Circuit Court for Somerset County
Case No.: C-19-CR-21-000104

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1517

September Term, 2022

JAMAR M. TENNER

v.

STATE OF MARYLAND

Beachley,
Shaw,
Wright, Alexander, Jr.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: September 21, 2023

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Appellant, Jamar M. Tenner, was charged by criminal indictment in the Circuit Court for Somerset County with various drug-related offenses. Following the denial of a motion to suppress, Mr. Tenner elected to proceed on a not guilty agreed statement of facts as to the charge of possession of fentanyl with intent to distribute. The court found Mr. Tenner guilty of possession of fentanyl with intent to distribute, and the State entered a nolle prosequi as to the remaining charges. The court sentenced Mr. Tenner to ten years of imprisonment, with all but five years suspended, a fine of $175.00, forfeiture of $5,292.00 to the Crisfield Police Department, and five years of probation. On appeal, Mr. Tenner contends that the circuit court erred in denying his motion to suppress.

Finding no error, we affirm.

BACKGROUND

The evidence produced at the suppression hearing showed that on February 24, 2021, at 6:20 p.m., Sergeant Mark Hoover and Captain Lonnie Luedtke of the Crisfield Police Department were on patrol in a marked vehicle. Sergeant Hoover observed Mr. Tenner in the area of 141 Somers Cove, "a Housing Authority residential area." Recognizing Mr. Tenner as an individual who had previously been issued a no trespass warning from Captain Luedtke on August 28, 2019, Sergeant Hoover ordered Mr. Tenner to stop.

Mr. Tenner did not comply with Sergeant Hoover's order to stop and proceeded to walk away. Sergeant Hoover observed Mr. Tenner "reach down in his dip or waistband area of his pants, retrieving what appeared to be a plastic item." Mr. Tenner then "walked to the right passenger side of a Chevy Impala[,] dark in color[,]" and "kneeled down, [and]

with his left hand made a throwing motion." Sergeant Hoover observed Mr. Tenner re-emerge from the passenger side of the vehicle with no items in his hands. At that point, Mr. Tenner proceeded to comply with the sergeant's orders to stop, and Captain Luedtke detained him.

Sergeant Hoover investigated the area of the right passenger door of the Chevy Impala, and observed, under the right front passenger door, "a clear plastic baggie with three other clear plastic baggies inside[.]" The three plastic baggies contained "a brown or off-brown powdery substance[,]" as well as "a white rock-like substance" and an "off-white powder-like substance." Based on the sergeant's training, knowledge and experience, he believed the off-brown substance to be heroin, the off-white rock-like substance to be crack cocaine, and the off-white powder to be powder cocaine. Sergeant Hoover arrested Mr. Tenner for trespassing and possession of CDS ("controlled dangerous substances"), and he was transported to the Crisfield Police Department.

Captain Luedtke testified that at 6:20 p.m. on February 24, 2021, he observed Mr. Tenner on Charlotte Avenue, Route 141 Somers Cove. He and Sergeant Hoover exited the vehicle, and the sergeant walked over to where Mr. Tenner was walking. Mr. Tenner walked out into the middle of Charlotte Avenue and stopped. The captain "saw Sergeant Hoover on the sidewalk stoop down next to a parked car." A subsequent search of Mr. Tenner yielded $5,292.00 in United States currency and two cell phones.

Captain Luedtke recalled "vaguely" that he had served Mr. Tenner with a trespass notice on August 28, 2019. The trespass notice was admitted as State's Exhibit 2. Captain Luedtke reviewed the trespass notice and observed that the notice was not signed by Mr.

Tenner, nor did it contain a notation that the notice was "refused," which, the captain explained, was his usual practice when an individual refused a notice. Captain Luedtke testified that he handed the notice to Mr. Tenner, despite the absence of a visible signature on the notice.

Mr. Tenner testified that he was never given the trespass notice admitted as State's Exhibit 2. Mr. Tenner recalled that in August of 2019, he was living with his mother at 211 Somers Cove in the Crisfield public housing units. Mr. Tenner further testified that the CDS that Sergeant Hoover located on the ground did not belong to him.

After considering argument and post-hearing memoranda submitted by the parties, the suppression court denied Mr. Tenner's motion to suppress, explaining:

> The [c]ourt believes . . . that the Crisfield Police Department did possess the requisite probable cause to arrest [Mr. Tenner] after executing a lawful *Terry*[1] stop upon [Mr. Tenner].
>
> * * *
>
> The defense, regarding the *Terry* issue that I asked both parties to submit supplemental memoranda on, which the [c]ourt has reviewed, the defense argues that regarding the issue, a forced abandonment, that the property which was abandoned by Mr. Tenner after the accosting, albeit a very novel legal argument, the [c]ourt is not persuaded by the argument here today.
>
> [Mr. Tenner's] notice of his trespass by the Crisfield Housing Authority was lacking. The officers were acting in good faith when they approached [Mr. Tenner] at Somers Cove Apartments.
>
> The facts did show that when Sergeant Hoover approached [Mr. Tenner], he did so with reasonable articulable suspicion that [Mr. Tenner] might be trespassing at Somers Cove Apartments.

[1] *Terry v. Ohio*, 392 U.S. 1, 8 (1968).

However, I do note from the evidence and testimony that Sergeant Hoover had asked [Mr. Tenner] to stop, as he believed he recognized Mr. Tenner and recognized that he would possibly or may possibly be on the trespass list.

However, I do note from the evidence and testimony received by this [c]ourt . . . that at no time at that point was Mr. Tenner told he was under arrest when the accosting first happened.

The [c]ourt is persuaded at that point that this is a classic *Terry* stop[.]

* * *

The [c]ourt did note from the evidence and testimony there was evidence, testimony, I believe even judicially noticed that the Somers Cove housing area, much to the chagrin of the [c]ourt, is a high crime area in the Crisfield area.

And therefore, the officer in making the initial accosting and asking Mr. Tenner to stop, albeit not being under arrest, was certainly warranted under *Terry*.

And at that point, the evidence and testimony further was that, when asked to stop that Mr. Tenner immediately, or very shortly thereafter, fled from the officer and then abandoned certain property that was recovered by the officer and ultimately is the subject of the suppression motion here today, the items that were recovered.

The [c]ourt further notes that a *Terry* stop does not require a police officer to be certain that a suspect is armed in order to conduct a frisk for dangerous weapons.

All that is required is reasonable suspicion that the person may be armed and dangerous.

* * *

Here, Sergeant Hoover believed that he recognized Mr. Tenner from the trespass list, as stated earlier, of the Somers Cove Apartments, which provided sufficient reasonable, articulable suspicion to further -- to execute an investigatory *Terry* stop of [Mr. Tenner].

> Sergeant Hoover did not detain or question [Mr. Tenner] at that point. Rather, [Mr. Tenner] ignored Sergeant Hoover's request and, at that point, fled on foot.
>
> It was then that the Sergeant witnessed [Mr. Tenner] reach into his waistband of his pants and pull something out and crouch behind a vehicle. It was that [Mr. Tenner] attempted to flee the scene.
>
> At that point, Sergeant Hoover proceeded to investigate the area near the vehicle where [Mr. Tenner] was seen crouching, discovering the CDS.
>
> It was at that point Sergeant Hoover had probable cause to arrest [Mr. Tenner] pursuant to the abandoned property being CDS that was -- or I should note, suspected CDS.
>
> Given those facts, [Mr. Tenner's] abandonment of the CDS was not forced, as argued by the defense. Rather, it was voluntary. Accordingly, [Mr. Tenner's] detention was the result of a lawful *Terry* stop and therefore the motion to suppress is denied.

STANDARD OF REVIEW

"Our review of a circuit court's denial of a motion to suppress evidence under the Fourth Amendment is limited to the information contained in the record of the suppression hearing." *Trott v. State*, 473 Md. 245, 253-54 (citing *Pacheco v. State*, 465 Md. 311, 319 (2019)), *cert. denied*, 142 S. Ct. 240 (2021). We accept the facts found by the suppression court unless clearly erroneous, and we view those facts in the light most favorable to the prevailing party – here the State. *Washington v. State*, 482 Md. 395, 420 (2022) (citing *Trott*, 473 Md. at 253-54). We review the suppression court's application of the law to the facts without deference. *Id*. (citing *Trott*, 473 Md. at 254). In deciding a constitutional challenge, we "conduct an 'independent constitutional evaluation by reviewing the relevant law and applying it to the unique facts and circumstances of the case.'" *Id.* (quoting *Trott*, 473 Md. at 254 (cleaned up)).

DISCUSSION

Mr. Tenner argues that the suppression court erred in finding that Sergeant Hoover conducted a lawful *Terry* stop based on reasonable suspicion that he was trespassing. Mr. Tenner contends that the evidence did not support a finding that he was trespassing because there was no testimony or evidence of a trespass list with Mr. Tenner's name on it and no evidence to support the court's finding that Somers Cove is a high crime area. Mr. Tenner further contends that the suppression court erred in rejecting his argument that his abandonment of the CDS was forced by the unlawful stop and, therefore, was not voluntary.

The State responds that the suppression court properly denied the motion to suppress because Mr. Tenner was not seized for Fourth Amendment purposes when police told him to stop. The State asserts that because Mr. Tenner was not seized until after he had discarded the drugs, he had abandoned any expectation of privacy in the drugs, and therefore, he lacked standing to seek suppression of the drugs.

We agree with the State on both points, and though the trial court did not rely on these grounds in denying Mr. Tenner's motion to suppress, we may affirm the trial court's ruling on any basis adequately supported by the record. *See, e.g.*, *Elliott v. State*, 417 Md. 413, 435 (2010) ("'[W]here the record in a case adequately demonstrates that the decision of the trial court was correct, although on a ground not relied upon by the trial court and perhaps not even raised by the parties, an appellate court will affirm.'" (quoting *Robeson v. State*, 285 Md. 498, 502 (1979))).

The Fourth Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, protects individuals from unreasonable searches and seizures. *Terry*, 392 U.S. at 8. Not every encounter with the police implicates the Fourth Amendment. *Swift v. State*, 393 Md. 139, 149 (2006). An encounter involving some restraint on a person's liberty prompting a belief that the person is not free to leave implicates the Fourth Amendment. *Id*. at 156 (citing *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988)); *see also Bellard v. State*, 229 Md. App. 312, 347 (2016) (explaining that an individual is "'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave").

"[A]n attempted seizure[,]" however, "is not a seizure" where a subject does not yield to a show of authority. *Brummell v. State*, 112 Md. App. 426, 432 (1996) (citing *California v. Hodari D*., 499 U.S. 621, 626 n.2 (1991)). In *Hodari D*., two officers were patrolling in a high crime area when they observed a group of youths, including Hodari, in a huddle. 499 U.S. at 622-23. Upon seeing the officers, the group fled, and the officers chased them. *Id*. at 623. While fleeing, Hodari tossed aside a small rock. *Id*. After tackling Hodari, police recovered the rock, which was later determined to be crack cocaine. *Id*.

The United States Supreme Court explained that a "seizure" for Fourth Amendment purposes occurs when a police officer makes a show of authority or uses physical force to apprehend an individual and the individual submits to the show of authority. *Id*. at 626. A seizure does not occur where the subject fails to yield to authority or comply with the officer's command. *Id*. The Supreme Court concluded that Hodari was not "seized"

because a "seizure" does not "remotely apply . . . to the prospect of a policeman yelling 'Stop, in the name of the law!' at a fleeing form that continues to flee." *Id*. The Supreme Court concluded that, because Hodari did not comply with the police officer's command to stop during the chase, "he was not seized until he was tackled" by police. *Id*. at 629. Accordingly, the cocaine he abandoned during the foot chase was not the fruit of an unlawful seizure. *Id*.

In *Brummell*, this Court agreed that the act of chasing a suspect who does not submit to a show of authority is not the type of police activity that is regulated by the Fourth Amendment. 112 Md. App. at 433-34. Like the defendant in *Hodari D*., the defendant in *Brummell* began running at the sight of approaching police officers. *Id*. at 430. The police officers in pursuit observed Brummell throw a clear plastic baggie containing a white substance into the air before he was tackled by police. *Id*. Applying the Supreme Court's Fourth Amendment analysis in *Hodari D*., Judge Moylan, writing for this Court, explained, "there is a critical distinction, in terms of Fourth Amendment applicability, between the jettison of contraband that precedes a police tackle and the jettison that follows a tackle." *Id*. at 433. This Court held that Brummell's "jettison preceded the tackle[,]" and therefore the police chase of Brummell did not implicate the Fourth Amendment. *Id*. Accordingly, there was no Fourth Amendment violation in the police recovery of the drugs that he had abandoned during the chase. *Id*. at 434.

In this case, Mr. Tenner did not submit to Sergeant Hoover's authority until after the sergeant saw him throw aside what turned out to be CDS. Where "there is a 'show of authority,' a seizure does not take place until the subject yields to that 'show of authority'

and stops." *Williams v. State*, 212 Md. App. 396, 408 (2013). Because Mr. Tenner discarded the drugs while walking away from the police, the drugs were abandoned before he was seized, and his abandonment of the drugs was not "forced" by an unlawful stop or illegal police conduct. *See Partee v. State*, 121 Md. App. 237, 245 (1998) ("[T]he police are free to confiscate property that is abandoned by an individual before he is seized by them, even if the seizure is found to be illegal under the Fourth Amendment." (citing *Hester v. United States*, 265 U.S. 57, 58 (1924))); *see also Williamson v. State*, 413 Md. 521, 535 (2010) (holding that "Fourth Amendment protection . . . does not extend to property that is abandoned or voluntarily discarded, because any expectation of privacy in the item searched is discarded upon abandonment"). Accordingly, the suppression court did not err in denying Mr. Tenner's motion to suppress.

We further conclude that, assuming *arguendo*, Mr. Tenner was "stopped" within the meaning of the Fourth Amendment, the police officers had reasonable articulable suspicion to initiate an investigatory stop and determine if he was trespassing. In *Jones v. State*, 194 Md. App. 110, 132-33 (2010), this Court held that a police officer was justified in stopping and briefly detaining Jones based on a reasonable suspicion that he was trespassing on property "conspicuously posted" with "no trespassing" signs. The police officer knew that Jones was not the property owner, and though the police did not know if Jones had permission to be on the property, that determination could be made after questioning him. *Id.*

In upholding the legality of the stop, we reviewed the scope of a *Terry* stop:

> A *Terry* stop allows police to investigate the circumstances that provoke suspicion. They do this by asking the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. The detainee is not obligated to respond, however, and, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released.

Id. at 130 (quoting *Collins v. State*, 376 Md. 359, 368 (2003) (quotation marks and emphasis omitted)); *accord Nathan v. State*, 370 Md. 648, 660 (2002) ("Reasonable suspicion of criminal activity warrants a temporary seizure for questioning limited to the purpose of the stop.").

Mr. Tenner's assertion that there was no evidence of a "trespass list" and insufficient evidence that he had received proper notice of the trespass warning is unavailing. "While there is no litmus test to define the 'reasonable suspicion' standard, … it has been defined as nothing more than 'a particularized and objective basis for suspecting the particular person stopped of criminal activity[.]'" *Stokes v. State*, 362 Md. 407, 415 (2001) (citations omitted). Here, the police officers recognized Mr. Tenner as an individual they believed had previously been issued a written "no trespass" warning by Captain Luedtke. The officers' observation of Mr. Tenner on the Somers Cove property in violation of the "no trespass" warning was sufficient to generate reasonable suspicion of criminal activity requiring further investigation.[2]

JUDGMENT OF THE CIRCUIT COURT FOR SOMERSET COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[2] Though, as Mr. Tenner and the State point out, the trial court's finding that Somers Cove is a high crime area was not supported by the record, that finding does not undermine the finding of reasonable articulable suspicion based on the trespass offense.