Circuit Court for Prince George's County
Case No. CT190035X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1369

September Term, 2019

DELONTE SINCLAIR

v.

STATE OF MARYLAND

Reed,
Wells,
Zic,

JJ.

Opinion by Reed, J.

Filed: January 10, 2022

This case stems from an interaction between Delonte Sinclair ("Appellant") and police. Appellant, along with a group of other individuals, was stopped by police after police observed the group in a circle near a set of dice and cash. While police questioned the group, Appellant admitted that he had "about an ounce [of marijuana]." An officer proceeded to conduct a "pat down" of Appellant, revealing a firearm in Appellant's waistband. Upon finding the handgun, the officer placed Appellant in handcuffs. Following Appellant's arrest, the State charged Appellant with possession of a firearm by a person under the age of 21; wearing, carrying, or transporting a handgun; and possession of marijuana. Thereafter, Appellant moved to suppress the evidence found during the search of his person. The Circuit Court denied Appellant's motion, finding that the search was permissible under the *Terry* frisk exception to the warrant requirement. Appellant entered a conditional guilty plea to the charge of possession of a firearm by a person under the age of 21, reserving the right to appeal the denial of his motion to suppress evidence. Appellant timely filed his appeal.

In bringing his appeal, Appellant presents one (1) question for appellate review:

I. Did the Circuit Court err in denying Appellant's motion to suppress evidence?

On appeal, the State no longer asserts that the search was justified under the *Terry* frisk exception, but instead argues that the search was justified as a search incident to arrest. For the reasons stated herein, we hold that the search was not justified as a search incident to arrest, and we reverse the decision of the Circuit Court.

FACTUAL & PROCEDURAL BACKGROUND

Events Preceding Search

This case stems from an interaction between Appellant and police on October 19, 2018, at approximately 9:45 PM in Brentwood, Maryland. That night, two officers, including Officer Joshua Wortman,[1] were operating marked police vehicles when they noticed a group of five people kneeling in a circle, facing inward toward each other. The officers parked their vehicles next to the group and utilized their vehicle spotlights to illuminate the area.

As the officers approached the group, the group stood up, and Officer Wortman noticed dice and money on the ground in the middle of the group. When the officers initiated a conversation with the group, an individual fled and managed to get away from Officer Wortman's pursuit. On his return, Officer Wortman asked the group if any of them had anything illegal on them, to which Appellant responded that he had "about an ounce."

The Search

Officer Wortman then "stood [Appellant] up and put him in a control hold," which Officer Wortman described as "just interlocking [Appellant's] fingers, [and] putting [Appellant's] hands behind his head to have control of the situation." With Appellant in the "control hold," Officer Wortman conducted a pat down of Appellant's person, during which he felt a "hard blunt object" in Appellant's waistband. Upon feeling the object, Officer Wortman lifted Appellant's shirt, revealing what Officer Wortman recognized as the magazine of a handgun. Officer Wortman proceeded to handcuff Appellant and

[1] Officer Wortman was the sole testifying witness at Appellant's suppression hearing.

removed the handgun from Appellant's waistband.

Proceedings on Motion to Suppress

Following Appellant's arrest, the State charged Appellant with possession of a firearm by a person under the age of 21; wearing, carrying, or transporting a handgun; and possession of marijuana. In response to the charges, Appellant moved to suppress the evidence obtained from the search of Appellant's person.

In support of the motion, Appellant argued that, at the time of the search, he was not under arrest, nor was there probable cause to support an arrest. Moreover, Appellant argued that the officers did not have reasonable suspicion to believe that Appellant was armed and dangerous at the time of the search. In opposition to the motion, the State argued that Officer Wortman had authority to conduct the search under either the search incident to arrest or the *Terry* frisk exception to the warrant requirement.

At a motions hearing in the Circuit Court for Prince George's County on April 26, 2019, the Circuit Court denied Appellant's motion to suppress. The Circuit Court explained its rationale for denying Appellant's motion to suppress as follows:

> So as the Court heard the testimony . . . there is a side block, there is a fence line. There is basically a row of houses, and where the officer marks the individuals as being is in between, largely it is on the property line between the two houses.
>
> . . . .
>
> . . . the testimony was the officers were conducting targeted enforcement in this area. They saw a group of young men, I think was the testimony, at about 9:45 p.m., on October 19, 2018, hunched in a group, and the original term used was loitering.
>
> Certainly, the officers at that point may exercise their prerogative to approach

the group and ask what is going on, at which point one member of the group flees. While fleeing the police in and of itself does not establish probable cause or reasonable articulable suspicion, it certainly does add to the overall plethora of facts that does create a circumstance where there is reasonable articulable suspicion to suspect that criminal activity is afoot.

And that was further testified to by Officer Wortman. As he approached the individuals, he sees dice, he sees money on the sidewalk. The Court does know that gambling in the state of Maryland, specifically any form of gambling was illegal, prior to the Constitutional amendment that allowed table games at certain very restricted establishments. It does not authorize in any way, shape, or form gambling on a public sidewalk.

So certainly at that point, the officers had reasonable articulable suspicion to move forward. At that point though, no one was in detention yet, no one had yet been otherwise in any way Mirandized, or in any way arrested or detained that would require any of those Constitutional protections.

The officer testified that he asked, "Does anyone have anything illegal on them?" And in response, and it is uncontroverted, that the Defendant who was identified in court, indicated that he had about an ounce. And the Court finds that that testimony is sufficient to at that point allow Officer Wortman to do a frisk for contraband. As Officer Wortman testified, he put the Defendant in a control hold and began to frisk his pockets and his waistband, at which [time] his hand came into contact with a hand[sic] object in the waistband.

And though you are right counsel, that *Norman v. State* does stand for the proposition that simply -- possession of marijuana does not necessarily mean that there is an association with the firearm once a Defendant responds that he is in possession of contraband.

Under federal law as well as state law, it is still very clear that the mere smell or odor of marijuana permits a warrantless search of a vehicle. Certainly when a defendant admits that he is in possession in some manner of marijuana, that certainly permits the frisk of that defendant so the officer may establish the amount of the contraband to determine whether it is a civil or a criminal violation.

And certainly, once an officer with training as to the waistband being a danger area for the possession and the concealment of weapons. Once his hands came into contact with a hard, as he indicated gun-like [object], he certainly then has absolute rights under *Terry* to then go even further to

> ascertain whether that object is in fact a weapon. Which at this point, he indicated that he had pulled up . . . the Defendant's clothing, and then visually witnessed the magazine . . . of a semi-automatic handgun, which through his training and understanding, he knew to be a handgun. And accordingly, the Court finds that that investigatory stop, the search, and the seizure were all lawful and will deny Defendant's motion. Thank you.

Thereafter, on September 5, 2019, Appellant entered a conditional guilty plea to the charge of possession of a firearm by a person under the age of 21, reserving the right to appeal the denial of his motion to suppress evidence. The Circuit Court accepted Appellant's conditional plea and sentenced Appellant to three years' incarceration, all of which was suspended in favor of three years of supervised probation. Appellant timely appealed the Circuit Court's denial of his motion to suppress evidence stemming from the search of his person.

STANDARD OF REVIEW

"Our review of a circuit court's denial of a motion to suppress evidence is 'limited to the record developed at the suppression hearing.'" *Pacheco v. State*, 465 Md. 311, 319 (2019) (Quoting *Moats v. State*, 455 Md. 682, 694 (2017)). We view the record "in the light most favorable to the party who prevails on the issue that the defendant raises in the motion to suppress." *Pacheco*, 465 Md. at 319 (quoting *Norman v. State*, 452 Md. 373, 386 (2017)). We accept the Circuit Court's factual findings unless clearly erroneous and give due regard to the Circuit Court's opportunity to assess the credibility of the witnesses. *See Hill v. State*, 134 Md. App. 327, 339 (2000); *see also Perkins v. State*, 83 Md. App. 341, 346–47 (1990); *McMillian v. State*, 325 Md. 272, 282 (1992). Regardless, when reviewing a Circuit Court's conclusion relating to the validity of a search or seizure, we undertake

"an independent constitutional evaluation by reviewing the relevant law and applying it to the unique facts and circumstances of the case." *Pacheco*, 465 Md. at 319 (internal quotations omitted); *see also Hill*, 134 Md. App. at 340-41 ("[A]s to the ultimate, conclusory fact of whether the search was valid, this Court must make its own independent constitutional appraisal by reviewing the law and applying it to the facts of [the] case.").

DISCUSSION

I. Denial of Appellant's Motion to Suppress Evidence

A. Parties' Contentions

We initially note that the State does not argue on appeal that the search of Appellant's person was justified under the *Terry* frisk exception to the Fourth Amendment's general warrant requirement. We agree that such an argument would have been unsupported by the facts of this case. Accordingly, we limit our review to the question of whether there was probable cause to support a search of Appellant's person under the search incident to arrest exception to the Fourth Amendment's general warrant requirement.

On that issue, Appellant argues that the record does not support the conclusion that Appellant was searched incident to lawful arrest. Appellant contends that Officer Wortman did not have probable cause to believe that Appellant had committed a felony or was in the process of "committing a felony or misdemeanor in the presence of the police." As to the contention that Appellant was engaged in illegal gambling, Appellant notes that he did not flee from police; he was not seen engaging in any illegal gambling; nor was he ever seen touching the dice or money. Accordingly, Appellant urges that any claim for probable

cause based on his proximity to gambling paraphernalia is not sufficiently particularized to Appellant's own involvement in the alleged gambling activity. Moreover, Appellant argues that, even if there had been probable cause, "the search was unreasonable because it was not incident to an arrest." Appellant contends that Officer Wortman's description of the incident clearly demonstrates that "[t]he decision to arrest in this case occurred only after, and as a result of the unlawful pat-down search." Accordingly, Appellant argues that "what actually occurred here was an 'arrest incident to search,' which does not pass constitutional muster." (Quoting *State v. Funkhouser*, 140 Md. App. 696, 731 (2001)).

In response, the State argues that Officer Wortman had probable cause to arrest Appellant prior to the search, and thus, the search of Appellant was a lawful search incident to arrest. The State forwards two distinct violations for which Officer Wortman had probable cause to arrest Appellant. First, the State contends that Officer Wortman had probable cause to believe that Appellant committed an illegal gambling violation because the circumstances indicated that Appellant was "playing the game of dice for money." Second, the State argues that Officer Wortman possessed probable cause to believe that Appellant was in possession of a criminal amount of marijuana based on Appellant's admission that he had "about an ounce." Finally, the State urges that Officer Wortman's subjective intent to arrest prior to the search is irrelevant, as is the fact that Officer Wortman "technically placed [Appellant] under arrest immediately after the search and not before."

B. Analysis

Probable Cause to Search Appellant Incident to Lawful Arrest

1. Gambling Violation

We reject the State's initial argument that Officer Wortman had probable cause to arrest Appellant for illegal gambling under Md. Code, Criminal Law Article (CL), § 12-103. Probable cause "must be particularized with respect to the person to be searched or seized." *Eusebio v. State*, 245 Md. App. 1, 42 (2020) (quoting *Maryland v. Pringle*, 540 U.S. 366, 371 (2003)). To arrest Appellant for illegal gambling, Officer Wortman must have had probable cause to believe that Appellant *himself* was engaged in illegal gambling. Probable cause to believe that some persons within Appellant's group were engaged in illegal gambling would not be sufficiently particularized to support a warrantless arrest of Appellant for illegal gambling. Here, there is no evidence that Appellant himself was engaged in illegal gambling. There is no evidence to indicate that Appellant touched the gambling paraphernalia, owned any of the paraphernalia, or engaged in any other gambling activity. The only evidence was Appellant's proximity – along with five others – to the gambling paraphernalia.

Maryland courts have held that an individual's proximity to gambling paraphernalia is insufficient to establish probable cause to arrest that individual for engaging in illegal gambling.[2] *See Le Faivre v. State*, 208 Md. 52 (1955) (holding that officer did not have probable cause to arrest a suspect for an illegal gambling misdemeanor where the officer

[2] We note, however, that proximity to gambling paraphernalia may be sufficient to establish probable cause to arrest an individual for *possession* of certain illegal gambling paraphernalia. *See e.g.* CL § 12-205 (Outlawing possession of lottery devices). Nonetheless, the present case involves a statute which outlaws the *act* of gambling rather than the possession of gambling paraphernalia. *See* CL § 12-103 ("For money or any other thing or consideration of value, a person may not play . . . dice or the game commonly called 'craps' . . . .").

observed the suspect sitting at a desk working on papers, including a paper notation which read "Tip-off-2D."); *De Angelo v. State*, 199 Md. 48 (1952) (holding that there were "no reasonable grounds to believe ... that [suspect] was participating in a lottery, merely by entering a private dwelling where the only suspicious circumstance at that time was the presence of the lottery tickets in the house."); *see also Cockey v. State*, 243 Md. 322 (1966) (holding that a defendant's possession of slips of paper containing notations of horse race bets was insufficient to support a conviction for violation of statute pertaining to bets on horses); c*f. Tsu v. Montgomery Cnty.*, 188 Md. App. 351 (2009) (Money forfeiture case in which probable cause for underlying gambling arrest *was* established based evidence including: police observing a car to car hand-off of a duffle bag containing a substantial amount of money; recipient of money informing police that the money "represented his winnings from gambling on football"; and police recovering a "notepad with notations indicative of bookmaking" during a consent search of one of the vehicles). Surely then, a group's proximity to gambling paraphernalia does not supply an officer with probable cause to arrest every individual in that group. Under the facts of this case, Officer Wortman's observations provided him with probable cause to believe that illegal gambling had occurred; but his observations did not provide him with sufficiently particularized probable cause to arrest Appellant for illegal gambling.

Accordingly, Officer Wortman did not have probable cause to arrest Appellant for illegal gambling and any search incident thereto would be unreasonable. Therefore, we must determine whether Officer Wortman had probable cause to believe that Appellant possessed a criminal amount of marijuana.

2. Possession of Criminal Amount of Marijuana

The State contends that Officer Wortman had probable cause to arrest Appellant for possession of a criminal amount of marijuana. *See* CL § 5-601 (establishing possession of marijuana as a misdemeanor, excepting that possession of less than 10 grams of marijuana is a civil offense). The State argues that when Appellant told Officer Wortman that he had "about an ounce,"[3] Officer Wortman had probable cause to believe that Appellant was in possession of a criminal amount of marijuana. We agree. Under CL § 5-601, possession of 10 or more grams of marijuana is a misdemeanor. An ounce is approximately 28 grams. Thus, based on Appellant's admission, Officer Wortman had probable cause to believe that Appellant was in possession of a criminal amount of marijuana, and was authorized to arrest Appellant under § 5-601. Having determined that Officer Wortman was authorized to arrest Appellant, we turn to address whether Officer Wortman actually intended to place Appellant under arrest prior to searching Appellant's person.

Search Incident to Arrest vs. Arrest Incident to Search

Appellant argues that Officer Wortman's testimony indicates that he made the decision to arrest Appellant only after discovering a firearm on Appellant's person during the search. Accordingly, Appellant argues that the search was not incident to the arrest, but rather, the arrest was incident to the search.

[3] While it is not immediately clear that Appellant was referring to marijuana, both parties appear to agree that Appellant was referring to marijuana. Because Appellant stated that he had "about an ounce" in response to Officer Wortman asking whether Appellant had anything illegal on his person, we also assume that Appellant was admitting to having about an ounce of marijuana.

In *Bouldin v. State*, the Court of Appeals explained that

> [i]t is axiomatic that when the State seeks to justify a warrantless search incident to arrest, it must show that the arrest was lawfully made prior to the search. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Preston v. United States*, 376 U.S. 364 (1964). Of course, the right to arrest is not equivalent to making an arrest; the record must satisfactorily demonstrate that an arrest was in fact consummated before a warrantless search incident thereto may be found to be lawful. *See Howell v. State*, 271 Md. 378 (1974).

276 Md. 511, 515 (1976). The requisite determination, as to when an arrest occurs, "ordinarily requires four elements to coalesce: '(1) an intent to arrest; (2) under a real or pretended authority; (3) accompanied by a seizure or detention of the person; and (4) which is understood by the person arrested.'" *Belote v. State*, 411 Md. 104, 116 (2009) (quoting *Bouldin*, 276 Md. at 516). We have noted that the search incident to arrest exception "is applicable as long as the search is 'essentially contemporaneous' with the arrest." *Carter v. State*, 236 Md. App. 456, 473–74 (2018). However, in *State v. Funkhouser*, we cautioned that authority to arrest does not in and of itself justify a warrantless search:

> Probable cause to make an arrest, however, is a far doctrinal cry from the arrest itself; the antecedent justification for an event is not the event itself. **The Fourth Amendment significance of an arrest, as the trigger for a warrantless search incident, is not the accumulation of data in the mind of an officer; it is the change in the legal status of the person arrested**. What matters is an actuality, not a potentiality. We need to remind ourselves periodically of the precise thing to which a "search incident" is incident. It is, of course, incident to a lawful arrest.
>
> Of the firmly rooted exceptions to the warrant requirement, a search incident to lawful arrest is the only one that authorizes a full-blown search of a person for the purpose of discovering evidence. (The frisk component of a stop-and-frisk authorizes the pat-down of the clothing surface for the limited purpose of detecting the presence of a weapon.) Probable cause to believe that a person is carrying evidence does not justify a warrantless search of the person any more than probable cause to believe a home contains evidence justifies a warrantless search of a home. Only places or things enjoying a lesser

> expectation of privacy, such as automobiles, are vulnerable to probable-cause-based warrantless searches for the purpose of discovering and seizing evidence of crime.
>
> **That the police have probable cause for a lawful arrest of a person does not in and of itself justify a warrantless search of that person. The search must be incident to an arrest itself. It may not be incident merely to good cause to make an arrest.** The existence of an unserved warrant of arrest, for instance, would not justify a warrantless search of a person who is not actually arrested.

140 Md. App. 696, 724–25 (2001) (emphasis added). In *Funkhouser*, we explained that, for an arrest to be "essentially contemporaneous" with an incidental search, the search must be part of the "arresting prerogative."

> For a search to be an incident of an arrest, it need not literally follow the arrest. **If an officer has determined to make an arrest, the search incident is simply an aspect of the arresting prerogative**. It is one part of an omnibus tactical maneuver. Because of the potential exigencies of a police-citizen confrontation, the process of 1) disarming the arrestee and 2) preempting destructible evidence a) may proceed simultaneously with the act of arresting or b) may even precede it by a moment or two. This departure from more routine sequencing does not destroy the search's character as an aspect or incident of the arrest it merely supports and accompanies.
>
> **The temporal latitude that we extend to incidental searches that are "essentially contemporaneous," however, does not dictate embracing antecedent searches that, albeit essentially contemporaneous, are nonetheless not incidental**. An arrest that is made on the basis of what the search recovers will never be constitutional no matter how instantaneously it may follow the search.

Funkhouser, 140 Md. App. at 730–31 (emphasis added).

The search incident to arrest framework pronounced in *Funkhouser* is consistent with the search incident to arrest framework enunciated in *Belote v. State*, 411 Md. 104 (2009). In *Belote v. State*, the Court of Appeals explained:

> There are two primary rationales that underlie the ability of the police to search an arrestee incident to a lawful custodial arrest: (1) to seize weapons from the arrestee that might be used to effect an escape or to harm law enforcement officers; and (2) to recover evidence that might be destroyed by the arrestee. . . . While these two rationales form the foundation for searching an arrestee incident to a custodial arrest, **the Supreme Court has made it clear that the fact of a custodial arrest alone is sufficient to permit the police to search the arrestee.**
>
> **Where there is no custodial arrest, however, these underlying rationales for a search incident to an arrest do not exist.** An individual who does not believe that he has been arrested has no need to effect an escape or to harm the police officer that has detained him. Moreover, an individual who does not believe that he has been arrested has little or no need to destroy evidence and, thus, almost certainly will not destroy evidence that might be in his possession. **Therefore, an officer's objective "manifestation of purpose and authority" at the "moment of arrest," by words or conduct, which signal to an individual that he or she is under arrest, will be, and always has been, significant in determining whether a custodial arrest has occurred** in Maryland. . . . In other words, and contrary to the State's position here, **the fact that a police officer conducts a *Terry* stop and has probable cause, without more, is not sufficient to give rise to a custodial arrest**.

411 Md. 104, 113 (emphasis added) (internal citations omitted). In other words, a search incident to arrest must be attendant to a custodial arrest, notwithstanding the officer's authority to arrest. *See Funkhouser*, 140 Md. App. at 728 ("It is axiomatic that a search incident to lawful arrest is absolutely dependent on the fact of an actual arrest."). Accordingly, the search incident to arrest exception may not be invoked to support an apparent *Terry* stop simply because the officer had probable cause to make an arrest. *Id*. at 730 ("Of course, the right to arrest is not equivalent to making an arrest; the record must satisfactorily demonstrate that an arrest was in fact consummated before a warrantless search incident thereto may be found to be lawful.") (quoting *Bouldin v. State*, 276 Md.

511, 515–16 (1976)). We must now decide whether Officer Wortman's seizure of Appellant constituted a custodial arrest, and thereby rendered the subsequent search lawful.

As previously noted, an arrest in Maryland requires four elements to coalesce: "(1) an intent to arrest; (2) under a real or pretended authority; (3) accompanied by a seizure or detention of the person; and (4) which is understood by the person arrested." *Belote*, 411 Md. at 116 (quoting *Bouldin*, 276 Md. at 516). Notably, "where a police officer's objective conduct unambiguously reflects an intent to make a custodial arrest, the subjective intent inquiry [i.e., intent to arrest] takes on less significance." *Id*. at 117. Where an officer's objective conduct is unambiguous, "courts need not allocate significant weight to an officer's subjective intent that is revealed partially in the form of his testimony at the suppression hearing[.]" *Id*. Conversely, "when an arresting officer's objective conduct is *ambiguous* . . . his or her subjective intent increases in importance to a court's legal inquiry into whether a custodial arrest of the suspect occurred." *Id*. (emphasis added).

In the present case, Officer Wortman's objective conduct was ambiguous. Officer Wortman's objective conduct certainly constituted a seizure; but it is not clear from Officer Wortman's conduct whether he intended to arrest Appellant, or instead, conduct a *Terry* frisk for officer safety. Officer Wortman did not place Appellant in handcuffs, move Appellant to a police car, or objectively manifest any other show of authority or force beyond what was necessary to conduct a *Terry* frisk. *See e.g. Morton v. State*, 284 Md. 526, 530 (1979) (holding that suspect was placed under arrest when he was "removed from the recreation center and placed . . . under guard in the patrol car."); *Dixon v. State*, 133 Md. App. 654, 673 (2000) (holding that suspect was arrested when his car was blocked in, he

was removed from his car, and he was handcuffed); *Grier v. State*, 351 Md. 241, 252 (1998) (holding that suspect was under arrest when he was immediately grabbed by police and put "on the ground" after emerging from a dead-end alley). Because Officer Wortman's conduct evinces an ambiguous objective intent, Officer Wortman's subjective intent increases in importance. *See id.* ("[W]hen an arresting officer's objective conduct is ambiguous . . . his or her subjective intent increases in importance to a court's legal inquiry into whether a custodial arrest of the suspect occurred."). Accordingly, we look to Officer Wortman's testimony at the suppression hearing to assist in determining his subjective intent at the time of the seizure.

Officer Wortman testified that, after Appellant admitted to having "about an ounce," Officer Wortman placed Appellant in a "control hold," and subsequently "[c]onducted a pat-down[.]" After feeling a "hard blunt object" in Appellant's waistband, Officer Wortman lifted Appellant's shirt, revealing a handgun. It was at that point that Officer Wortman handcuffed Appellant and removed the handgun from Appellant's waistband. Based on this testimony, given by Officer Wortman at the suppression hearing, Officer Wortman's subjective intent was to conduct a *Terry* frisk. The term "pat down," used by Officer Wortman in his testimony, typically refers to the search method utilized during a *Terry* frisk. *See Bailey v. State*, 412 Md. 349, 368 (2010) ("A proper Terry frisk is limited to a *pat-down* of the outer clothing[.]") (emphasis added). Indeed, the Circuit Court also believed that, based on Officer Wortman's testimony, the search constituted a *Terry* frisk:

> The officer testified that he asked, "Does anyone have anything illegal on them?" And in response, and it is uncontroverted, that the Defendant who was identified in court, indicated that he had about an ounce. And the Court

> finds that that testimony is sufficient to at that point [to] allow Officer Wortman to do a *frisk* for contraband.
> . . . .
> Certainly when a defendant admits that he is in possession in some manner of marijuana, that certainly permits the *frisk* of that defendant so the officer may establish the amount of the contraband to determine whether it is a civil or a criminal violation.
> . . . .
> And certainly, once an officer with training as to the waistband being a danger area for the possession and the concealment of weapons. Once his hands came into contact with a hard, as he indicated gun-like [object], he certainly then has absolute rights under *Terry* to then go even further to ascertain whether that object is in fact a weapon.

(emphasis added). In sum, Officer Wortman's objective conduct was ambiguous, but his subjective intent during the search was to conduct a *Terry* frisk of Appellant. Only after finding the firearm on Appellant's person did Officer Wortman proceed to handcuff Appellant. It was not until that point that Appellant was clearly placed under arrest. The search at issue was more akin to an arrest incident to a search.

We reiterate that "[t]he Fourth Amendment significance of an arrest, as the trigger for a warrantless search incident, is not the accumulation of data in the mind of an officer; it is the change in the legal status of the person arrested." *Funkhouser*, 140 Md. App. at 724. Appellant was searched prior to his change in legal status from suspect to arrestee. Accordingly, the search of Appellant cannot be justified as a search incident to arrest where the intent to arrest Appellant did not arise until after discovering a firearm on Appellant's person. See *Id*. at 730-31 ("'It is axiomatic that an incident search may not precede an arrest and serve as part of its justification.'") (quoting *Sibron v. New York*, 392 U.S. 40, 63 (1968)).

The search of Appellant was not conducted in a manner "essentially

contemporaneous" with the intent to arrest Appellant; nor was it "essentially contemporaneous" with objective conduct which would unambiguously indicate that Appellant was under arrest. Thus, we hold that the Circuit Court erred in denying Appellant's motion to suppress evidence emanating from the search of Appellant.

CONCLUSION

Although police had information amounting to probable cause to arrest Appellant, Officer Wortman's objective conduct and testimony indicates that Appellant was placed under arrest only after finding a firearm on Appellant's person as a result of the search. It is well established that "an incident search may not precede an arrest and serve as part of its justification." *Funkhouser*, 140 Md. App. at 730-31 (quoting *Sibron*, 392 U.S. at 63). Thus, we hold that the Circuit Court erred in denying Appellant's motion to suppress evidence.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY REVERSED. COSTS TO PRINCE GEORGE'S COUNTY.