Circuit Court for Baltimore County
Case No. 3K-17-0958

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1984

September Term, 2017

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MALEK CALVIN REDD

v.

STATE OF MARYLAND

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Wright,
Nazarian,
Wilner, Alan M.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Nazarian, J.

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Filed: November 27, 2018

While conducting surveillance at the site of a prior narcotics investigation, undercover detectives saw Malek Calvin Redd engage with someone from his vehicle. Mr. Redd, who was unknown to detectives, backed into a driveway, interacted briefly with an unknown individual standing outside, and then pulled away about a minute later. The detectives followed Mr. Redd when he left the scene of the suspected exchange and noted a dark tint to his windows. Police dispatch ran Mr. Redd's temporary West Virginia plates and found no match in their database.

At the detectives' request, a marked police vehicle pulled Mr. Redd over onto the shoulder of the road. As Mr. Redd pulled over, the detectives cut rapidly in front of him, stopped, and exited their unmarked police vehicle with guns drawn. Mr. Redd was ordered out of the car at gunpoint, and a detective saw a baggie of suspected crack cocaine in plain view on the driver's seat. Detectives searched Mr. Redd's vehicle and found more narcotics in the center console.

Mr. Redd was charged in the Circuit Court for Baltimore County with five narcotics offenses, and he moved to suppress the evidence found in his vehicle. He argued that the detectives' initial stop was not an investigative *Terry*[1] stop as they claimed, but a full-blown arrest requiring probable cause, and that because the officers lacked probable cause to arrest him, any narcotics found in the vehicle were fruit of an unlawful arrest. The circuit court denied the motion and Mr. Redd entered a conditional guilty plea to one count of

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

possession with intent to distribute heroin. He appeals the denial of his Motion to Suppress and we reverse.

## I. BACKGROUND

On the morning of February 3, 2017, Detective Joshua Waskui and two other narcotics detectives were conducting undercover surveillance in the vicinity of 7825 Old Harford Road in Parkville, a location known to Detective Waskui as the site of a narcotics investigation six months earlier.[2] Detective Waskui watched as a silver Honda, driven by Mr. Redd, backed into the driveway of the house and an individual approached the driver's side window and reached inside. When the Honda departed moments later, Detective Waskui and the other detectives followed in an unmarked police vehicle. Detective Waskui noted that the Honda's windows were tinted, illegally he suspected,[3] and that the vehicle had temporary West Virginia tags. He asked police dispatch to run the tags through their database, and dispatch advised him that the tags were "not on file and did not come back." At this point, the detectives asked for assistance from a marked police vehicle to conduct a traffic stop on the Honda for "unlawful narcotics activity."

At the suppression hearing, Lieutenant Chemilli testified that she came up behind the Honda in a marked patrol car and signaled for it to pull over. Mr. Redd complied

[2] In September 2016, a narcotics investigation resulted in the arrest of a resident at that address, which is a formerly single-family home divided into multiple apartments.

[3] In Maryland, vehicles are permitted only to have a 35% tint. Md. Code (1977, 2012 Repl. Vol.), § 22-406 of the Transportation Article ("TA"). Detective Waskui testified that he did not have his tint meter with him on this occasion, but that he had prior experience and training assessing window tint.

immediately and pulled his vehicle onto the shoulder. The Lieutenant testified that "the narcotics detectives . . . pulled in front of the vehicle and they very quickly ran up to the vehicle." She stayed in the patrol car, but she could see detectives speaking with Mr. Redd and Mr. Redd exiting his car. Detective Waskui testified that at the time of the initial stop, there were four officers on the scene, and that after Lieutenant Chemilli stopped Mr. Redd, he and another officer approached the driver's side of the vehicle and asked Mr. Redd to get out of the car.[4] Detective Waskui said when Mr. Redd exited his vehicle, he saw a small baggie of what he believed to be crack cocaine in plain view on the driver's seat.

Mr. Redd testified that as he complied with Lieutenant Chemilli's signal to pull over, the unmarked police vehicle "slashed" in front of his car and the undercover detectives immediately jumped out, guns drawn, and ran up to his vehicle. He testified that three detectives ordered him out of the car at gunpoint, so he put his hands up and exited the vehicle as ordered. The officers then ordered him, still at gunpoint, to go to the back of the car; he disputed Detective Waskui's claim that there were drugs on the driver's seat. Police searched and handcuffed Mr. Redd and went on to search the rest of the vehicle without Mr. Redd's consent. The police searched the center console and found a baggie containing 44 bags of crack cocaine, a baggie containing 23 capsules of heroin, and a Suboxone strip.

[4] Over the course of the stop and search, more police vehicles arrived on the scene. The precise timing and numbers are unclear from the record, but there were, in total, at least three police vehicles and five to seven officers and detectives present by the time the stop concluded.

Mr. Redd was charged with five narcotics offenses, and he moved to suppress all of the evidence found in his vehicle. He offered several arguments. *First*, he argued that the police lacked reasonable suspicion to effectuate a lawful traffic stop. *Second*, he argued that in ordering him out of his vehicle at gunpoint, the police's actions were elevated from a *Terry* stop to a full-blown arrest, for which the police lacked the required probable cause. *Third*, he argued that there were no narcotics in plain view and that Detective Waskui could only have found drugs by searching the center console of the vehicle.[5] *Finally*, Mr. Redd argued that even if Detective Waskui saw drugs in plain view, they and the drugs found in the center console were fruits of his unlawful arrest and must be suppressed.

The suppression hearing included extensive testimony from Mr. Redd, Lieutenant Chemilli, and Detective Waskui, who was qualified as an expert in the packaging and distribution of narcotics. The day after the hearing, the circuit court issued a written order denying Mr. Redd's motion. The court found that seeing the suspected hand-to-hand drug transaction gave the officers reasonable suspicion to pull Mr. Redd over:

> The Court finds that the police officers involved in the investigation of [Mr. Redd] had, at a minimum, reasonable suspicion to stop [Mr. Redd's] vehicle based on information they had regarding potential drug activity related to the property at 7825 Old Harford Road and the detectives' observations of what appeared to them, based on their knowledge, training, and experience, to be a hand-to-hand drug transaction between [Mr. Redd] and another individual.

The Court also found that the police had probable cause to stop Mr. Redd "because the

[5] Mr. Redd does not dispute that there were narcotics in the console.

information received from a police dispatcher indicated that [Mr. Redd's] West Virginia tags were not properly registered." In response to Mr. Redd's argument that the police's show of force elevated the traffic stop to an arrest, the court reasoned that because the police had legal justification to conduct a traffic stop, and because the officers "had a right to order [Mr. Redd] out of his vehicle . . . the circumstances of how he exited the vehicle are not material." The court accepted Detective Waskui's testimony that he observed a baggie of drugs in plain view and that the drugs' incriminating character was immediately apparent. From that observation, the Court found, the police were justified in continuing their search of Mr. Redd's vehicle and the evidence they found was admissible.

After receiving the court's ruling, Mr. Redd entered a conditional guilty plea, Maryland Rule 2-242(d), to one count of possession with intent to distribute heroin. The State entered a *nolle prosequi* on the other four counts. Mr. Redd appeals.

## I. DISCUSSION

We base our review of a circuit court's decision on a motion to suppress evidence on the record before the court at the suppression hearing. *Rowe v. State*, 363 Md. 424, 431 (2001). We review the circuit court's factual findings for clear error and its legal conclusions *de novo*, viewing the evidence in the light most favorable to the prevailing party, in this case, the State. *Smith v. State*, 182 Md. App. 444, 455 (2008).

The Fourth Amendment, which applies to the States via the Fourteenth Amendment, *see Mapp v. Ohio*, 367 U.S. 643, 654 (1961), protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures." U.S. CONST. amend. IV. To be reasonable, a search or seizure in the ambit of the Fourth Amendment must be tailored in scope appropriately to the circumstances and be supported by the requisite level of suspicion. Subject to exceptions not relevant here, when police obtain evidence in violation of the Fourth Amendment, *i.e.*, via an unreasonable search or seizure, that evidence must be suppressed. *Mapp*, 367 U.S. at 657; *Chu v. Anne Arundel Cty.*, 311 Md. 673, 679 (1988). Any additional evidence found as a result of the initial Fourth Amendment violation must likewise be suppressed as fruit of the poisonous tree. *See Wong Sun v. U.S.*, 371 U.S. 471 (1963).

A traffic stop is a seizure within the meaning of the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 810 (1996). Under most circumstances, at least at their outset, traffic stops fall under the umbrella of investigative stops, which allow the police to "stop and detain a person briefly for investigative purposes if the officer has reasonable suspicion, supported by articulable facts, that criminal activity 'may be afoot.'" *Longshore v. State*, 399 Md. 486, 494 (2007) (*quoting Terry v. Ohio*, 392 U.S. 1, 30 (1968)); *Brendlin v. California*, 551 U.S. 249, 251) (2007) ("When a police officer makes a traffic stop, the driver of the car is seized within the meaning of the Fourth Amendment"). These investigative stops represent a lesser intrusion on the subject's Fourth Amendment protections, and hence require a lower level of suspicion than other Fourth Amendment searches. *See generally Terry*, 392 U.S. 1. Rather than requiring probable cause, which "exists where the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of

reasonable caution in the belief that an offense has been or is being committed" by the subject, *Longshore*, 399 Md. at 501, *Terry* stops require only reasonable suspicion, a less demanding standard requiring only something more than an "inchoate and unparticularized suspicion or hunch." *Terry*, 392 U.S. at 27; *accord Crosby v. State*, 408 Md. 490, 507 (2009).

There is no doubt that Mr. Redd was seized by the police when he was pulled over. This case turns instead on whether the seizure was an investigative stop under *Terry*, which required only reasonable suspicion, or if the police's conduct escalated the encounter to an arrest, which required probable cause. At the time of the seizure, and thus at the time they saw the small baggie of drugs in plain view on the seat, the police may have had reasonable suspicion (more on that below), but they did not, by their own reckoning, have probable cause to arrest. So if in seizing Mr. Redd, the police arrested him, the seizure violated the Fourth Amendment and the drugs should have been suppressed.

The nature of the seizure turns, then, on the way the police effected it, and that requires a closer look at the suppression hearing record. At oral argument before this Court, for the first time, the State disputed that Mr. Redd was ordered from his vehicle at gunpoint. Mr. Redd's testimony on this point was unequivocal, though. On direct examination, he testified that officers ran from their vehicle with guns drawn and ordered him out of the car. After this initial statement, guns were mentioned three additional times during his testimony by Mr. Redd and his counsel. The State had the opportunity to cross-examine Mr. Redd, and asked him only one question (which was unrelated to the officers' use of

weapons during the stop). It's true, as the State argued in this Court, that none of the officers testified that their guns were drawn. But that's due at least in some part to the fact that the officers were never asked about whether their guns were drawn when they ordered Mr. Redd out of his vehicle. And the State did not re-call either officer witness to refute Mr. Redd's testimony that guns were drawn or call any of the other officers known to be on the scene at the time.

During closing arguments at the suppression hearing, the circuit court inquired about this issue directly:

> What significance, if any, should I attach to [defense counsel's] argument that if the police take the truck and they block in the vehicle and get out with guns drawn, order him out of the vehicle, that that doesn't convert it to an arrest that would require more than just reasonable suspicion?

The State did not dispute Mr. Redd's version of events. Rather than argue that police *did not* use force, the State argued that police were *permitted* to use force under the circumstances, that "[police] may use force in order to detain a subject" upon reasonable suspicion that the subject may flee, although there was no evidence of a flight risk in this case. Finally, in its brief on appeal, the State adopted all relevant portions of Mr. Redd's statement of facts, and the State's argument section doesn't mention the guns.

The circuit court did mention the guns in its order, but because, in its view, the use of guns was immaterial to the propriety of the stop, the court made no specific finding on the issue. At oral argument, the State argued that if we find that Mr. Redd was arrested when the officers drew weapons on him, we must remand this case for the circuit court to

determine whether guns were, in fact, employed in Mr. Redd's seizure. We disagree. Although we must, and do, consider the record in the light most favorable to the State, we are not required to find a dispute of fact from the absence of any contrary factual evidence. *Smith*, 182 Md. App. at 555. Mr. Redd's version of his encounter with the police went uncontradicted throughout direct examination, cross-examination, the State's closing argument at the suppression hearing, and in appellate briefing. For purposes of analyzing the seizure, then, we will credit Mr. Redd's uncontradicted testimony that the detectives had their guns drawn when they approached him after he pulled over as directed.

### A. The Police Had Reasonable Suspicion to Conduct a *Terry* Stop

Mr. Redd argues that the traffic stop was unjustified at its inception because the police lacked reasonable suspicion that he was engaged in narcotics activity. In ruling on the Motion to Suppress, the circuit court found that the police had "at minimum" reasonable suspicion that Mr. Redd was involved in drug activity. The circuit court also found that the police had probable cause to stop Mr. Redd based on "the information received from a police dispatcher [] that [Mr. Redd's] West Virginia vehicle tags were not properly registered." We review findings of reasonable suspicion and probable cause *de novo*. *Ray v. State*, 206 Md. App. 309, 333 (2012).

There is no single, standardized, inquiry for what constitutes reasonable suspicion—the concept "purposefully is fluid." *Holt v. State*, 435 Md. 443, 459 (2013) (cleaned up). The Supreme Court has defined reasonable suspicion as "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Illinois v. Wardlow*,

528 U.S. 119, 128 (2000) (*quoting United States v. Cortez*, 449 U.S. 411, 417–418 (1981)). It is not enough for officers "simply [to] assert that [] conduct was suspicious . . . [r]ather the officer must explain how the observed conduct, when viewed in the context of all of the other circumstances known to the officer, was indicative of criminal activity." *Crosby v. State*, 408 Md. 490, 508 (2009) (*quoting Bost v. State*, 406 Md. 341, 357 (2008)). Whether the standard is met in a particular case is based on to totality of circumstances, giving "due deference to the training and experience of the . . . officer who engaged the stop at issue." *Crosby*, 408 Md. at 508.

Detective Waskui, an expert in narcotics packaging and distribution, testified that he observed Mr. Redd's vehicle back into the driveway of a residence. The detective was familiar with the house from a prior narcotics investigation, but the investigation did not involve Mr. Redd and had occurred six months previously. Detective Waskui testified that the vehicle stopped next to an individual standing in the driveway and that there was a "quick hand-to-hand meet" between that individual and the driver. In Detective Waskui's opinion, the interaction was consistent with a hand-to-hand drug transaction, and that created reasonable suspicion of a drug crime, which in turn justified an investigation.

The State points to *Williams v. State*, in which this Court found that police had probable cause to arrest a suspect they observed exchanging an unknown object for currency in an area described as an "open air drug market." 188 Md. App. 78, 93 (2009). But the facts of *Williams* are distinguishable from this case. To be sure, a suspect's presence in a high crime area can enhance the level of suspicion. *Sizer v. State*, 456 Md. 350, 366–

369 (2017). But although Detective Waskui was familiar with the residence at 7825 Old Harford Road as the site of a narcotics investigation months before, there was no evidence that the home is located in a high crime area or that any of the subjects of the prior investigation were present. Furthermore, Detective Waskui did not observe money or any object changing hands.

That said, the Detective wasn't claiming probable cause to arrest, only reasonable suspicion that a drug crime had occurred. Reasonable suspicion requires only that the officer has some particularized basis to suspect criminal activity is afoot, something more than a mere hunch. *Wardlow*, 528 U.S. at 123. And we agree with the State that Detective Waskui had more than a hunch. At the suppression hearing, he testified that hand-to-hand transactions normally take place at a "predetermined location," frequently involve a vehicle, and happen quickly, usually in less than a minute. In this case, the Detective observed an unknown individual seemingly waiting for Mr. Redd's arrival in the driveway. The individual approached Mr. Redd's vehicle when he arrived and reached into the driver's side window twice. The exchange lasted less than a minute, and the driver immediately pulled away. These details are sufficiently particularized to create reasonable suspicion, especially in light of the Detective's considerable expertise.

We also agree with the circuit court that Mr. Redd's unlawfully tinted windows and the no-hit on his temporary West Virginia plates gave the officers reasonable suspicion to

believe he had committed a traffic offense.[6] *See Turkes v. State*, 199 Md. App. 96, 114 (2009) (an officer may stop a vehicle if they can articulate, based on personal knowledge, a reasonable suspicion that the vehicle's window tinting violates the statute prohibiting tint over 35%); *Baez v. State*, 238 Md. App. 587 (2018). *Whren v. United States* recognized that police can stop and detain motorists upon probable cause that they have committed a traffic violation regardless of the officer's subjective intent. 517 U.S. at 813. In *State v. Williams*, the Court of Appeals confirmed that the same principle applies when officers have only reasonable suspicion. 401 Md. 676, 689–690 (2007). The fact that Detective Waskui and Lieutenant Chemilli intended to investigate a possible narcotics offense doesn't render the traffic stop invalid because Detective Waskui had reasonable suspicion to stop Mr. Redd for a traffic violation.[7]

[6] The circuit court found properly that Lt. Chimelli's lack of personal knowledge about these violations did not alter the analysis because she and the undercover detectives were acting as members of a police team:

> The knowledge of one police officer involved in an investigation is attributable to other members of a police team. *Peterson v. State*, 15 Md. App. 478, 489 (1972) (holding that an undercover detective was part of the "police team" and therefore "[h]is knowledge was attributable to the whole team[,]" including the arresting officer) . . . .

[7] The State also argues that probable cause for these traffic violations can serve as the basis for arrest under *Devenpeck v. Alford*, 543 U.S. 146 (2004). That case provides that the probable cause that generates an arrest need not be "closely related" to the crime charged. *Id*. at 153–55. But the tag and tint violations that the officers observed are not arrestable offenses in Maryland and therefore could not have given rise to probable cause to arrest Mr. Redd. *See* TA § 26-202 of the T (enumerating traffic violations that give the police the power to arrest).

### B. Mr. Redd Was Arrested When He Was Ordered Out of His Vehicle at Gunpoint

The fact that the officers were justified in stopping Mr. Redd doesn't end the inquiry, though. The critical issue here is whether the officers executed a *Terry* stop consistent with their reasonable suspicion or, as Mr. Redd argues, whether they leaped past *Terry* and arrested him without probable cause. The circuit court did not make a finding one way or the other about whether Mr. Redd was arrested when he was ordered out of his vehicle. The court reasoned instead that because the officers could have ordered Mr. Redd out of his vehicle as part of the traffic stop, it didn't matter how they did so:

> [Mr. Redd] testified that police officers blocked his vehicle and approached him with guns drawn when they ordered him to exit his vehicle. According to [Mr. Redd], this activity escalated the interaction to an arrest, which required the heightened legal justification of probable cause. Given that the police officers had a right to order [Mr. Redd] out of his vehicle after making a legally justified traffic stop, the circumstances of how he exited the vehicle are not material.

This is where we part company with the circuit court. If the manner in which the officers stopped Mr. Redd effected an arrest, it was an arrest without probable cause, and the fruits of the post-arrest search must be suppressed. *Mapp v. Ohio*, 367 U.S. 643, 671 (1961). Whether or not an alternative process might have revealed the evidence lawfully is immaterial. *See Grier v. State*, 351 Md. 241, 252 (1998) ("[a]lthough [police] may have had the right simply to detain and question Petitioner before placing him in custody, he did not do so."). An officer who searches a home without a warrant, for example, normally is not excused from the requirement because he *could have* obtained a warrant. *Mapp*, 367

U.S. at 671. So too for the evidence found in the Honda if the police arrested Mr. Redd by ordering him out of his car at gunpoint without probable cause.

We agree with Mr. Redd that the officers arrested him when they ordered him out of the car at gunpoint. The circuit court is right that an officer conducting a lawful traffic stop is entitled to order the driver out of his vehicle. *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977); *Chase v. State*, 449 Md. 283, 297 (2016). In *Mimms*, the Supreme Court weighed officer safety considerations against the relatively minimal impact of being ordered out of a vehicle on a suspect's Fourth Amendment rights and said that the added intrusion "can only be described as *de minimis.*" *Mimms*, 434 U.S. at 111. And under ordinary circumstances, ordering a suspect out of a vehicle in the course of a lawful traffic stop does not so impose on a suspect's Fourth Amendment protections as to elevate the intrusion outside of the scope of *Terry*. *Id.* But a lawful traffic stop does not give the police *carte blanche* to handle suspects however they wish. The officers' right to detain and intrude must still be reasonable, *i.e.*, "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference." *Terry*, 392 U.S. at 20. If the intrusion goes beyond the scope of reasonableness under *Terry* and rises to the level of an arrest, it must be justified by probable cause. *Bailey v. State*, 412 Md. 349, 375 (2010).

An arrest is defined generally as "the taking, seizing, or detaining of the person of another (1) by touching or putting hands on him; (2) or by any act that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest . . . ." *Bouldin v. State*, 276 Md. 511, 515–16 (1976). A *de facto* arrest

occurs when a suspect is not formally notified of his arrest, but "the circumstances surrounding a detention are such that a reasonable person would not feel free to leave." *Reid v. State*, 428 Md. 289, 299–00 (2012). There is no bright line test to distinguish an investigative detention from an arrest; each case must be evaluated independently based on the totality of circumstances. *See In re David S.*, 367 Md. 523, 535 (2002); *Ferris v. State*, 355 Md. 356, 376 (1999). In recent cases assessing whether a *Terry* stop was elevated to a *de facto* arrest, courts have considered a variety of factors, including whether an officer physically touched a suspect, the use of handcuffs, an officer's tone of voice, the use of force, and the number of officers participating in the stop. *Longshore v. State*, 399 Md. 486, 514 (2007) ("[the defendant] was arrested when he was asked to step out of his car and placed in handcuffs"); *Bailey v. State*, 412 Md. 349, 374 (2010) (defendant was under *de facto* arrest when an officer grabbed his hands and placed them on his head); *Elliott v. State*, 417 Md. 413, 430–431 (2010) (suspects were arrested when officers pointed guns at them, forced them to the ground, and handcuffed them); *Dixon v. State*, 133 Md. App. 654, 673 (2000) (defendant was under arrest when officers "blocked his car, removed him from his vehicle, and handcuffed him); *see also Morton v. State*, 284 Md. 526, 530 (1979) (defendant was arrested when officers removed him from a building and placed him under guard in a patrol car). Each of these factors points toward a finding that a suspect was arrested within the meaning of the Fourth Amendment. At the same time, countervailing concerns of officer safety and the risk of flight may justify the use of force or restraint in a *Terry* stop under certain narrow circumstances without elevating it to an arrest. *In re David*

*S.*, 367 Md. at 523 (officers were justified in drawing their guns and forcing a suspect to the ground based on the reasonable belief that the suspect was armed); *Trott v. State*, 138 Md. App. 89, 118 (2001) (finding that placing a suspect in handcuffs was permissible to avoid flight).

In this case, we find that three factors, operating together, weigh in favor of a finding that Mr. Redd's seizure was outside of the scope of reasonableness under *Terry*. *First*, the police physically blocked Mr. Redd with their vehicle as he was pulling over. In *Dixon v. State*, detectives "blocked [the defendant's] car, removed him from his vehicle, and handcuffed him," and we determined that those events "exceeded an investigatory stop under *Terry* and its progeny." 133 Md. App. at 673*; see also Swift v. State*, 393 Md. 139, 150 (2006) (including "blocking [a] citizen's path" as a factor indicative of seizure); *but see State v. Dick*, 181 Md. App. 693, 709 (2008). Here, the officers cut Mr. Redd off and blocked his path as he was pulling over. That may have been permissible if Mr. Redd was a flight risk, but there is nothing in the record to suggest that he was. To the contrary, when Lieutenant Chemelli signaled for Mr. Redd to pull over he complied immediately.

*Second*, the number of officers on the scene at the time of the seizure escalated the encounter and eliminated any notion that Mr. Redd was free to leave. The Court of Appeals has recognized that "a threatening presence of several officers" bears on the propriety of a Fourth Amendment event. *Swift*, 393 Md. at 150; *Elliott*, 417 Md. at 430. From the moment of this stop's inception, according to both Mr. Redd's and Lieutenant Chemilli's testimony,

there were two police vehicles and at least four police officers or detectives on the scene.[8] The presence of multiple officers, particularly when those officers have made a display of force, significantly affects a reasonable person's sense of whether they are free to leave. *See U.S. v. Mendenhall*, 446 U.S. 544, 554 (1980).

*Third*, and most significantly, Mr. Redd was ordered out of his vehicle at gunpoint. The record in this case indicates that at least three detectives had guns trained on Mr. Redd as he was ordered out of his vehicle. "[G]enerally, a display of force by a police officer" indicates an arrest. *Longshore*, 399 Md. at 502; *Elliot*, 417 Md. at 429. Most often in our cases, the display of force takes the form of physical restraint, either by physically touching a suspect or placing them in handcuffs. *See e.g., Bailey v. State*, 412 Md. 349, 373 (2010) (finding that a defendant was seized when police grabbed his hands and placed them on his head); *Longshore*, 399 Md. at 502 ("Ordinarily, [] there can be no arrest where there is no restraint. . . . Thus, generally a display of force, such as putting a person in handcuffs, is considered an arrest"). And we recognize that a display of guns during a *Terry* stop does not *per se* elevate the seizure to an arrest requiring probable cause. *See e.g. Lee v. State*, 311 Md. 642, 664 (1988) (officers acted reasonably when they approached suspects with guns drawn and ordered them to lie face-down on the ground during a *Terry* stop). But although "there is no hard and fast rule concerning the display of weapons" in a *Terry* stop, our courts have held consistently that the use of firearms in a *Terry* stop is permissible only

[8] Lieutenant Chemilli testified that, by the end of the stop, there were at least three police vehicles and five to seven officers present.

upon suspicion that a suspect is armed and dangerous. *Lee*, 311 Md. at 664 ("The determinative element in the balancing process here is that the police reasonably suspected that [the defendants] were armed and dangerous"); *see also United States v. Harley*, 682 F.2d 398, 402 (2d Cir. 1982) ("What might be unreasonable when an officer merely suspects that a minor offense has been committed is not unreasonable when . . . officers have reason to fear that a suspected criminal is armed."); *United States v. Seni*, 662 F.2d 277, 283 (4th Cir. 1981), *cert. denied,* 455 U.S. 950 (1982) ("Courts have held that an officer may draw his gun . . . when justified as a reasonable precaution for protection and safety"); *United States v. Hensley*, 469 U.S. 221, 235 (1985) ("officers . . . were authorized to take such steps as were reasonably necessary to protect their personal safety . . . in the context of suspects who are reported to be armed and dangerous").

The reasonableness of force in a *Terry* stop ultimately depends on the presence of circumstances requiring it, most notably officer safety or flight risk. *Elliott*, 417 Md. at 429 (Court of Appeals "recognized certain limited circumstances when the use of force will be considered reasonable as part of an investigative detention: where the use of force is used to protect officer safety or prevent a suspect's flight."). The reasons must be articulable and specific to the factual circumstances, and an investigative stop for suspected possession of narcotics does not inherently create either a safety or flight risk. *Longshore*, 399 Md. at 514 (officers conceded that the defendant was stopped because they believed him to possess drugs, there was no reason to believe the defendant was armed and dangerous, and officers did not indicate that they were concerned for their safety); *Norman v. State*, 452

Md. 373 (2017). In this case, the officers offered no reason to suspect that he was armed and dangerous and no reason to think he would flee. Mr. Redd was stopped in daylight hours and was not in a high crime area. He was not suspected of any crime of violence. Officers had not seen any weapons. And Mr. Redd complied immediately when directed to pull his vehicle onto the shoulder. The officers' "unambiguous show of force" was not, therefore, justified by the circumstances of the stop. *Bailey v. State*, 412 Md. 349, 373 (2010).

Viewed in their totality, the circumstances of Mr. Redd's seizure exceeded what would have been reasonable in an investigative stop. Although officers were legally justified in pulling Mr. Redd over, their actions from that point on were not "reasonably related in scope to the circumstances which justified the interference." *Terry*, 392 U.S. 1, 20 (1968). As a result, Mr. Redd's seizure rose to the level of an arrest that required probable cause that the officers didn't have. He was detained by police at gunpoint, an act that "indicates [the] intention to take him into custody and that subjects him to the actual control and will of the person making the arrest." *Bouldin v. State*, 276 Md. 511, 515–516 (1976). And a reasonable person in Mr. Redd's position "would not feel free to leave" when, as he sought to comply with a patrol car's signal to pull over, a police vehicle blocked his path and three narcotics detectives rushed to his car and ordered him out at gunpoint. *Reid*, 428 Md. 289, 299–300 (2012). These actions went well beyond the "mere inconvenience" or *de minimus* intrusion on Mr. Redd's Fourth Amendment rights anticipated in *Mimms*, and elevated a permissible *Terry* stop to a *de facto* arrest.

*Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977). And because the police team lacked probable cause, the arrest was unlawful.

Had detectives ordered Mr. Redd out of his vehicle without blocking him and without the use of their weapons, the baggie of cocaine in plain view on the driver's seat would have been fair game. But the plain view doctrine, which allows officers to seize illegal items in plain view without a warrant, applies only when police are "*lawfully* in a position to observe an item first-hand." *Illinois v. Andreas*, 463 U.S. 765, 771 (1983) (emphasis added). In this case, the police's access to the driver's seat stemmed from an unlawful arrest. Because the police did not obtain access to the cocaine on the driver's seat lawfully, they lacked probable cause to search Mr. Redd's vehicle. This means that the narcotics contained in the center console were fruit of the initial Fourth Amendment violation. *See Wong Sun v. U.S.*, 371 U.S. 471 (1963). For these reasons, the evidence recovered from the vehicle should have been suppressed, and the circuit court erred in denying Mr. Redd's motion.

**JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY REVERSED. BALTIMORE COUNTY TO PAY THE COSTS.**