Circuit Court for Wicomico County
Case No. 22-K-15-000483

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1892

September Term, 2016

DONALD HENRY ELLIS

v.

STATE OF MARYLAND

Kehoe,
Leahy,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: February 13, 2018

Appellant, Donald Henry Ellis, was charged in the Circuit Court for Wicomico County, Maryland, with possession with intent to distribute cocaine and related offenses. After his motion to suppress was denied, appellant entered a conditional guilty plea and was found guilty of possession with intent to distribute cocaine. Appellant was sentenced to fifteen years in prison. Appellant was permitted to file a belated notice of appeal, and presents the following question for our review:

> Did the pre-trial hearing court err by denying the motion to suppress evidence?

For the following reasons, we shall affirm.

Background

The Suppression Hearing

We summarize the evidence presented at the hearing in the light most favorable to the prevailing party, the State.

On June 25, 2015, at approximately 11:30 a.m., Maryland State Trooper Mike Porta, assigned to the gang enforcement unit on the Eastern Shore of Maryland, was in the process of executing a search warrant at 706 Rose Street in Salisbury, Maryland. The target of that search warrant was Anthony Lamar Jones. Before the warrant was executed, a member of the police search team saw a person matching the description of Jones leave the residence and enter a taxicab. After receiving this information, and believing that Jones was inside the vehicle, Trooper Porta stopped the taxi within a minute after it left the Rose Street address. Trooper Porta approached the front seat passenger and asked for identification. The passenger identified himself as "Jerry Ellis." As Trooper Porta began

to write that name in his notepad—within seconds of the stop according to Porta—another officer in the same unit, Corporal Richard Hagel arrived on scene. He told Trooper Porta that the man in the taxi was "Donnie Ellis not Jerry Ellis," and that there was an outstanding warrant for Donnie Ellis's arrest. At that point, appellant confirmed his true identity. The police performed warrant check that revealed that there was indeed an outstanding warrant for appellant's arrest for parole violation. Appellant was taken into custody at that time. The police conducted a search incident to this arrest and recovered suspected cocaine and heroin, as well as drug paraphernalia and ammunition.

Corporal Hagel also testified that he was familiar with appellant from prior police-related contacts, and had known for about 30 to 45 days prior to the stop that appellant "was . . . wanted on a parole retake through the Maryland State Police." Corporal Hagel confirmed that this warrant was still open for appellant "several days" prior to the stop. Trooper Porta testified that, had a person been arrested on such a warrant, they would have been transferred to the Eastern Correctional Institute, where it was unlikely they would be released in such a short time.

When the police team returned to the 706 Rose Street residence, they found the primary target of their investigation, Jones, seated in the living room. Trooper Porta testified that appellant and Jones were "remarkably similar" in appearance. Photographs of both men were also introduced into evidence.

Trooper Porta took photographs of appellant and Jones after they were detained that day, and the trooper agreed that the two men looked "remarkably similar."

On cross-examination, Trooper Porta agreed that he stopped the taxicab because he believed Jones was inside. He confirmed that the taxi was not stopped for any traffic violations.

After hearing argument, the court found that there was an outstanding parole retake warrant for appellant. The court concluded that "there's reasonable articulable suspicion, indeed there's probable cause to make a traffic stop on the cab" because the police thought the target of the investigation, Jones, was inside a taxicab seen leaving the address listed in the search warrant. After appellant was arrested, he was searched incident to arrest and contraband was found. Based on these findings, the court denied the motion to suppress.

The Conditional Guilty Plea

On the day set for trial, appellant agreed to enter a conditional guilty plea, so as to reserve his right to challenge the suppression ruling, to one count of possession with intent to distribute cocaine. The State agreed to *nol pros* the remaining charges. After determining that appellant waived his right to a jury trial and was entering a plea knowingly, intelligently, and voluntarily, the prosecutor presented an agreed statement of facts, which was consistent with those presented at the motions hearing. In addition to reiterating details about appellant's stop, the discovery of the outstanding parole retake arrest warrant, and his arrest, the agreed statement of facts provided was follows:

> The officers briefly detained the Defendant in order to verify that the outstanding parole retake warrant was still active. Once the existence of the warrant was confirmed, the Defendant was placed under arrest and a search

> of the Defendant was conducted pursuant to that arrest. During this search, Trooper Porta recovered a plastic baggie containing six individually wrapped baggies containing an amount of suspected crack cocaine, another baggie containing a small amount of suspected heroin, and a final baggie containing an amount of suspected marijuana.
>
> The suspected controlled dangerous substances had been concealed in the Defendant's underwear in his crotch. The Defendant was also found to be in possession of $480 in U.S. currency, a cellular telephone, and blue-tooth speaker which had a police scanner being played from the cellular telephone.

Further, the prosecutor proffered to the court that a State's expert would testify that the baggies found in appellant's person contained cocaine and heroin. Another State's expert would have testified that the facts and circumstances of this case were "consistent with and indicative of the street-level distribution of cocaine."

Analysis

Appellant contends that the court erred in denying his motion to suppress because he was subjected to an illegal second stop after the police learned his identity and discovered he was not the person named in the warrant. The State responds that this argument is without merit because the legal investigatory stop had not concluded when appellant was identified as a wanted person with an outstanding arrest warrant. Moreover, the State continues in the alternative that, even assuming any illegality, the fact of the outstanding arrest warrant attenuated any alleged illegality.

Our standard of review is well-established:

> In reviewing a trial court's ruling on a motion to suppress, we defer to that court's findings of fact unless we determine them to be clearly erroneous, and, in making that determination, we view the evidence in a light most favorable to the party who prevailed on that issue, in this case the State. We

> review the trial court's conclusions of law, however, and its application of the law to the facts, without deference.

Taylor v. State, 448 Md. 242, 244 (2016) (citations omitted), *cert. denied*, 137 S.Ct. 1373 (2017).

Turning to appellant's contention, the taxicab was stopped by police because they believed that the subject associated with a warrant, Anthony Lamar Jones, was seen leaving the location to be searched. Trooper Porta learned within seconds that the passenger in the cab was not Jones, but rather Ellis, and that there was an outstanding arrest warrant pending against the latter.

The Supreme Court has stated that "[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Adams v. Williams*, 407 U.S. 143, 146 (1972) (citing *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968)). In *United States v. Sharpe*, 470 U.S. 675 (1985), the Supreme Court found a detention following a traffic stop reasonable under the Fourth Amendment, stating:

> Obviously, if an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop. But our cases impose no rigid time limitation on *Terry* stops. While it is clear that "the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion," . . . we have emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes. . . . Much as a "bright line" rule would be desirable, in evaluating whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria.

Id. at 685 (citations omitted).

As the State points out, appellant does not challenge the legality of the initial *Terry* stop of the taxicab. [1] The unchallenged stop took place within a minute or so after the cab left the subject premises. Within fifteen to twenty seconds after the initial stop, Corporal Hagel arrived, identified appellant as "Donnie" Ellis, and told Trooper Porta that appellant was wanted on an outstanding warrant. Appellant confirmed his true identity at that time. A subsequent warrant check revealed that there was, in fact, an outstanding warrant for appellant's arrest for the parole violation. We are persuaded that the duration of the investigative stop to ascertain appellant's identity was reasonable under the circumstances. *See Chase v. State*, 224 Md. App. 631, 653 (2015) (A ten minute period from the initiation of an investigatory stop to the arrival of, and alert by, a drug dog, did

[1] The State also suggests that challenging the stop would have been an exercise in futility. The State views the issue as one of probable cause to arrest Jones. It relies *Dett v. State*, 161 Md. App. 429, 445 (2005), *aff'd*, 391 Md. 81 (2006), for the proposition that "when the police have probable cause to arrest one person but reasonably mistake a second person for him, the arrest of the second person is valid." *Id.* (citing *Hill v. California*, 401 U.S. 797 (1971)).

These holdings from *Hill* and *Dett* are unrelated to the matter at hand. As far as the record in this case shows, the police didn't have probable cause to arrest Jones at the time of the stop. The police did, however, have the right to detain Jones, and other occupants of the Rose Street property, while the search warrant was executed. *See Michigan v. Summers*, 452 U.S. 692, 705 (1981). But this authority is limited to detentions that occur within "the immediate vicinity of the premises" to be searched. *Bailey v. United States*, 568 U.S. 186, 200–02 (2013).

Because appellant did not challenge the legality of the stop, the record at the suppression hearing isn't very well-developed as to the location of the stop *vis-à-vis* the Rose Street property, or whether there was the basis for a *Terry* stop. There is no point in our speculating about what the officers might have said had they been asked.

not violate the Fourth Amendment.).

Our analysis is dispositive of appellant's contentions as to the ruling of the suppression court. Moreover, even if the duration of the stop was unreasonable, any resulting illegality was attenuated by the fact that appellant was arrested on an outstanding arrest and the search incident to that arrest uncovered the drugs that were the basis of the State's case.

Because the exclusionary rule is "applicable only . . . where its deterrence benefits outweigh its substantial social costs[,]" the Supreme Court has recognized exceptions to the rule through which the taint may be purged from evidence obtained through initially unlawful conduct. *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016) (quoting *Hudson v. Michigan*, 547 U.S. 586, 591 (2006)) (quotation marks omitted). One of these exceptions is "attenuation," which is the occurrence of an intervening event that breaks the chain of causation between the government's initial unlawful action and the eventual discovery of the evidence to be used against the defendant. *Id.* at 2061-62. In *Sizer v. State*, 456 Md. 350 (2017), the Court of Appeals outlined the relevant analysis:

> First, we look to the "temporal proximity" between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search. Second, we consider "the presence of intervening circumstances." Third, and "particularly" significant, we examine "the purpose and flagrancy of the official misconduct."

Id. at __, slip op. at 24 (quoting *Utah v. Streiff*, 136 S.Ct. at 2062).

The first factor, *i.e.*, temporal proximity, concerns the issue of "lapsed time." *Ferguson v. State*, 301 Md. 542, 550 (1984). The greater the time lapse between the

alleged unlawful police conduct and the discovery of the evidence, the greater the "likelihood that the taint has been purged[.]" But, there must be a "substantial time" lapse. *Utah v. Strieff*, 136 S. Ct. at 2062. Because our Court of Appeals has indicated that "time spans ranging from two hours to six hours" are "insufficient" to purge the taint from challenged evidence, *Ferguson*, 301 Md. at 550, we conclude that this factor weighs in appellant's favor. However, this factor is "relatively unimportant" in an attenuation analysis. *Ferguson*, 301 Md. at 550.

The next factor is the presence of an intervening circumstance, that is, "any event that breaks the causal connection between the unlawful conduct and the derivative evidence." *Cox v. State*, 421 Md. 630, 654 (2011) (internal quotation marks omitted). *Sizer*, which involved a police stop followed by the subsequent discovery of an outstanding warrant, is instructive:

> Where there is an outstanding arrest warrant, the attenuation doctrine applies because the discovery of the warrant breaks the causal chain from any possible taint to the evidence collected. Here, even assuming that the stop of Mr. Sizer was unlawful, the discovery of a valid pre-existing arrest warrant as well as absence of flagrant police misconduct, notwithstanding the close temporal proximity between the illegal seizure and the discovery of the pistol, would result in the non-suppression of the evidence.

Sizer, 456 Md. at ___, slip op. at 25. In this case, as in *Sizer*, the discovery of the open arrest warrant for appellant weighs heavily in the State's favor.

The third factor focuses on reasons for the official misconduct. Courts will usually not find attenuation if the police acted with "deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights[.]" *Davis v. United States*, 564 U.S. 229, 238 (2011) (internal quotation marks and citations omitted). The similarity in appearance between appellant and Jones, Corporal Hagel's personal familiarity with appellant, his

knowledge that an open warrant existed for his arrest mere days before the stop, and the corroboration after the stop of that warrant's existence, all work to undermine the notion that the police were engaged in any sort of misconduct. "[T]he harsh sanction of exclusion should not be applied to deter objectively reasonable law enforcement activity." *Davis*, 564 U.S. at 238 (internal quotation marks omitted).

Accordingly, we hold that there was no Fourth Amendment violation. The police did not unreasonably delay their investigative stop. Moreover, even if there were any illegality regarding the stop, that illegality was sufficiently attenuated by the discovery of the open warrant for appellant's arrest.

THE JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY ARE AFFIRMED. APPELLANT TO PAY COSTS.