Circuit Court for Wicomico County
Case No.: C-22-CR-21-000029

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1268

September Term, 2021

TONY ELLIS MACK

v.

STATE OF MARYLAND

Berger,
Shaw,
Eyler, James R.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: August 11, 2022

Appellant, Tony Ellis Mack, was charged in the Circuit Court for Wicomico County, Maryland with possession with intent to distribute cocaine and related charges. After his motion to suppress evidence was denied, appellant entered a not guilty plea on an agreed statement of facts to possession with intent to distribute cocaine. He was sentenced to fifteen years' incarceration with all but eighteen months suspended, to be served on home detention, followed by four years' supervised probation. On this timely appeal, appellant presents one question for our review:

Did the trial court err in denying Appellant's suppression motion?

For the following reasons, we shall reverse.

BACKGROUND

On December 10, 2020, at around 1:22 a.m., Deputy Jonathan Adams, then employed with the Salisbury Police Department, was working a uniformed night shift in the area of West Main Street and Catherine Street in Salisbury.[1] While driving his marked police vehicle, Deputy Adams saw a silver minivan turn onto the 100 block of Catherine Street, a high crime area known for drug use and distribution. Deputy Adams observed an unknown male on foot, leaning into the passenger side of this same minivan. The deputy

[1] Deputy Adams, employed at the time of the hearing with the Worcester County Sheriff's Office, testified he was previously employed as a patrol officer with the Salisbury Police Department, beginning in June 2016. During that employment, he had been involved in hundreds of drug related investigations and arrests, usually involving cocaine, crack cocaine, heroin and marijuana, and had assisted with approximately ten hand-to-hand transactions. Deputy Adams also had received specialized training in undercover narcotics. On cross-examination, he added that he had worked with confidential informants and had "debriefed users as well as dealers" in the hope of using them as informants for the Gang Unit and the Narcotics Task Force.

testified he "put essentially a third of his body inside of the van, itself." The deputy did a u-turn and, when he drove back to the area, he observed the male, on foot, leave the area with an unknown female. The deputy "believed through my training, knowledge, and experience, the time of the day, the area which it was, the actions of that unknown male actually putting … a majority of his body inside the vehicle at that time, I believed it was a hand-to-hand transaction of a controlled dangerous substance." Deputy Adams concluded that another unknown male, sitting in the passenger seat of the minivan, had dealt a controlled dangerous substance to the man leaning into the vehicle. Asked to elaborate, Deputy Adams testified:

> Normally when someone is involved in the distribution of a controlled dangerous substance, they tend to hide it because it's illegal. If someone is saying hi to somebody, they don't put normally -- at least, through my experience, they don't put a third of their body inside the vehicle. The amount of time, it was only a few minutes, if that, that this whole deal from me initially seeing the vehicle to it going mobile, it was only a few minutes time it passed. It just seemed to me through my training, knowledge, and experience, it was a controlled dangerous substance transaction.

Deputy Adams waited for the minivan to turn around and leave the dead-end area in which it had stopped and then followed the minivan down West Main Street. He stopped the minivan after it cut through a private bank parking lot.[2] He activated his emergency lights at around 1:27 a.m., and the minivan pulled into a gas station/convenience store parking lot. He agreed that it was his intention to call for a K-9 unit to scan the vehicle and

[2] Ultimately, Deputy Adams issued a warning to the driver. This aspect of the stop is not challenged.

to arrest the front seat passenger based on his prior observations of what he believed to be a hand-to-hand transaction.

After Deputy Adams approached the minivan on the passenger side, he identified the driver as Toneeka Duggins and the front seat passenger as appellant.[3] Deputy Adams then realized that the minivan was a taxi. He advised the occupants that he stopped them because of the illegal use of the parking lot. He told them that he was going to issue a warning for that offense, and he asked for identification. Because he was alone, he waited for backup to arrive.

At approximately 1:30 a.m., Officer Barr arrived with his K-9 dog, Chuckie. Officer Barr asked the occupants to exit the minivan. As appellant exited the vehicle, Deputy Adams asked him whether he had any weapons on him. Appellant stated that he had a pocketknife. After retrieving the knife, Deputy Adams patted appellant down "for officers' safety" to check if he had "any other weapons on the outside of his -- the outside of his clothing." During that pat-down, the Deputy noticed that appellant "was clenching his butt up in order to hinder me from patting down[.]" Feeling no other weapons, and because appellant was "cooperative," appellant was not placed in handcuffs but was directed to wait by the Deputy's patrol car.

[3] Body camera footage of the stop was admitted as State's Exhibit 1. On February 25, 2022, this Court granted Appellant's Unopposed Motion to Supplement the Record with the video recording, as well as a transcription of that recording.

We note that the driver testified on behalf of appellant and denied that she saw a drug transaction while she transported him in her minivan, which was being used as a taxi that evening. She also testified that she told a police officer that the marijuana later found inside her vehicle was for her own personal use.

Shortly thereafter, as Deputy Adams sat in his vehicle and attempted to run the appellant's information on his apparently malfunctioning laptop, Chuckie scanned the vehicle and alerted near the driver's side rear door.[4] The vehicle was then searched and a baggie of marijuana weighing three grams, another bag of marijuana, and a "plethora of unused plastic baggies" were recovered. Deputy Adams testified that plastic baggies are used in the distribution of narcotics. He testified that one bag of marijuana was located in the center console, another bag was inside a bag belonging to the driver, and the baggies were found in the back pocket area behind the driver's seat. Deputy Adams could not recall if the marijuana was found in plain view or if it was concealed inside the passenger area of the vehicle. Deputy Adams agreed that there was just "a civil amount of marijuana in the baggies."

After searching the minivan, Deputy Adams searched appellant's person. As evident from the officers' body camera recording, appellant was positioned close to the patrol car, and in between the two open doors on the passenger side. Deputy Adams stood at the outside edge of those open doors, blocking appellant, and another police officer stood nearby. The Deputy maintained that, although he was not handcuffed at this time, appellant was under arrest based on his observations of what he believed to be a drug transaction near Catherine Street.

During the search, Deputy Adams felt a "harder object" in appellant's groin area. After appellant "clenched his butt cheeks" again, and believing this item to be narcotics,

[4] Officer Barr, first name not provided, testified that Chuckie was certified to detect cocaine, heroin, methamphetamines, ecstasy and marijuana.

Deputy Adams pulled appellant's sweatpants out and up and saw "a tennis size ball of a plastic baggie containing what I immediately identified as cocaine." Deputy Adams denied that he exposed any of appellant's private area when he did this. He added that the gas station/convenience store where the stop was performed was closed and that there "was no one around who could possibly see it." Appellant momentarily attempted to flee, but he was taken to the ground adjacent to Deputy Adams' patrol car by the officers, then placed in handcuffs. The officers recovered 39.9 grams of cocaine and powder cocaine and $551.25 in U.S. currency and coins.

On cross-examination, Deputy Adams maintained that he intended to arrest appellant based on his observation of what he believed to be a drug transaction near Catherine Street before the stop. He agreed that he did not see any drugs or money exchanged during that transaction because the pedestrian leaned into the minivan. He further agreed that appellant's knife was a "lawfully carried folding pocket knife[.]" *See, e.g.,* Md. Code (2002, 2021 Repl. Vol.) § 4-101(a)(5)(ii)(2) of the Criminal Law Article ("Crim. Law") (the penknife exception).

On redirect examination, Deputy Adams was asked if appellant could have left the scene after he stopped the minivan in the gas station parking lot. Deputy Adams replied, "[n]o, absolutely not … [b]ecause at that point in time, he was going to be – he was detained at that point, just not in handcuffs. He was going to be placed under arrest because of what the initial observations I observed prior to the traffic stop."

After hearing from the State, defense counsel argued that Deputy Adams did not have probable cause to arrest him based on the alleged drug transaction prior to the stop,

considering that Deputy Adams did not see an actual hand-to-hand exchange and the evidence only established that an unidentified person leaned into the minivan for a short period of time before walking away. Further, counsel continued, there was no reasonable articulable suspicion when appellant was directed to get out of the vehicle and subjected to a pat-down prior to the K-9 scan. And, although Deputy Adams believed appellant was "clenching" his buttocks during that pat-down, there was no testimony that the Deputy believed he felt narcotics. Defense counsel also argued that the K-9 alert was ambiguous because the dog could have been alerting to under 10 grams of marijuana.[5] Counsel then addressed the result of the search that followed, noting that only a "civil amount" of marijuana and plastic bags were recovered, not in plain view, and that appellant was only a passenger in a taxi. Further, the driver, Ms. Duggins, testified that the marijuana found in the vehicle belonged to her. Defense counsel concluded that there was no probable cause to support appellant's arrest or the search incident thereto.

After the State reasserted that the standard of review was the totality of the circumstances, the court denied appellant's motion to suppress. The court first addressed the Deputy's observations on Catherine Street, a high crime area known for drug distribution. After recounting Deputy Adams' experience and training, the court disagreed with his assessment that probable cause existed based on those observations. Nevertheless,

[5] As pointed out by the motions court, and as conceded by the appellant on appeal, the K-9 alert provided probable cause to search the minivan. *See Bowling v. State*, 227 Md. App. 460, 476 ("[A] drug dog's alert to the odor of marijuana, without more, provides the police with probable cause to authorize a search of a vehicle pursuant to the *Carroll* doctrine."), *cert. denied*, 448 Md. 724 (2016).

as there was an independent reason for stopping the minivan for a traffic violation, *see* Md. Code (1977, 2020 Repl. Vol.), § 21-201(a)(2) of the Transportation Article ("Transp.") (prohibiting driving across private property to avoid a traffic control device), the court continued to the initial interactions between appellant and Deputy Adams when the deputy approached the passenger side of the minivan after it was stopped.

The motions court found that, after calling for backup and a K-9 dog, Deputy Adams attempted to complete the traffic stop by checking the driver's license and registration, despite some difficulty with his onboard computer. The court found that there was no unlawful second stop while Deputy Adams awaited the arrival of the K-9 unit. *See generally, Ferris v. State*, 355 Md. 356, 372 (1999) (holding that second stops are only permitted where there is either consent or additional reasonable articulable suspicion).

Turning next to when the occupants were asked to step outside of the vehicle for purposes of the K-9 scan, the court noted that this was for the occupants' safety and that the K-9 was trained to alert to multiple controlled dangerous substances. The court continued that Deputy Adams then patted down appellant "for safety." The court disagreed that officers had "carte blanche" to "pat people down for safety." The court stated:

> Officers have the ability to patdown individuals if they have reasonable articulable suspicion that they are armed and dangerous. I believe that Officer Adams, however, testified that time was 1:22 in the morning. The officers were evenly, I guess, numbered with the individuals in the vehicle. The area was a high crime area known for drug activity is axiomatic, known to this Court that drug activity, there is a certain level of violence and dangerousness. We have officers killed all across the country during traffic stops when there is drug activity because there is risk.
>
> There is guns involved. I mean, so I think there was enough articulated by the officer to lead me to conclude that a patdown, open hand, flat patdown,

> Terry patdown, was reasonable under the totality of the circumstances, regardless, again, of the subjective thought of the officer that you could just pat them down for safety any time you take them out of a vehicle. So that's that interaction.[6]

The court then turned to the search of appellant's person near Deputy Adams' patrol vehicle. Recognizing that the case turned on whether this was a valid search incident to arrest, *see generally, Lewis v. State*, 470 Md. 1, 20-21 (2020), the court found as follows:

> And at that moment, here's what the officer has objectively under the totality of the circumstances. He has the observation, initially. And the observation is a person leans one third of the way into a vehicle. He gets to view that information in light of his knowledge, training, and experience that it looked like a hand-to-hand. It's on Catherine Street. It's a high crime area where specifically he articulated that there are lots of calls for controlled dangerous substance sales and activity. He has participated in numerous investigations related to the arrests of controlled dangerous substance purchases. So that's colored by his experience.
>
> Then he has a dog alert. So the dog alerted to contraband inside the vehicle. Yes, it could be cocaine. It could be methamphetamines. It also could be marijuana which is decriminalized but is still contraband. He has the patdown of the defendant which I find based upon what he articulated at the time of night, area, high crime area, drug -- drug area where there is lots of drug activity. The defendant himself also says before he conducts his Terry patdown and begins the intrusion which is a fourth amendment dimension, the defendant says I have a pocket knife. The defendant could have another weapon, so a Terry patdown was reasonable.
>
> But during that Terry patdown, the officer also observes a clenching of his buttocks.
>
> Now, it could be innocuous, like you said, [Defense Counsel]. It could be, well, he got close to his scrotum or his groin area, and the man just might do that naturally. But, again, in the context of everything, he also might be doing it because he's hiding something. He's either hiding a weapon. He's

[6] There was no evidence that guns were involved in this stop. However, this Court has recognized that "although a drug transaction by itself may not automatically provide reasonable suspicion that the person is armed … it is a factor that the police may consider." *Goodwin v. State*, 235 Md. App. 263, 281 (2017), *cert. denied*, 457 Md. 671 (2018).

> either hiding some sort of contraband or some other type of CDS. So, again, I see not just bricks, but I see a wall.
>
> And I also find that once the dog alerts, and there's a search of the passenger compass of the vehicle, there is found contraband. There is a, what I would call, a de minimis amount of marijuana, several grams, but under the amount that our legislators deemed to be a criminal amount, certainly enough to result in a civil citation. There is no search incident to citation that I know of.
>
> However, in addition to the marijuana, you have, and I refer to Defendant's Exhibit Number 1 and Defendant's Exhibit Number 2, and what I saw with my own eyes on the search and the body cam, you have a number of these glassine baggies that are strewn about this vehicle of all different types. There's maybe like two or three types of glassine baggies. And, again, this from the eye of a lay person may indicate that a person just likes to bring peanut butter and jelly sandwiches to their, to their job site, drive around the cab, or it could mean based upon the knowledge, training, and experience of the officer that the person is using these baggies to pinch off some of that marijuana and sell it quickly on the streets of Salisbury or some other type of controlled dangerous substance activity.
>
> All of this, all of these facts, I'm taught as a judge that I look at the totality of the circumstances, whether the State has presented to me sufficient evidence to rebut the presumption that the warrantless search was unreasonable, and I find that it has. I find that just under the totality of the circumstances, that at the time the officer effectuated the arrest, communicated the arrest, and also conducted the search which would have to be a search incident to arrest that he had probable cause to believe that the defendant was engaged in either distribution of marijuana or some other type of CDS.

We may include additional detail in the following discussion.

DISCUSSION

Appellant contends the court erred in denying his motion to suppress because he was subjected to an unlawful frisk and then an unlawful arrest and search incident thereto. In the alternative, appellant contends that he was not arrested at the time of his search or, if this court concludes that the record is too ambiguous to determine that question, the case

should be remanded to the circuit court for that court to make appropriate findings. The State responds that any argument that appellant was not under arrest at the time of the search of his person is unpreserved and that, under a totality of the circumstances analysis, appellant's arrest was supported by probable cause. Assuming that the initial frisk of appellant was lawful and that he was arrested at the time of the search, we conclude that Deputy Adams lacked probable cause to arrest appellant, and thus, the search was unlawful. The circuit court erred in denying appellant's motion to suppress.

Standard of Review

Our standard of review is clear:

> In reviewing a trial court's ruling concerning the admissibility of evidence allegedly seized in violation of the Fourth Amendment, we accept the trial court's findings of fact unless they are clearly erroneous. *Grant v. State*, 449 Md. 1, 31 (2016). We independently appraise the ultimate question of constitutionality by applying the relevant law to the facts *de novo*. *See id*.
>
> Where "there is any competent evidence to support the factual findings below, those findings cannot be held to be clearly erroneous." *Givens v. State*, 459 Md. 694, 705 (2018) (internal quotation marks and citation omitted). We review "the trial court's findings of fact, the evidence, and the inferences that may be drawn therefrom in the light most favorable to the party who prevails on the issue that the defendant raises in the motion to suppress." *Robinson v. State*, 451 Md. 94, 108 (2017) (citation omitted).

In re: D.D., __ Md. __, No. 27, Sept. Term, 2021, slip op. at 9-10 (filed June 21, 2022).

In considering any case under the Fourth Amendment to the United States Constitution, our "touchstone" is "reasonableness." *Lewis*, 470 Md. at 18. What is reasonable depends on "all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *Id*. (quotation marks and citation omitted). Further:

> "[S]ubject only to a few specifically established and well-delineated exceptions, a warrantless search or seizure that infringes upon the protected interests of an individual is presumptively unreasonable." "Whether a particular warrantless action on the part of the police is reasonable under the Fourth Amendment depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers."

Id. (internal citations omitted).

We need first to look at the nature of the encounter between appellant and the police. As the Court of Appeals explained in *Swift v. State*, 393 Md. 139 (2006), the Fourth Amendment is not implicated every time the police have contact with an individual. *Id*. at 151-52; *California v. Hodari D.*, 499 U.S. 621, 625-26 (1991). Courts have looked at three tiers of interaction between the police and individuals in analyzing the applicability of the Fourth Amendment, *i.e*., an arrest, an investigatory stop, and a consensual encounter. *Swift*, 393 Md. at 149-50. An arrest requires probable cause to believe that the person has committed or is committing or is about to commit a crime. *See Maryland v. Pringle*, 540 U.S. 366, 370-71 (2003) (restating the "well-known doctrine of probable cause" to be a "a fluid concept–turning on the assessment of probabilities in particular factual contexts[,]" concerning "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act[,]" and that "depends on the totality of the circumstances" (quotation marks and citations omitted)). An investigatory stop or detention, known as a *Terry* stop, requires reasonable and articulable suspicion that criminal activity is afoot and permits an officer to stop and briefly detain an individual. *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968); *see also Ferris*, 355 Md. at 384-85 ("Due weight must be given not to [an officer's] inchoate and unparticularized suspicion or hunch, but to

the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." (quotation marks and citation omitted)). A consensual encounter is based upon a person's voluntary cooperation with non-coercive police contact and is not based upon acquiescence to police authority or force. *Swift*, 393 Md. at 151-52.

The Stop

Applying these principles to the case at hand, this encounter began with Deputy Adams' observations on Catherine Street. Looking at the evidence in the light most favorable to the prevailing party, in this case, the State, Deputy Adams observed an individual on foot approach the minivan, which was located in a high crime area known for drug distribution, and extended a third of his body into the passenger side window for a brief moment, and then walk away with another unidentified female. Although he never saw an actual exchange of any objects, based on his training, knowledge and experience, Deputy Adams believed he witnessed a hand-to-hand transaction of a controlled dangerous substance.

The initial stop of the minivan is not challenged on appeal. We observe without deciding, however, that the observations by Deputy Adams may have been sufficient to justify a stop based on reasonable articulable suspicion. As the Court of Appeals has recently restated:

> [L]aw enforcement officers do not need to rule out innocent explanations for suspicious conduct before conducting a *Terry* stop. Given the important governmental interest in detecting, preventing, and prosecuting crime, the Fourth Amendment allows a brief seizure, based on reasonable suspicion, to attempt to determine whether criminal activity is afoot. An officer who lacks probable cause to arrest is not required "to simply shrug his shoulders and

> allow a crime to occur or a criminal to escape." *Adams v. Williams*, 407 U.S. 143, 145 (1972) (citation omitted).

In re: D.D., __ Md. at __, slip op. at 26; *see also United States v. Perez*, 977 F.3d 163, 165 (1st Cir. 2020) (concluding there was reasonable articulable suspicion to justify a stop by police, even though no hand-to-hand transaction was witnessed, where, *inter alia*, officers saw a man lean into passenger side window of a parked Mercedes for fifteen seconds and then walk away); *United States v. Dubose*, 579 F.3d 117, 119 (1st Cir. 2009) (holding that there was reasonable articulable suspicion to stop an individual after officers observed him approach a parked car, lean into the driver's side window with both hands and upper torso for a brief conversation, then turn and walk away) (cited in *State v. Holt*, 206 Md. App. 539, 557 (2012), *aff'd*, 435 Md. 443 (2013)), *cert. denied*, 562 U.S. 1016 (2010); *United States v. McCoy*, 513 F.3d 405, 415 (4th Cir. 2008) (holding there was reasonable articulable suspicion to stop and frisk the driver of a vehicle after officer witnessed that driver meet with a tow truck driver in a grocery store parking lot, which was known in that county to be a meeting place for drug deals, then follow that truck to another nearby grocery store parking lot and enter the tow truck for only a few minutes, without ever entering either grocery store), *cert. denied*, 553 U.S. 1061 (2008).

We need not rest on that rationale, however, because we note, as the motions court did, that there was an independent ground for stopping the minivan after the driver cut through a private parking lot. *See* Transp. § 21-201(a)(2); *see also Rowe v. State*, 363 Md. 424, 433 (2001) (citing, in part, *Whren v. United States*, 517 U.S. 806, 810 (1996), and

recognizing that traffic stops are lawful when supported by either probable cause or reasonable articulable suspicion that a traffic violation has occurred).

The Frisk

The investigatory portion of the stop was conducted appropriately. While Deputy Adams was completing the paperwork for the traffic stop, a certified drug dog arrived on the scene. The occupants were lawfully ordered to get out of the vehicle. *See Maryland v. Wilson*, 519 U.S. 408, 410-15 (1997) (holding that "an officer making a traffic stop may order passengers to get out of the car pending completion of the stop" (discussing *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977))).

Then, according to the transcript of his body worn camera recording, Deputy Adams asked appellant if "[y]ou got anything else on you (indiscernible) stick me in or blow me up?" Appellant replied "I got a knife on me." The deputy said, "don't go for it. Don't reach for it. Just tell me where it's at, man." Appellant pointed to the knife's location and it was seized by the deputy. Deputy Adams then asked, "[a]ny other weapons on you or anything like that?" After appellant replied in the negative, Deputy Adams told him to "go ahead and spread your feet[,]" and then patted him down. During that pat-down, Deputy Adams testified that appellant appeared to be "clenching his butt up in order to hinder me from patting down" his crotch area.

Appellant argues that Deputy Adams never articulated why he thought appellant was armed and dangerous and that the frisk was simply a matter of general police policy. He also argues that, once the knife was removed, "[i]t was no longer a threat" to the officer and the pat-down was unlawful. Relying primarily on *Lockard v. State*, 247 Md. App. 90

(2020), appellant argues on appeal that the "clench was a fruit of the unlawful frisk" and must be excluded from our analysis.

During a stop, a police officer may pat down an individual for weapons when the officer has reason to believe that the individual may be armed and dangerous. *See In re D.D.*, __ Md. at __, slip op. at 31 ("[D]uring a *Terry* stop, a police officer may pat down an individual for weapons if the officer 'has reason to believe that [the officer] is dealing with an armed and dangerous individual.'" (quoting *Sellman v. State*, 449 Md. 526, 541 (2016), in turn quoting *Terry*, 392 U.S. at 27)). As for the proper scope of such a frisk, generally, the scope must be "reasonably related in scope to the justification for [its] initiation." *Terry*, 392 U.S. at 29. Such a search or seizure must "be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Id.*

In *Lockard, supra*, officers initiated a traffic stop of a vehicle because it was "following another vehicle too closely" and ordered the occupants out of the vehicle. *Lockard*, 247 Md. App. at 96. The officers noticed a knife in Lockard's pocket and after removing it, and relying only on the confiscated knife, asked Lockard if he would consent to a pat-down search for weapons. *Id*. at 97-98. The officer did not initiate the pat-down because he believed that Lockard was armed and dangerous – on cross-examination, he testified that "I didn't need to. If I needed to, if I had to, I would have. If I had reasonable, articulable suspicion, I would have just searched or frisked him." *Id*. at 98 (emphasis omitted). On appeal, we reversed the trial court's denial of Lockard's motion to suppress, finding no evidence "except for the knife that was confiscated" that the officers believed

Lockard to be armed and dangerous. *Id*. at 113. Even without the officer's testimony that he did not believe Lockard was armed and dangerous, "the other relevant circumstances fail[ed] to support the *Terry* frisk." *Id.* We stated: "The knife in Lockard's pocket had already been secured by [another officer] when Corporal Adkins asked Lockard 'if he minded' being frisked. . . . Corporal Adkins testified that Lockard was not threatening or aggressive during the encounter, and Deputy Story confirmed that Lockard was 'polite and cooperative.'" *Id.*

We are not persuaded that *Lockard* is apposite. Unlike that case, this was not just a traffic stop. Here, Deputy Adams testified that, prior to the stop, he witnessed an unidentified subject lean into the passenger side window of the minivan, where appellant was sitting, in a high crime area known for drug distribution, and then, after a brief moment, walk away. Based on his training, knowledge, and experience, the deputy believed that he had witnessed a hand-to-hand transaction of a controlled dangerous substance. Given that the stop occurred in the early morning hours in a high crime area, Deputy Adams was justified in asking appellant if he had any weapons. When appellant responded that he had a knife, even though the knife was lawful, the total circumstances justified a *Terry* frisk for safety. The Deputy's limited pat-down at this point, after retrieving the knife, was reasonable under the circumstances. *See Goodwin*, 235 Md. App. at 283.

Regardless, however, the frisk did not result in discovery of any incriminating items. The most that came out of it that is relevant to the question of probable cause to arrest is the testimony that appellant clenched his buttocks. As the motions court observed, clenching buttocks during a pat-down in the groin area might have occurred naturally.

The Arrest

Appellant did not argue to the motions court that he was not under arrest at the time of the search in question. On appeal, as part of his alternative argument, appellant argues that we should consider this issue because Deputy Adams intentionally muted his body worn camera for over 10 minutes, during the time leading up to and during the search. Appellant also did not argue to the motions court that his rights were violated for that reason. We decline to consider these arguments further. *See generally Carroll v. State*, 202 Md. App. 487, 513 (2011) (suppression argument that is not timely raised generally is waived), *aff'd on other grounds*, 428 Md. 679 (2012).

The alternative argument is of no consequence, however, because we conclude that Deputy Adams lacked probable cause to arrest appellant.

Probable Cause

The State argues that probable cause to arrest was based on the fact that the stop occurred in a high crime area with frequent complaints relating to illegal drug transactions; the known relationship between drugs and guns; Deputy Adams had discovered that appellant had a knife; appellant clenched his buttocks during the frisk; Chuckie alerted on the minivan; and the search of the minivan produced marijuana and baggies.

In *Williams v. State*, 188 Md. App. 78, *cert. denied*, 411 Md. 742 (2009), a Baltimore City detective was monitoring a city block known for drug trafficking via closed circuit television mounted on a street pole. He observed two men on a sidewalk exchange a concealed object. *Williams*, 188 Md. App. at 96. Even though the detective could not specify what objects were passed between the suspects, this Court stated that his inability

to see what was passed is not surprising given the furtive efforts taken in a drug exchange. *Id*. "[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*. (quotation marks and citation omitted). We agreed there was probable cause based on these facts to support Williams' arrest. *Id*. at 97.

In *Donaldson v. State*, 416 Md. 467 (2010), the arresting officer observed Donaldson go with a group of people into a corner alley in an area where drug dealing was known to take place. *Id.* at 475. The officer saw Donaldson pull a plastic bag from the rear of his pants, take small white objects from the bag, and exchange the objects for money. *Id*. The other individuals then walked away. *Id*. The officer testified that, based on his experience and training, he believed that a drug transaction had taken place. *Id*.

On appeal, Donaldson argued that the exchange of money for an unidentified item does not, by itself, establish probable cause to arrest. *Id.* at 480. The Court of Appeals held, however, that the totality of the circumstances, including the manner in which Donaldson kept the items in the rear of his pants and the group's gathering in the corner while making an exchange, "certainly supports the conclusion that the group was engaged in some activity they wanted to conceal." *Id*. at 483. Accordingly, the officer had probable cause to arrest Donaldson and to conduct a search incident to that arrest. *Id*. at 487.

Although in the context of reasonable articulable suspicion and not probable cause, we note two other cases. In *Hicks v. State*, 189 Md. App. 112 (2009), two Prince George's County police officers were conducting surveillance of a Shell gas station in Oxon Hill,

Maryland. *Id.* at 115. Observing a blue four-door sedan parked at the gas pumps, the vehicle was occupied by Hicks and Milton Jennings. The sedan was not running, its lights were off, and no one was pumping gas. *Id*. After approximately fifteen minutes, the driver, Jennings, got out of the vehicle and met a third unidentified individual who had approached on foot. *Id*. at 116. Jennings and this other individual then exchanged something in a quick hand-to-hand transaction, and, afterwards, the unidentified individual walked away. *Id*. We upheld the motions court's denial of the motion to suppress, concluding that the officers "reasonably suspected that criminal activity may have been afoot and that this suspicion was sufficient to support the investigatory detention[.]" *Id*. at 122.

In *State v. Dick*, 181 Md. App. 693 (2008), Baltimore County police officers were conducting surveillance of a BP gas station when they observed Brian Hoffman riding a bicycle in circles in the gas station parking lot. *Id.* at 697. Hoffman looked around like he was waiting for someone. After around ten to fifteen minutes, Dick showed up on foot and spoke with Hoffman. *Id*. The two men then left the gas station and went to a nearby road, while still under surveillance by members of the police team. *Id*. Officers then observed a hand-to-hand exchange between the two, following by Hoffman quickly putting the unidentified item in his pocket and riding away on his bicycle. *Id*. This Court held that the police stop of Dick following this exchange was supported by reasonable articulable suspicion. *Id*. at 705-06.

Here, Deputy Adams did not witness an exchange. Instead, he witnessed a person lean one third of his body into the passenger side of a vehicle, located in a high crime area known for drug distribution, and then walk away with another individual. We recognize

the Deputy's training, knowledge and experience is a factor in determining probable cause. *See State v. Johnson*, 458 Md. 519, 533-34 (2018) (recognizing that officer experience is a factor in determining probable cause); *Norman v. State*, 452 Md. 373, 387 (2017) ("[A] court must give due deference to a law enforcement officer's experience and specialized training, which enable the law enforcement officer to make inferences that might elude a civilian."). Nevertheless, we conclude, as did the motions court, that merely observing an individual lean into a taxi on the passenger side followed by the individual walking away on foot with another person is insufficient to constitute probable cause to arrest the passenger.

After the stop and the K-9 alert, there was probable cause to search the minivan. *See Grimm v. State*, 232 Md. App. 382, 399-400 (2017) ("[W]hen a properly trained canine alerts to a vehicle indicating the likelihood of contraband, sufficient probable cause exists to conduct a warrantless '*Carroll'* search of the vehicle" (quoting *State v. Wallace*, 372 Md. 137, 146 (2002) (quotation marks and emphasis omitted), and also citing *Florida v. Harris*, 568 U.S. 237, 246 n.2 (2013)), *aff'd*, 458 Md. 602 (2018), *cert. denied*, 139 S. Ct. 263 (2018). During that search, the deputy found, a "plethora" of unused baggies and, what he referred to as, "civil" amounts of marijuana. *See generally, In re: D.D.*, __ Md. at __, slip op. at 12 (discussing Crim. Law § 5-601(c)(2) concerning the use or possession of less than 10 grams of marijuana).

Based on these circumstances, the State asserts that "Deputy Adams had probable cause to believe [appellant] had committed a drug trafficking crime[,]" and that "[t]he facts that justified the *Terry* patdown … also supported the subsequent search and

contemporaneous arrest of [appellant]."

Indeed, Maryland courts have recognized that "[a] *Terry* stop may yield probable cause, allowing the investigating officer to elevate the encounter to an arrest or to conduct a more extensive search of the detained individual." *Crosby v. State*, 408 Md. 490, 506 (2009) (citing *Terry*, 392 U.S. at 10); *see also Freeman v. State*, 249 Md. App. 269, 282 n.2 (2021) ("Both reasonable suspicion and probable cause move in the same direction along the same continuum of mounting suspicion. The only difference between them is quantitative."); *Rosenberg v. State*, 129 Md. App. 221, 243 (1999) (recognizing that, under the circumstances, reasonable, articulable suspicion may ripen to probable cause), *cert. denied*, 358 Md. 382 (2000).

The courts have also recognized that, incident to a lawful arrest, an arrestee's person may be searched without a warrant. As the Court of Appeals explained:

> The prerequisite to a lawful search of a person incident to arrest is that the police have probable cause to believe the person subject to arrest has committed a felony or is committing a felony or misdemeanor in the presence of the police. [*Pacheco v. State*, 465 Md. 311, 323 (2019)] (citing *Maryland v. Pringle*, 540 U.S. 366, 369-70 (2003)). "Because the search is premised on probable cause to make the arrest, the first question to be considered whenever such a search has been conducted is whether the police had the requisite probable cause *before* conducting the search." *Id.* (citing *Donaldson v. State*, 416 Md. 467, 481 (2010)). The justifications underpinning the search incident to arrest exception include the confiscation of weapons potentially used to resist arrest, escape custody, or endanger police officers' safety, and the seizure of evidence "to prevent its concealment or destruction." *Riley v. California*, 573 U.S. 373, 383 (2014) (internal quotation omitted); [*Chimel v. California*, 395 U.S. 752, 762-63 (1969)] ("When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons . . . [and] any evidence on the arrestee's person in order to prevent its concealment or destruction.")[, *overruled in part in Arizona v. Gant*, 556 U.S. 332 (2009)].

Lewis, 470 Md. at 20-21; *see Carter v. State*, 236 Md. App. 456, 474 (observing that "the search incident to arrest exception 'is applicable as long as the search is "essentially contemporaneous" with the arrest'" (quoting *Barrett v. State*, 234 Md. App. 653, 672 (2017), *cert. denied*, 457 Md. 401 (2018))), *cert. denied*, 460 Md. 9 (2018); *see also Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980) ("Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa.").

In evaluating probable cause to arrest, we consider the totality of the circumstances, which consisted of the following: Deputy Adams observed someone lean into the passenger side window of the minivan on Catherine Street; appellant was the front seat passenger in that minivan; appellant was armed with a lawful pocketknife; when appellant was frisked for additional weapons, Deputy Adams felt appellant clench his buttocks; a K-9 dog then alerted to the presence in the minivan of controlled dangerous substances; and a small, civil amount of marijuana and unused plastic baggies, which, according to the deputy, could be used in drug distribution, were found in the minivan.

Although it is meant "to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime[,]" *Brinegar v. United States*, 338 U.S. 160, 176 (1949), the probable-cause standard does not set a '"high bar"' for police. *Johnson*, 458 Md. at 535 (citation omitted). While the arresting officer must have something "more than bare suspicion[,]" *Brinegar*, 338 U.S. at 175, he need not have proof sufficient to conclusively establish guilt beyond a reasonable doubt or even by a preponderance of the evidence. *Illinois v. Gates*, 462 U.S. 213, 235 (1983). All that is

required is a "fair probability" of the arrestee's criminal activity. *Id*. at 246. And, "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." *Williams*, 188 Md. App. at 96-97 (quotation marks and citation omitted); *see also In re D.D.*, __Md. at __, slip op. at 18 ("The probable cause standard does not require an officer 'to rule out a suspect's innocent explanation for suspicious facts.' *District of Columbia v. Wesby*, 138 S. Ct. 577, 588 (2018). The same is true, of course, for the reasonable suspicion standard. *See, e.g., United States v. Arvizu*, 534 U.S. 266, 277 (2002).").

The *Terry* frisk did not produce any unlawful items. Appellant was cooperative. The K-9 alert and subsequent search of the minivan did not produce any incriminating evidence as to appellant. There was no K-9 alert on appellant's person. Although it is not entirely clear, it appears that the marijuana and baggies, in addition to not being criminally unlawful, were not in plain view. Appellant was seated in a taxi in which multiple people might have been occupants shortly before the time in question. Assuming the frisk was lawful, appellant's clenching of buttocks could have been a natural reaction or could have been an effort to hide something. Applying the totality of the circumstances test, the components relied on by the State, individually and collectively, do not constitute probable cause.

The motions court erred in denying the motion to suppress.

JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY REVERSED. COSTS TO BE PAID BY WICOMICO COUNTY.