Circuit Court for Baltimore City
Case No. 116221032

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1169

September Term, 2017

KRISTOPHER WASHINGTON

v.

STATE OF MARYLAND

Wright,
Kehoe,
Reed,

JJ.

Opinion by Wright, J.

Filed: May 23, 2018

Appellant, Kristopher Washington, was convicted by a jury in the Circuit Court for Baltimore City of illegal possession of a regulated firearm after having been convicted of a disqualifying crime and wearing, carrying, or transporting a handgun in a vehicle. After he was sentenced to a total sentence of six years, the first five without possibility of parole, appellant timely appealed and presents the following questions for our review:

> 1. Did the circuit court err in denying defense counsel's motion to suppress evidence?
>
> 2. Did the circuit court abuse its discretion in admitting evidence, the basis of which was an alleged statement made by Mr. Washington, which was not provided by the State in discovery?
>
> 3. Is the evidence sufficient to sustain the conviction for transporting a handgun in a vehicle?

For the following reasons, we shall affirm.

BACKGROUND

Motions hearing

The following evidence was received at a hearing on appellant's motion to suppress. At around 10:30 p.m. on July 12, 2016, Detective Benn and Detective Weston, of the Baltimore City Police Department, were on patrol in an unmarked police vehicle near the 1300 block of West Lafayette Street. West Lafayette Street is a two-way street, located in a residential neighborhood, with one lane in each direction. The street was lit with streetlights with light traffic at this time of the evening. In addition, there were vehicles parked along either side of the street.

While slowly driving eastbound on West Lafayette towards Carey Street, Detective Benn, a 16-year veteran of the police force, observed a green Cadillac parked on the left side of the roadway, facing westbound. There was a vehicle parked in front of the Cadillac, but no vehicle was parked behind it. Through the front windshield, Detective Benn saw two individuals, one of whom he identified as appellant, reclining in the front seats.

As the detective slowly drove past the vehicle, appellant sat up and started staring at him. According to Detective Been, appellant then appeared to attempt to conceal himself behind the door post on the driver's side of the Cadillac. The detective explained that appellant's shoulder was "in line with the door posts."

Detective Benn then stopped his patrol vehicle in the eastbound lane of West Lafayette Street, approximately 15 to 20 feet past appellant's car near the double yellow lines. The patrol vehicle did not obstruct traffic on the westbound lane of West Lafayette Street.

Detective Benn confirmed that, before he and Detective Weston got out of their patrol vehicle, he activated his red, white, and blue emergency lights. The officers then approached the Cadillac. Both detectives were in plainclothes, but were wearing black ballistic vests that identified them as "POLICE" in bold, white letters on the front and back. They also were armed, and their firearms were visible on their hips. As they approached, Detective Benn went to the driver's side of the vehicle while Detective Weston went around to the passenger side. The detective then continued:

> Q. And so, what, if anything, took place once you approached the vehicle?

> A. Once I approached the vehicle, I – the windows were up and I tapped on the vehicle. And Mr. Washington, there, he put his window down.
>
> Q. Okay. And what, if any, observation did you make once the window was down?
>
> A. Once the windows were down, a very, very strong odor of burnt and fresh marijuana coming from inside of the car [sic].[1]

On cross-examination, Detective Benn testified that he did not say anything to appellant before he knocked on the window. And, he clarified that he asked for identification after the window was down.

Upon this request, appellant produced his Maryland driver's license. He admitted that he and his passenger had been smoking marijuana inside the car. Appellant also stated that he had more marijuana on his person, and then he reached into his right front pants pocket and gave the detective three bags of marijuana.

Following the reception of evidence, defense counsel argued that the appellant was stopped when Detective Benn turned on his police lights and knocked on the Cadillac's window. Noting there was no evidence that this was a high-crime area or anything other than two people simply reclining in a car in a residential neighborhood, defense counsel

[1] Although his testimony on this point was not entirely clear, Detective Benn believed the Cadillac's engine was on when he passed the vehicle because the windows were up and it was hot outside. But, he agreed the engine was off after the vehicle windows were down.

(continued)

specifically argued that this was not a consensual encounter and that appellant submitted to police authority, stating:

> They stopped in the – Judge, wouldn't you think that if you're sitting in a car that's idling, and the police pull up very slowly to you, they stop their car within ten feet, blocking a lane, blocking the traffic lane, turn on their lights, and immediately two officers surround your car, how is that a consensual encounter? [2]

Defense counsel continued as follows:

> [DEFENSE COUNSEL]: And so, when they knocked on the window, the response is acquiescence. That he puts down the window. And that's how he discovers the odor. The problem is, is that legally, what right do the police have to conduct a stop at that point in time? The people were doing – the individuals were doing absolutely nothing illegal. What implicated activity that was the degree of suspicion necessary – and this is akin to a car stop. I mean, Judge Moylon [sic] talks about whether the car is parked or running, if police approach it in an official manner, that is a key to a car stop. And you have to have –
>
> THE COURT: Is your position, [Defense Counsel], this is a *Terry* [3] stop?
>
> [DEFENSE COUNSEL]: Yes. Hundred percent. And that the officers did not articulate for you this movement. I mean, I can't imagine how the Court could accept that as reasonable, articulable suspicion that criminal activity was afoot. The [sic] didn't do anything wrong. They did what any normal human being would do when a vehicle crept up on them in the middle of the night, shined their lights, and slowed down, especially given the – you know, the tenor of crime in Baltimore City.

[2] Although Detective Benn never used the phrase "high-crime area," he did testify that the police were deployed to the area "because of a spike in violence."

[3] *See Terry v. Ohio*, 392 U.S. 1, 30 (1968) (holding that police may stop and briefly detain a person for purposes of investigation if the officer has a reasonable suspicion supported by articulable facts that criminal activity may be afoot).

Defense counsel continued by suggesting that the police could have "honked their horn" or "you know, done something other than create a nonconsensual encounter." And, "[w]hen you turn on your lights, you effect a stop and you surround the car on both sides, it's the equivalent of a traffic stop, Judge. And I don't see the reasonable, articulable legal suspicion in this case."

The State responded by noting that, based on Detective Benn's experience, he believed that the conduct in question, including appellant's apparent attempt to conceal himself behind the door post, was "suspicious" and "warranted some further attention." The prosecutor then asserted that the State was not arguing that this was a consensual encounter, but that the evidence was sufficient to justify a *Terry* stop.

After hearing further argument from defense counsel, the circuit court denied the motion to suppress. The court found that there was reasonable, articulable suspicion for Detective Benn to investigate and that the evidence, considered under the totality of the circumstances, warranted a lawful *Terry* stop.

Trial

Detective Benn testified consistently at trial, informing the jury that, at around 10:30 p.m. on July 12, 2016, he and Detective Weston encountered appellant and another individual, later identified as Rodney Smith, as they were reclining in the front seats of a parked Cadillac along the 1300 block of West Lafayette Avenue. Detective Benn stopped his patrol vehicle, approached appellant's driver side, and, when the window was rolled down, smelled the odor of both burned and fresh marijuana.

After appellant and Smith were ordered out of the vehicle and arrested, Detective Benn searched the car and found a loaded Taurus .380 caliber handgun concealed inside the center console. Neither appellant nor Smith claimed ownership of the handgun. Pertinent to issues on appeal, instead of having the vehicle towed, Detective Benn gave the car keys to appellant's brother. The parties stipulated that appellant was prohibited from possessing a firearm and that the recovered firearm was operable.

We shall include additional detail in the following discussion.

DISCUSSION

I.

Appellant first contends that the police did not have reasonable articulable suspicion to justify what amounted to an investigative stop under *Terry v. Ohio*, 392 U.S. 1 (1968). Specifically, appellant asserts that "there was nothing suspicious, other than [appellant's] alleged concealing of himself behind the door post of the car," that gave Detective Benn "reasonable articulable suspicion to believe that crime was afoot."[4]

In response, the State has abandoned any argument that the stop was a lawful *Terry* stop, and, instead, asserts that this was a consensual encounter and not a seizure. Appellant replies that the issue of whether this was a consensual encounter was not raised in the

[4] There is no dispute that, once Detective Benn smelled the odor of burned and fresh marijuana, he had probable cause to search appellant's vehicle, *see Robinson v. State*, 451 Md. 94, 130-31 (2017), and to place appellant under arrest. *See Barrett v. State*, 234 Md. App. 653, 671 (2017), *cert. denied*, 457 Md. 401 (2018).

motions court and is not properly before us. And, even assuming that the issue is properly raised, appellant continues that the stop was not consensual, because he did not feel free to leave, and submitted to police authority after Detective Benn approached his car and knocked on his window.

As the Court of Appeals has recently reaffirmed, our standard of review of this issue is *de novo*:

> Appellate review of a motion to suppress is "limited to the record developed at the suppression hearing." *Moats v. State*, 455 Md. 682, 694 (2017). "We view the evidence and inferences that may be drawn therefrom in the light most favorable to the party who prevails on the motion," here, the State. *Raynor v. State*, 440 Md. 71, 81 (2014). "We accept the suppression court's factual findings unless they are shown to be clearly erroneous." *Id*. We give "due weight to a trial court's finding that the officer was credible." *Ornelas v. United States*, 517 U.S. 690, 700 (1996). "[W]e review legal questions *de novo*, and where, as here, a party has raised a constitutional challenge to a search or seizure, we must make an independent constitutional evaluation by reviewing the relevant law and applying it to the unique facts and circumstances of the case." *Grant v. State*, 449 Md. 1, 14-15 (2016) (quoting *State v. Wallace*, 372 Md. 137, 144 (2002)).

State v. Johnson, __ Md. __, No. 22, Sept. Term, 2017 (filed April 20, 2018) (slip op. at 12).

Terry v. Ohio generally holds that the police may stop and briefly detain a person for purposes of investigation if the officer has a reasonable suspicion supported by articulable facts that criminal activity may be afoot. *See Terry v. Ohio*, 392 U.S. at 30; *accord Holt v. State*, 435 Md. 443, 459 (2013). Reasonable suspicion is further defined as "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Illinois v. Wardlow*, 528 U.S. 119, 128 (2000) (quoting *United States*

v. Cortez, 449 U.S. 411, 417-18 (1981)). In considering whether there is reasonable articulable suspicion, reviewing courts "must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *United States v. Arvizu*, 534 U.S. 266, 273-74 (2002).

Appellant argues that this stop did not meet the minimum requirements set forth by *Terry* and its progeny, relying primarily on *Crosby v. State*, 408 Md. 490 (2009). In that case, the Court of Appeals held, under the totality of the circumstances, that observations by a Harford County sheriff's deputy of a driver who was "slumped down" in a vehicle, arguably to avoid identification, was "by itself, wholly innocent." *Crosby*, 408 Md. at 515. As the officer only had, at most, an "inchoate and unparticularized suspicion or 'hunch'" of criminal activity, the Court held this was insufficient to justify a stop under *Terry*. *Id*.

Here, we agree with appellant, as well as the State's concession, that the facts in *Crosby* are apposite to this case. Accordingly, we conclude that there was not reasonable articulable suspicion to justify this encounter under *Terry v. Ohio*. However, that does not end our analysis.

As argued by the State on appeal, the pertinent question becomes whether the stop was a consensual encounter that did not require justification under *Terry*. And, as articulated by appellant in his reply brief, the preliminary issue we must consider is whether we can even address that question on appeal. The Court of Appeals has stated:

> Apart from the exceptions previously noted, this Court has consistently taken the position that an appellee is entitled to assert any ground adequately shown by the record for upholding the trial court's decision, even if the ground was not raised in the trial court, and that, if legally

> correct, the trial court's decision will be affirmed on such alternative ground.

Unger v. State, 427 Md. 383, 406 (2012); *accord Barrett v. State*, 234 Md. App. 653, 665 (2017), *cert. denied*, 457 Md. 401 (2018).

And, in *State v. Greenstreet*, 162 Md. App. 418, 426 (2005), *rev'd on other grounds*, 392 Md. 652 (2006), this Court noted that "[t]he Court of Appeals has recognized the distinction between a new issue, as the term is used in [Md.] Rule 8-131(a), and a new argument, and the Court has held that [Md.] Rule 8-131(a) does not preclude the latter." (Citing *Crown Oil & Wax Co. of Delaware, Inc. v. Glen Constr. Co. of Virginia, Inc.*, 320 Md. 546, 560-63 (1990)); *see also Smith v. State*, 176 Md. App. 64, 70 n.3 (2007) ("Preservation for appellate review relates to the issue advanced by a party, not to every legal argument supporting a party's position on such issue") (citing *State v. Greenstreet, supra*). The Court of Appeals has further provided that, "[i]n the interest of judicial efficiency, we may affirm the judgment of a trial court to grant a motion to dismiss on a different ground than that relied upon by the trial court, as long as the alternative ground is before the Court properly on the record." *Forster v. Office of Public Defender*, 426 Md. 565, 580-81 (2012); *see also State v. Rush*, 174 Md. App. 259, 289 (2007) (This Court may "affirm the circuit court's decision on any ground adequately shown by the record"), *aff'd in part and rev'd in part on other grounds*, 403 Md. 68 (2008).

Here, defense counsel addressed the issue of whether this was a consensual encounter during argument on the motion. We are persuaded that not only may we address the issue based on our independent standard of review, but that, despite the prosecutor's

decision not to argue the issue, the issue was raised in the motions court and appellant would suffer no unfair prejudice by our consideration of the issue on appeal. *See Greenstreet v. State*, 392 Md. 652, 667 (2006) ("[A] party may not concede a point of law to the exclusion of appellate review, as necessary and proper to decide the case") (citations omitted); *see also Spencer v. Md. State Bd. of Pharm*., 380 Md. 515, 523 (2004) (observing that an appellate court "is not bound by the concessions made by the parties on issues of law, which we may independently review") (citation omitted); *Martin v. State*, 165 Md. App. 189, 209 n.9 (2005) ("Confession of error does not abrogate our duty to conduct an independent review") (citations omitted), *cert. denied*, 391 Md. 115 (2006).

Addressing the merits, there are various types of police-citizen encounters. "The purpose of the Fourth Amendment is not to eliminate all contact between the police and citizenry, but to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *United States v. Mendenhall*, 446 U.S. 544, 553-54 (1980) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976)) (internal quotations omitted). For Fourth Amendment purposes, there are three levels of interaction between the police and citizens:

> The most intrusive encounter is an arrest, which requires probable cause to believe that a person has committed or is committing a crime. The second category is the investigatory stop or detention, known commonly as a *Terry* stop, an encounter considered less intrusive than a formal custodial arrest and one which must be supported by reasonable suspicion that a person has committed or is about to commit a crime and permits an officer to stop and briefly detain an individual. The third contact is considered the least intrusive police-citizen contact, and one which involves no restraint of liberty and elicits an individual's voluntary cooperation with non-coercive police contact. A consensual encounter, or a mere accosting, need not be

> supported by any suspicion and because an individual is free to leave at any time during such an encounter, the Fourth Amendment is not implicated; thus, an individual is not considered to have been "seized" within the meaning of the Fourth Amendment.

Wilson v. State, 409 Md. 415, 440 (2009) (citing *Swift v. State*, 393 Md. 139, 149-51 (2006)).

As the Court explained, "[e]ncounters are consensual where the police merely approach a person in a public place, engage the person in conversation, request information, and the person is free not to answer and walk away." *Swift*, 393 Md. at 151. "The guarantees of the Fourth Amendment are not implicated in such an encounter unless the police officer has by either physical force or show of authority restrained the person's liberty so that a reasonable person would not feel free to decline the officer's requests or otherwise terminate the encounter." *Id*.

Notably, "[t]he test for existence of a 'show of authority' is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person." *California v. Hodari D.*, 499 U.S. 621, 628 (1991). And, this determination is made by evaluating pertinent factors under the totality of the circumstances. *Ferris v. State*, 355 Md. 356, 376-77 (1999). Such factors include:

> the time and place of the encounter, the number of officers present and if they were uniformed, whether the police removed the person to a different location or isolated him or her from others, whether the person was informed that he or she was free to leave, whether the police indicated that the person was suspected of a crime, whether the police retained the person's documents, and whether the police demonstrated threatening behavior or physical contact that would suggest to a reasonable person that he or she was not free to leave.

Ferris, 355 Md. at 377. *Accord Pyon v. State*, 222 Md. App. 412, 447 (2015).

This Court considered a similar question to the one presented here in *Pyon, supra*. There, a police officer responding to a vague dispatch, related to drug activity in the area, observed a parked Honda with its engine off. *Pyon*, 222 Md. App. at 425. The officer "maneuvered her cruiser in such a way as to block, at least partially, any potential egress by the Honda," parking "cater-corner" to the Honda. *Id*. The officer promptly exited her cruiser, approached the Honda "quickly," immediately requested identification from the occupant of the Honda, and called for backup as soon as she observed a second individual in the Honda. *Id*. at 426. During the encounter, the officer detected the odor of marijuana emanating from the Honda, conducted a search of the vehicle, and seized a baggie of marijuana in the glove compartment, resulting in the arrest and trial of both occupants for possession of a controlled dangerous substance. *Id*. at 424, 428-29.

This Court reversed the trial court's ruling not to suppress the evidence discovered during the search. *Id*. We concluded that the officer's initial vehicular approach, including parking "cater-corner" to the rear of the Honda, was not only "aggressive and intimidating," but also blocked, at least partially, the vehicle's possible egress. *Id*. at 448. We also noted the presence of three police officers, as well as at least two marked police cruisers, which "might well have suggested to a reasonable citizen that he was not free to walk or drive away without police permission." *Id*. at 450.

In addition, we deemed the stop investigative in nature based on the officer's immediate request for identification. *Id*. We stated "[i]t is very difficult for us to conceive that an objective observer would view [the officer's] request that [the occupant] produce

his driver's license as a prelude to a consensual conversation." *Id*. at 451. We also observed that the officer called for "back-up," and that, "[i]n assessing the tone and mood of a police-citizen encounter, a call for reinforcements is quintessentially confrontational." *Id*. at 456.

Ultimately, under the totality of the circumstances, this Court concluded that the encounter was not consensual, observing that "[e]very action taken by [the officer] in this case indicated that she was following routine police procedures for the conduct of a traffic stop or other investigative stop." *Pyon*, 222 Md. App. at 452. As we further observed:

> It is constitutionally permissible, and indeed desirable, that the police react in a professionally authoritarian fashion and exercise firm control over the scene of a police-citizen encounter, whenever the police have at least a *Terry*-level reasonable suspicion that a crime (including a traffic offense) has occurred. Where, on the other hand, such Fourth Amendment justification is lacking, such authoritarian behavior may be completely inappropriate. As far as intellectual honesty is concerned, moreover, it is with ill grace that the police should behave in an authoritarian manner but then pretend that the encounter was innocuously egalitarian. It is necessary to recognize the level of police-citizen encounter that is called for in a given situation and then to adapt the police behavior accordingly. One size does not fit all. Overly authoritarian police behavior can *ipso facto* transform what might otherwise be an innocuously consensual police-citizen conversation into a full-fledged constitutional encounter.

Id.

In this case, Detective Benn and his partner, Detective Weston, were on patrol in an unmarked police vehicle at around 10:30 p.m. on a hot July evening in the 1300 block of West Lafayette Street, a two-way street located in a residential neighborhood. The street was well lit, with light traffic in the area. As the officers drove slowly through the neighborhood, apparently aware of a recent "spike in violence," they saw appellant's green

Cadillac, parked on the left side of the roadway, facing westbound. There was evidence that, although a vehicle was parked in front of the Cadillac, no vehicle was parked behind it. In addition, Detective Benn believed that the vehicle was running at the time, since its windows were rolled up and it was likely that the air conditioner was turned on due to the weather conditions.

Appellant and his companion were seen reclining in the front seats of the parked vehicle. As Detective Benn drove past the Cadillac, appellant sat up and stared at him. He then attempted to conceal his body from view behind the driver's side door post.

At that point, Detective Benn stopped his vehicle in the eastbound lane of West Lafayette Street, approximately 15 to 20 feet past appellant's car near the double yellow lines. The westbound lane of West Lafayette Street remained entirely unobstructed. More importantly, there was no evidence, whatsoever, that Detective Benn blocked in the Cadillac.

At that point, prior to exiting the unmarked vehicle, Detective Benn confirmed that he activated his red, white, and blue emergency lights. There was no evidence that he also activated his siren. When both detectives got out of their patrol vehicle, they were wearing black ballistic vests that identified them as police officers over their plainclothes. They also were armed, and their firearms were visible on their hips.

The two detectives then approached the Cadillac on either side, with Detective Benn walking up to the driver's side of the vehicle. There was evidence that Detective Benn did not say anything to appellant through the closed window, but simply tapped on the glass.

At that point, appellant rolled down the window. It was then that the detective smelled the odor of marijuana, which ultimately provided probable cause to arrest and search appellant's person and his vehicle.

As we see it, there are several key factors that bear on the ultimate question presented of whether this was a consensual encounter. Most notably, there was no evidence that the police blocked in appellant in an effort to prevent him from leaving the scene. There was no call for back up, as was the case in *Pyon*. While these clearly weigh in favor of a consensual encounter, the facts that are more problematic include: (1) Detective Benn's activation of the emergency lights on his patrol vehicle; (2) the fact that the two officers were wearing visible sidearms when they approached; and, (3) Detective Benn's act of knocking on the window of appellant's Cadillac. We begin with the officer's activation of the emergency lights on his patrol vehicle.

In *Lawson v. State*, 120 Md. App. 610 (1998), Officer G.S. Gautney observed Lawson's vehicle legally parked in an area known for drug activity. *Lawson*, 120 Md. App. at 612. Officer Gautney decided to stop his vehicle to ask Lawson what he was doing in the area. As he pulled in behind Lawson's vehicle, that vehicle began to back up. *Id*. at 613. The officer then "turned on his emergency lights to 'cause the vehicle to stop.'" *Id*. Lawson stopped his car, and ensuing events culminated with Lawson being arrested for driving under the influence of alcohol. *Id*. This Court held that Lawson was subjected to an unlawful *Terry* stop:

> In this case, we find that the officer's conduct, the activation of the emergency lights, was a show of authority that constituted a seizure within

> the contemplation of the Fourth Amendment because it communicated to a reasonable person that there was an intent to intrude upon appellant's freedom of movement. Few, if any, reasonable citizens, while parked, would simply drive away and assume that the police, in turning on the emergency flashers, would be communicating something other than for them to remain.

Lawson, 120 Md. App. at 616-17.[5]

In contrast to *Lawson*, Detective Benn was not parked directly behind appellant or otherwise blocking him in when he activated the emergency lights on his unmarked police vehicle. Indeed, a fair reading of the evidence is that the patrol car was parked on the other side of the two-way street, *i.e.*, West Lafayette, in the opposite direction, and at least 15 to 20 feet away from appellant's vehicle when the emergency lights were activated. And, as the State notes in its brief, it was just as likely that the use of the emergency lights was for safety reasons.

As for the remaining two facts, there was no evidence in this case that Detective Benn said anything, or otherwise directed appellant to respond, before knocking on the Cadillac's window. *Cf. Swift*, 393 Md. at 145, 156-57 (concluding that deputy's request to speak with Swift "in order to perform a field interview stop," and requesting identification weighed in favor of categorizing the encounter as an investigative stop). And, even were there evidence that Detective Benn somehow directed appellant to roll down the window, perhaps using nonaudible cues, that would not persuade us that the encounter was nonconsensual. *See INS v. Delgado*, 466 U.S. 210, 216 (1984) ("While most citizens will

[5] We also observed that Transportation § 21-904(b) makes it unlawful for a driver to fail to stop when a uniformed officer gives a visual or audible signal to stop. *Lawson*, 120 Md. App. at 617. *See* Md. Code (1977, 2012 Repl. Vol. 2017 Supp.) § 21-904(b) of the Transportation Article.

respond to a police request, the fact that people do so, and do so without being told that they are free not to respond, hardly eliminates the consensual nature of the response").

Furthermore, this Court has recognized that otherwise consensual encounters are not turned into *Terry* stops, requiring articulable Fourth Amendment justification, just because an officer wears a holstered firearm at his side:

> [I]t is unlikely that the sight of a holstered weapon on a police officer would surprise or intimidate any citizen. We expect and even count on our police officers, in uniform or in plain clothes, to be armed. The more important question is whether, at any time during the encounter, the officer drew or pointed his weapon, *see In the Matter of T.T.C.*, 583 A.2d 986, 988 (D.C.1990), or referred to it.

Trott v. State, 138 Md. App. 89, 105 (2001).

We recognize that there is no bright-line rule for determining whether a reasonable person would have felt free to leave under the circumstances:

> The test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation. Moreover, what constitutes a restraint on liberty prompting a person to conclude that he is not free to "leave" will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs.

Michigan v. Chesternut, 486 U.S. 567, 573 (1988).

Considered under the totality of the circumstances, we are unable to conclude that the police engaged in a show of authority when they approached appellant's vehicle, or that appellant submitted to police authority when he rolled down the window to his Cadillac. We hold that, due to the consensual nature of the encounter, appellant was not seized under *Terry* and that the motions court properly denied the motion to suppress.

II.

Appellant next asserts that the circuit court abused its discretion by admitting evidence that was not provided in discovery; namely, information that, after he was arrested, appellant gave the car keys to his brother. The State responds that the court did not abuse its discretion in resolving the discovery dispute. We agree with the State.

During direct examination, Detective Benn was asked why he did not have the vehicle towed from the scene of the stop. After defense counsel objected on the grounds of relevance, the State proffered that appellant gave the keys to his brother and that this transfer of possession of the vehicle was relevant to show constructive possession of its contents; namely, the handgun. Defense counsel then responded:

> [DEFENSE COUNSEL]: So here's the problem. They're trying to introduce a statement made of the defendant which is inculpatory. This is the first time hearing that the defendant made such a statement, it has not been disclosed to me, it's not in any report. Up until this minute, I have no idea if he allegedly made a statement about that he was releasing the vehicle. I can't, I mean, it's a discovery violation.
>
> THE COURT: Are you proffering that Detective Benn would testify to a statement made by the defendant?
>
> [PROSECUTOR]: It's my understanding that the car keys were given to the brother, um, if it's a statement, I would just like that part to come in, that the car keys were given to someone who was on scene.
>
> THE COURT: Well, I do find that it's relevant to the possession issue and he can testify to what he did with the keys but I agree with [Defense Counsel] that if not statements was disclosed, he can't testify to any statement made by the defendant.
>
> [DEFENSE COUNSEL]: Okay. And – I don't think he can, in other words, he can't – I don't think the officer can say I gave it to the defendant's brother, how would he know that's his brother? That would come from a statement from hearsay. I mean, you know, unless the person

walked up and said I'm his brother because again, it's hearsay also. I don't – that's fine –

[PROSECUTOR]: It would be –

[DEFENSE COUNSEL]: -- the officer can say I, for example, took the keys from place X and I gave the keys to Place Y. But as to who he gave it to? How would he know that that person was the brother? It's hearsay?

THE COURT: So I don't necessarily agree with that, I think he can testify to what he did with the keys and avoid any statement made by the defendant. I'll entertain a further objection based on what he says. But it's your understanding that he's simply going to testify to what he did with the keys, not to any statement?

[PROSECUTOR]: I can direct him to testify –

THE COURT: And I think you need to direct him to that.

[PROSECUTOR]: Okay.

THE COURT: All right? So it's sustained in part, overruled in part. Thanks.

When direct examination resumed, and after Detective Benn was asked what he did with the keys, defense counsel again objected. At the ensuing bench conference, defense counsel maintained that he was concerned that Detective Benn would testify that he gave the keys to the appellant's brother, and that such testimony would be hearsay. Further, defense counsel argued that it appeared that the State was attempting to prove constructive possession of the handgun based on appellant's transfer of the car keys to his brother. Defense counsel further maintained that this was a discovery violation.

The circuit court reiterated that the appellant's statements were not admissible, but the fact that he gave the keys to another person was admissible. Defense counsel then

directed a question to the prosecutor, as follows: "So you'll just direct, in other words, a simple question is, did you give the keys to Mr. Washington's brother?" Before the prosecutor could give a definitive answer, the court recessed for lunch. After lunch, the following ensued:

> [DEFENSE COUNSEL]: I believe for clarity, I talked with Madam State and I think that she's going to indicate – the simple question is going to be, to whom did you give the keys to the car and the answer is going to be Mr. Washington's brother.
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: Right?
>
> [PROSECUTOR]: Correct.
>
> [DEFENSE COUNSEL]: Okay. And then that will clear the subject up.
>
> THE COURT: Jury instructions, did you have a chance to look at the jury instructions?
>
> [DEFENSE COUNSEL]: It should reflect I still object to it, but I understand you overruled my objection and therefore we – that's what I understand is going to happen.
>
> THE COURT: Your objection is noted for the record.

When Detective Benn retook the stand, the following testimony was elicited:

> Q. And before we took a break, you had mentioned that you did not tow the vehicle. To whom did you give the keys of the vehicle since you didn't have it towed?
>
> A. The brother of the defendant.[6]

[6] During cross-examination, Detective Benn interjected that "I was asked to give him the keys," referring to appellant's brother. There was no testimony concerning who (continued)

Generally, the purpose of discovery in criminal cases is to "avoid surprise at trial" and to provide the parties with sufficient time to prepare their cases. *Hutchinson v. State*, 406 Md. 219, 227 (2008). It is long-established that a "defendant has a due process right to discover and put before the fact finder evidence that might influence the determination of guilt." *Reynolds v. State*, 98 Md. App. 348, 364 (1993) (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987)). Further, a "defendant cannot be prohibited from discovering evidence the nondisclosure of which would undermine the confidence in the outcome of the trial." *Reynolds*, 98 Md. App. at 364 (citing *Pennsylvania v. Ritchie*).

When the trial court determines that a discovery violation has occurred, the remedy is "within the sound discretion of the trial judge." *Williams v. State*, 364 Md. 160, 178 (2001). And, "[t]he exercise of that discretion includes evaluating whether a discovery violation has caused prejudice." *Cole v. State*, 378 Md. 42, 56 (2003) (citing *Williams*, 364 Md. at 178)). "[A] defendant is prejudiced only when he is unduly surprised and lacks adequate opportunity to prepare a defense, or when the violation substantially influences the jury." *Thomas v. State*, 397 Md. 557, 574 (2007) (concluding that petitioner was not prejudiced and observing that petitioner did not seek a continuance for the belated disclosure, but instead, sought the windfall of exclusion). Where, however, the court does not make a specific finding regarding whether there was a discovery violation, the appellate

asked the detective to transfer the keys this way. Further, we also note that, although hearsay was raised in the trial court, the only issue on appeal is whether the court abused its discretion in resolving the discovery dispute.

courts will review the issue *de novo* "to determine whether a discovery violation occurred." *Williams*, 364 Md. at 169. If we determine that the State did violate a discovery rule, we consider whether the admission of the evidence was harmless error. *Id*. at 169, 179.

Md. Rule 4-263 requires the State to provide "[a]ll written and all oral statements of the defendant and of any co-defendant that relate to the offense charged and all material and information, including documents and recordings, that relate to the acquisition of such statements." Md. Rule 4-263(d)(1). Here, there is no dispute that, by excluding the appellant's statements, the court found that the State violated this rule by not disclosing appellant's statements concerning to whom he gave the car keys. The issue then is whether the court abused its discretion in remedying the violation by excluding any evidence of appellant's statements and, as apparently agreed to by defense counsel, limiting the testimony to the fact that Detective Benn gave the car keys to appellant's brother.

Md. Rule 4-263(n) provides a list of potential sanctions a trial court may impose for a violation of the discovery rules, including: ordering discovery of the undisclosed matter, granting a continuance, excluding evidence as to the undisclosed matter, granting a mistrial, or entering any other appropriate order. In fashioning a sanction for a discovery violation, "the court should impose the least severe sanction that is consistent with the purpose of the discovery rules." *Thomas*, 397 Md. at 571 (citations omitted); *accord Raynor v. State*, 201 Md. App. 209, 228 (2011), *aff'd*, 440 Md. 71 (2014), *cert. denied*, 135 S. Ct. 1509 (2015). A court abuses its discretion in fashioning a remedy where the ruling is "'well removed from any center mark imagined by the reviewing court and beyond the

fringe of what that court deems minimally acceptable.'" *Patterson v. State*, 229 Md. App. 630, 639 (2016) (quoting *McGhie v. State*, 224 Md. App. 286, 298 (2015), *aff'd*, 449 Md. 494 (2016)), *cert. denied*, 451 Md. 596 (2017). Stated another way, a court abuses its discretion "'where no reasonable person would take the view adopted by the [trial] court[] . . . or when the court acts without reference to any guiding principles.'" *Thompson v. State*, 229 Md. App. 385, 404 (2016) (quoting *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 418 (2007)).

We are not persuaded that the circuit court abused its discretion in this case. When the information became known, the court heard argument, then took a lunch break during trial. Presumably, during that time, defense counsel could have spoken with appellant about the transfer of the car keys to his own brother.

Moreover, we conclude that appellant was not unfairly prejudiced or surprised as there was no dispute that appellant was driving the car in question. Indeed, the law in Maryland recognizes that "the knowledge of the contents of the vehicle can be imputed to the driver of the vehicle." *Neal v. State*, 191 Md. App. 297, 317 (citation and quotation omitted), *cert. denied*, 415 Md. 42 (2010). We hold that the circuit court properly exercised its discretion on this issue.

III.

Finally, appellant argues the evidence was insufficient to support his conviction for transporting a handgun in a vehicle because the State failed to prove that appellant's vehicle was "traveling on a road or parking lot" per the applicable statute. The State responds that

the evidence was sufficient to sustain appellant's conviction, both under our standard of review and considering the circumstantial evidence in this case. We conclude the evidence was sufficient.

In considering a challenge to the sufficiency of the evidence, we ask "'whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Grimm v. State*, 447 Md. 482, 494-95 (2016) (quoting *Cox v. State*, 421 Md. 630, 656-57 (2011)); *accord Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "[W]e defer to the fact finder's 'resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *Riley v. State*, 227 Md. App. 249, 256 (quoting *State v. Suddith*, 379 Md. 425, 430 (2004)), *cert. denied*, 448 Md. 726 (2016). As an appellate court, "'[w]e do not re-weigh the evidence,' but, instead, seek to determine 'whether the verdict was supported by sufficient evidence, direct or circumstantial, which could convince a rational trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt.'" *Haile v. State*, 431 Md. 448, 466 (2013) (quoting *State v. Smith*, 374 Md. 527, 534 (2003)); *see also Burlas v. State*, 185 Md. App. 559, 569 ("[T]here is no distinction to be given to the weight of circumstantial, as opposed to direct, evidence"), *cert. denied*, 410 Md. 166 (2009). We will not reverse a conviction on the evidence "'unless clearly erroneous.'" *Id*. (quoting *State v. Manion*, 442 Md. 419, 431 (2015)).

In addition to being convicted of illegal possession of a regulated firearm,

appellant was convicted of the following offense:

> (a)(1) Except as provided in subsection (b) of this section, a person may not:
>
> * * *
>
> (ii) wear, carry, or knowingly transport a handgun, whether concealed or open, in a vehicle traveling on a road or parking lot generally used by the public, highway, waterway, or airway of the State;
>
> * * *
>
> (2) There is a rebuttable presumption that a person who transports a handgun under paragraph (1)(ii) of this subsection transports the handgun knowingly.

Md. Code (2002, 2012 Repl. Vol., 2017 Supp.), § 4-203 of the Criminal Law ("Crim. Law") Article; *see also State v. Smith*, 374 Md. at 563 (Raker, J., concurring) (recognizing that former Article 27 § 36B "creates a rebuttable presumption that a person who transports a handgun in a vehicle is 'knowingly transporting' that handgun").[7]

Looking to the plain language of the statute, and, as noted by an opinion from the Office of the Maryland Attorney General concerning the predecessor statute, former Article 27 § 36B(b), "the statute does not condition the criminal act of wearing, carrying or knowingly transporting a hand gun in a vehicle on the operation or ownership of the vehicle, but rather upon the physical act of wearing, carrying or knowingly transporting the hand gun in the vehicle." 57 Md. Op. Atty. Gen. 288, 289 (1972). And, this Court has also considered the legislative history of the statute and observed that "[t]he intent of this statute is clear: to curtail the movement of handguns, whether they be 'carried' on a person or in

[7] Appellant does not challenge the sufficiency of the evidence on the illegal possession count.

a vehicle." *Battle v. State*, 65 Md. App. 38, 48 (1985) (footnote omitted) (rejecting an argument that the appellant was not "knowingly transporting" a handgun that he "carried" on his person), *cert. denied*, 305 Md. 243 (1986).

Consistent with that purpose, this Court has held that the statutory proscription applies to parked cars. For instance, in *Ruffin v. State*, 77 Md. App. 93 (1988), the police searched an empty car that was parked outside a pool hall. *Ruffin*, 77 Md. App. at 95. On appeal, although the primary issue concerned whether Ruffin had standing to challenge the search because the car was stolen, *id*. at 99-103, Ruffin also challenged the sufficiency of the evidence on his conviction for transporting a handgun in a vehicle on the grounds that the parked car was stationary, and not in motion. *Id*. at 103. This Court disagreed, observing that appellant "conveniently ignores the splendid utility of circumstantial evidence." *Id*. We held:

> When assessing the legal sufficiency of evidence, we take not only that version of the facts most favorable to the State but also all inferences that can reasonably be drawn therefrom. At 5:30 in the morning, the appellant was in a pool room. The car he was operating was parked in the street immediately outside. We do not find irrational the inference that he transported himself to the pool room in the car. With that inference flows the parallel inference that the gun which was contained in the car was transported there with him. We hold that [the trial court's] verdict in that regard was not clearly erroneous.

Ruffin, 77 Md. App. at 103. *See generally, Atkinson v. State*, 331 Md. 199, 216 (1993) (suggesting factors a court may consider to determine whether an individual was "driving," "operating," "moving," or in "actual physical control" of a vehicle in a driving

while under the influence ("DUI") case, including, but not limited to, the status of the engine and the location of the defendant inside the vehicle).

Here, according to Detective Benn, the Cadillac was parked on the side of West Lafayette Street with its windows up on a hot summer night. The detective maintained that it appeared the vehicle was running when he first approached, explaining:

> . . . like I said, from the car, all the windows were up, from our car, I could see all the windows up, it's July, I mean, our windows are down and if – and our A/C is on and those windows are up so the A/C had to be in that car, so the vehicle – it appeared to me the vehicle was on. When I approached, I didn't see any movement with his hands other than to make the – to turn the – to put the window down. He immediately – he put the window down immediately. He didn't have to turn the ignition on or anything like that.

The facts also established that appellant was seated in the driver's seat of the parked car, smoking marijuana with a friend. After appellant was arrested and the vehicle searched, a handgun was found, concealed inside the center console, in an area immediately adjacent to the driver's seat. Considering that the Court affirmed a similar conviction on lesser facts in *Ruffin, supra*, we are persuaded that there was sufficient evidence that appellant was knowingly transporting a handgun in a vehicle.

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