the party that prevailed on the motion.'" *Bailey v. State*, 412 Md. 349, 362 (2010) (alteration in original) (quoting *Crosby v. State*, 408 Md. 490, 504 (2009)). "'[A]n appellate court reviews for clear error the trial court's findings of fact, and reviews without deference the trial court's application of the law to its findings of fact.'" *Varriale v. State*, 444 Md. 400, 410 (2015) (quoting *Hailes v. State*, 442 Md. 488, 499 (2015)).

DISCUSSION

The Fourth Amendment to the United States Constitution states, in pertinent part, that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" Ordinarily, evidence obtained in violation of this right is inadmissible in a state criminal prosecution. *See, e.g.*, *Mapp v. Ohio*, 367 U.S. 643, 655-56 (1961). This "exclusionary rule" excludes evidence obtained as a direct result of an unreasonable search or seizure, as well as

evidence that is the indirect product of the violation. *See, e.g.*, *Wong Sun v. United States*, 371 U.S. 471, 484 (1963).

Warrantless searches are "'presumptively unreasonable'" (*see*, *e.g*., *Briscoe v. State*, 422 Md. 384, 395-96 (2012), quoting *Henderson v. State*, 416 Md. 125, 148 (2010)), and that presumption is "subject only to a few specifically established and well-delineated exceptions[.]" *Grant v. State*, 449 Md. 1, 16-17 (2016). "[T]he State bears the burden to overcome the presumption of unreasonableness" (*see*, *e.g*., *Briscoe v. State*, 422 Md. at 396) and the burden of showing that the search or seizure falls within an exception to the warrant requirement. *See*, *e.g*., *Bailey v. State*, 412 Md. at 366.

One such exception is the stop-and-frisk exception established by *Terry v. Ohio*, 392 U.S. 1 (1968). Under *Terry*, a "seizure" occurs when a police officer approaches someone on the street and restrains their freedom to walk away, and a "search" occurs when an officer pats down a person's clothing to find items hidden on the person. *Id.* at 16. The *Terry* Court held that an officer "may conduct a brief, investigative 'stop'" of a person, without a warrant, as long as the officer "has a reasonable suspicion that criminal activity is afoot." *Crosby v. State*, 408 Md. at 505 (citing *Terry v. Ohio*, 392 U.S. at 17). During such a "*Terry* stop," if the officer has reason to suspect that the detained person is armed and dangerous, the officer may perform a protective "frisk," by patting down the person's outer clothing to discover any weapons that could be used to assault the officer. *See, e.g.*, *Sellman v. State*, 449 Md. 526, 530 n.1 (2016).

"There is no standardized test governing what constitutes reasonable suspicion." *Crosby v. State*, 408 Md. at 507; *accord Holt v. State*, 435 Md. 443, 459 (2013). The Court of Appeals has described the standard as "a common sense, nontechnical conception that considers factual and practical aspects of daily life and how reasonable and prudent people act." *Stokes v. State*, 362 Md. 407, 415 (2001); *accord Crosby v. State*, 408 Md. at 507. "While the level of required suspicion is less than that required by the probable cause standard, reasonable suspicion nevertheless embraces something more than an 'inchoate and unparticularized suspicion or hunch.'" *Crosby v. State*, 408 Md. at 507 (quoting *Terry v. Ohio*, 392 U.S. at 27) (internal quotation marks removed).

The Court of Appeals has explained how a court should go about determining whether a law enforcement officer had reasonable suspicion to conduct a warrantless *Terry* stop and, potentially, a warrantless frisk:

> When reviewing whether reasonable suspicion exists, the test is the totality of the circumstances, viewed through the eyes of a reasonable, prudent, police officer. The test is objective: the validity of the stop or the frisk is not determined by the subjective or articulated reasons of the officer; rather, the validity of the stop or frisk is determined by whether the record discloses articulable objective facts to support the stop or frisk. Reasonable suspicion requires an officer to have specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.

Sellman v. State, 449 Md. at 542 (citations, quotation marks, and brackets removed).

"This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information

available to them that 'might well elude an untrained person.'" *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

"A factor that, by itself, may be entirely neutral and innocent, can, when viewed in combination with other circumstances, raise a legitimate suspicion in the mind of an experienced officer." *Ransome v. State*, 373 Md. 99, 105 (2003). Thus, courts generally must "respect the inferences and conclusions drawn by experienced police officers." *Id.* at 110. Nonetheless, courts must not abandon their "responsibility to make the ultimate determination of whether the police have acted in a lawful manner" or "'rubber stamp' conduct simply because the officer believed he had a right to engage in it." *Id.* at 110-11.

In the circuit court, the State argued that the deputy did not "seize" the car and its occupants, for Fourth Amendment purposes, when he pulled in behind the car, blocked it from leaving, and turned his floodlight on the car and its occupants. The circuit court correctly rejected that argument. *See*, *e.g.*, *Mack v. State*, 237 Md. App. 488, 495 n.2 (2018). On appeal, the State does not challenge the circuit court's conclusion that the deputy seized the car and its occupants.[4]

In this case, the circuit court justified the seizure on the basis of the deputy's observation of two people standing outside of a car that was legally parked, with its engine running, in a residential parking lot, at 11:40 p.m. on a Friday evening (which happened to be Valentine's Day). One person was leaning into the car, talking to the

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[4] Nor does the State defend the erroneous supposition that Eppes lacked standing to challenge the warrantless seizure and search of the automobile in which he was a passenger. *See supra* n. 2.

occupants and possibly giving something to them or taking something from them (the deputy could not see and had no way to tell). The other person was standing next to him, looking up the street. If these same events occurred at 11:40 p.m. on a Friday evening on Roland Avenue in Baltimore City or near Chevy Chase Circle in Bethesda, no one would think for a minute that they suggested that criminal activity was afoot. But because they occurred in a "high crime area," we are told that they gave rise to reasonable suspicion to conduct a *Terry* stop.

As the circuit court correctly observed, innocent factors, in combination, can give rise to reasonable suspicion. *United States v. Sokolow*, 490 U.S. 1, 9 (1989). In this case, however, we do not have much of a combination of innocent factors. We have two innocent factors that are said to appear less than innocent solely because of the neighborhood in which they occurred.[5]

The fact that a stop occurred in a "high crime area" is "among the relevant contextual considerations in a *Terry* analysis." *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). Thus, for example, "unprovoked flight" from the police in a "high crime area" may give rise to reasonable articulable suspicion to support a *Terry* stop. *See id.* at 124-25. In this case, however, Eppes's presence in a "high crime area" is not merely a

[5] In this regard, it is notable how little the deputy knew about the transaction that he was witnessing before he intervened. He did not how the transaction began, because he did not observe it until it was underway. Nor did he know what happened to the two people who were outside of the car when he first passed by, but who were no longer there when he conducted the stop. He "determined" (i.e., surmised, guessed, or assumed) that they had gotten into the car, but he did not see them do so. For all we know, the four people inside of the car had been there all along, and the two people outside of the car had gone their separate ways by the time the stop began.

"contextual consideration"; it is the decisive factor that is said to transform innocuous conduct into potentially criminal wrongdoing, and thus to permit a law enforcement officer to detain four citizens against their will.

Although *Terry* stop cases tend to rise or fall on their own unique set of facts, the decision in *Ransome v. State* offers useful guidance in resolving this case. In *Ransome* Officer Javier Moro and two colleagues were cruising in an unmarked car through a Baltimore City neighborhood at 11:20 p.m. on a summer evening. *Ransome v. State*, 373 Md. at 100. The neighborhood "that had produced numerous complaints of narcotics activity, discharging of weapons, and loitering." *Id.* at 100-01. The officers were looking for loiterers, people congregating on the steps of vacant houses, and loud groups hanging out on corners. *Id.* at 101.

Officer Moro saw Ransome with another man, either standing or walking on the sidewalk. *Id.* The officer did not know either of the men and did not see them do anything unusual. They were not loitering, or congregating, or loud, or boisterous. "They were simply there." *Id.*

As the unmarked car passed Ransome, it slowed to a stop. Ransome looked at the car, which Officer Moro, "for some reason," considered to be suspicious. *Id.*

The officer noted a large bulge in Ransome's left front pants pocket. He suspected that Ransome might have a gun. *Id.*

The three officers got out of their car, and Officer Moro approached Ransome. The officer testified that he intended to stop and frisk Ransome because of the bulge. *Id.*

At first, Officer Moro engaged Ransome in a conversation, posing a couple of questions, which Ransome answered truthfully. *Id.* Then, he directed Ransome to place his hands on his head. He proceeded to search Ransome's waist (not the pocket where he observed the bulge). He found a bag of marijuana. He placed Ransome under arrest, conducted a more thorough search incident to the arrest, and found a roll of money where the bulge was, as well as some ziplock bags and cocaine. *Id.* at 101-02.

After the circuit court denied Ransome's motion to suppress, he, like Eppes, proceeded to trial on an agreed statement of facts. *Id.* at 102. He was convicted, and this Court affirmed. On certiorari, however, the Court of Appeals reversed. *Id.*

In *Ransome*, as in this case, the State did "not even suggest, much less argue," that Officer Moro "had probable cause to seize and search" Ransome. *Id.* Instead, as in this case, "[t]he issue [was] whether, under the rules of engagement announced in *Terry v. Ohio*, . . . he had reasonable suspicion to frisk [Ransome] for possible weapons." *Id.*

Arguing for affirmance, the State urged the Court not to limit its consideration to Officer Moro's observation of the bulge (his stated reason for acting), but also to consider that the encounter occurred in a high-crime area. *Id.* at 105. In addition, the State asked the Court to consider that Ransome "gazed" at the unmarked car as it passed, but did not maintain eye contact with Officer Moro during their exchange and "appeared nervous" when the officer questioned him. *Id.*

The Court was unconvinced. Writing for the majority, Judge Wilner stated:

> 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 for those men who live in or have occasion to visit high-crime areas.

Id. at 111.

Accordingly, the Court held "that Officer Moro did not have a reasonable basis for frisking petitioner and that the evidence recovered by him as a result of the frisk and subsequent extended search was inadmissible." *Id.*

Although the Court had expressed its holding in terms of an unlawful frisk, Judge Raker, in a concurring opinion, observed that the facts of the case did not justify a frisk or a *Terry* stop. *See id.* at 112 (Raker, J., concurring). "In order to have a valid *Terry* frisk," Judge Raker wrote, "there must first be a valid *Terry* stop." *Id.* at 113. In her view, "sufficient grounds for a *Terry* stop [were] lacking." *Id.* Echoing Judge Wilner's comments, she explained:

> If Ransome's actions were sufficient to warrant a *Terry* stop, then anyone standing on a corner, talking with a friend in the late evening, in a high-crime area, with an unidentified "bulge" in a pocket, may be stopped.

Id. at 114.

In short, a bulge may indicate the presence of a gun, but it may also indicate the presence of something innocuous, like a wallet, a money clip, keys, change, credit cards, a cell phone, cigarettes, etc. *Id.* at 108. Similarly, a person leaning into the window of a parked car while another person stands off to the side may indicate that a drug deal is taking place, but it may also be evidence of any one of countless other human interactions, nearly all of which are totally innocuous. If a bulge does not become the

basis for a *Terry* stop when it is observed at 11:00 p.m. in a high-crime area, nor can leaning into the window of a parked car at 11:00 p.m. in a high-crime area while a friend or acquaintance stands to the side.

In our judgment, therefore, the circuit court erred in concluding that the deputy had reasonable suspicion to stop or seize the parked car. People do not lose their Fourth Amendment rights just because they live in or pass through a high-crime area.[6]

After the deputy had seized the car and tapped on a window, one of the occupants rolled down the window, releasing marijuana fumes. Although the odor of marijuana may give a law enforcement officer probable cause to search a motor vehicle under the automobile exception to the warrant requirement (*Robinson v. State*, 451 Md. 94, 125 (2017)), the deputy detected the odor of marijuana in this case only because he had effectuated an illegal stop. Thus, the search was invalid. Accordingly, the court should have suppressed the results of the search – the gun and Eppes's statement. *Wong Sun v. United States*, 371 U.S. at 484.[7]

[6] There is no question that the stop in this case occurred in a high-crime area. The term "high-crime area" is, however, notoriously ill-defined. *See* Ben Grunwald & Jeffrey Fagan, *The End of Intuition-Based High-Crime Areas*, 107 Calif. L. Rev. 345 (2019), available at https://scholarship.law.columbia.edu/faculty_scholarship/2317.

[7] Had the deputy pulled up beside the parked car, parked in an adjacent parking space (without attempting to prevent the car from leaving), walked up to the car, and tapped on the window, we would have no Fourth Amendment issue. Instead, we would have a consensual encounter between citizens. *See*, *e.g*., *Pyon v. State*, 222 Md. App. at 421. If one of the occupants chose to respond by rolling down the window, and let out some marijuana fumes in the process, the deputy would then have obtained probable cause to search the car. *Robinson v. State*, 451 Md. at 126. Thus, in this case, the fruits of the search must be suppressed only because the deputy seized the car (by blocking it in) before he approached the occupants.

JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY REVERSED; CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO BE PAID BY HARFORD COUNTY.