UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0647

September Term, 2015

ANTWANN D. GIBSON

v.

STATE OF MARYLAND

Krauser, C.J.,
Woodward,
Wright,

JJ.

Opinion by Wright, J.

Filed: March 18, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of *stare decisis* or as persuasive authority. Md. Rule 1-104.

Appellant, Antwann Gibson, appeals the Circuit Court for Dorchester County's decision to deny his motion to suppress. Gibson was charged with three counts of handgun possession in the District Court for Dorchester County. The case was transferred to the circuit court upon Gibson's request for a jury trial.

On May 4, 2015, the circuit court heard and denied Gibson's motion to suppress evidence of the handgun. On June 4, 2015, Gibson pled not guilty and proceeded on an agreed statement of facts. He was found guilty of wearing, carrying, and transporting a handgun. He was sentenced to a suspended two-year sentence, with a three-year probation. Gibson presents the following question on appeal:

Did the circuit court err in denying appellant's motion to suppress?

For the reasons provided below, we hold that the circuit court did not err in denying Gibson's motion to suppress.

STATEMENT OF FACTS

On December 1, 2014, around 3:00 p.m., Lieutenant Jeff Biskach of the Hurlock Police Department pulled over Devonya Adamson outside an apartment complex known as Prospect Heights for failure to stop at a stop sign. At Gibson's suppression hearing, Lt. Biskach testified that Prospect Heights is known to have an open-air drug market and that over the course of his thirty-year career, he has "made hundreds of drug-related arrests there."

When Lt. Biskach approached Ms. Adamson's car, he saw that there were three other passengers inside: one in the passenger's seat, one in the rear driver's seat, and

Gibson in the back passenger's seat. Lt. Biskach testified that while he was speaking with Ms. Adamson, he noticed that Gibson:

> appeared to be nervous to me more so than the other occupants inside of the vehicle. Lack of eye contact. Typically everybody watches the Officer . . . [Gibson] was not making any kind of eye contact. He was looking forward . . . . Not aggressively. He just seemed nervous.

Lt. Biskach further testified that based on his training, knowledge, and experience, such behavior was unusual from an individual. He then called for assistance, after which Officer Jake Garvey responded to the scene. Lt. Biskach expressed his concerns about Gibson to Ofc. Garvey, and asked Ofc. Garvey to check on Ms. Adamson.

Ofc. Garvey testified that when he "made contact with [Ms. Adamson, he] looked in the back seat there was a passenger on the driver's side making eye contact with me, was speaking [sic]. The rear passenger [Gibson] would not make eye contact and was quiet the whole time." Ofc. Garvey testified that it was not normal behavior for a passenger to avoid eye contact and interact with the officers, and "[m]ost of the time they will speak to you.

After Lt. Biskach finished writing the warning for the traffic violation, he asked Ms. Adamson to exit her car and come to the rear of the vehicle "[b]ecause there was heavy traffic." He asked her if there was any illegal contraband in the vehicle, to which, according to Lt. Biskach, she responded that there was not, to her knowledge, but that he could search the car if he wanted. Lt. Biskach testified that because the vehicle was occupied by passengers, he got them out of the vehicle to conduct his search, as he normally does. He also explained that "we'll pat them down one at a time and have them

sit depending on the area either in the grass or the sidewalk." He then clarified that they pat individuals "down for any weapons for Officer safety." Ofc. Garvey testified as to his procedure in such circumstances, explaining, "I have every occupant step out of the vehicle one by one. As they get out pat them down make sure there is no weapons on their person, anything that's going to harm us . . . [then] we'll send them back to the back of the car. That way they're not interfering with the search."

Consistent with this practice, the officers asked Gibson out of the car. Ofc. Garvey testified, "When I advised him I was going to do a pat down on him I turned to the car to do a pat down and he pulled away and said what are you doing." Ofc. Garvey continued that he again informed Gibson that he was going to conduct a pat down of his person, and Gibson again pulled away. That is "when [Ofc. Garvey] took him to the ground," after which Gibson "stated that he was scared and he had a piece in his pocket." Based on his training, knowledge, and experience, Ofc. Garvey stated that he understood a "piece" to mean a gun or drugs.

Before trial, Gibson moved to suppress the statement about the "piece" in his pocket and any evidence seized from him because the frisk and the related pat down were unlawful. According to Gibson, there was no reasonable, articulable suspicion that Gibson was armed to justify the frisk. The trial court denied the motion, explaining:

> Well, the evidence that we have is that Lieutenant Biskach made a routine traffic stop for failing to obey a traffic control devices. He made a stop on a car being driven by a lady. There were four individuals in the car. Lieutenant Biskach's attention was drawn on a particular individual on the back seat on the passenger side who unlike the other individuals did not make eye contact, appeared to be nervous. Based on Officer Biskach's

twenty-nine years[’] experience he determined that the conduct of the Defendant including the nervousness which could be if you separately may be innocent conduct it can when considered in conjunction with other conduct or circumstances warrant further investigation.

In this case Lieutenant Biskach knew the vehicle was coming from an area that was known as a[n] open drug market, an area in which he had made multiple arrests. So the stop is lawful. The person that exercised control over the vehicle gave the Lieutenant and the Hurlock Police Department . . . her consent to search the vehicle after indicating there was nothing illegal in the vehicle.

The Police officer then in order to effect the search and any search would have to being with bringing the occupants of the car out of the vehicle. There is no evidence other than the fact that Officer Garvey tried to effect a pat down search on the Defendant to detect if there were any weapons, but before he could get to do that in almost a split second the Defendant pulled away, was tackled and blurted out that he was scared and had a piece which apparently indicates that Lieutenant Biskach’s instincts were accurate.

Given the state of the law the Court finds there is no problem with the series of events in this particular case. The Court finds that it was reasonable for the Officer’s safety to conduct a very nonintrusive Terry pat down to make sure no one had any weapons. The Police directed their suspicion at a person who was acting differently than the other occupants of the vehicle in a matter that was consistent with perhaps having some criminal issue.

So the court finds that . . . the Officers were entitled to pat down Mr. Gibson for weapons and that the weapon seized was a result of this event may be used as evidence in these charges.

Additional facts will be discussed below as they become relevant.

DISCUSSION

I. Standard of Review

An appellate court reviewing the circuit court’s grant or denial of a motion to suppress considers “only the facts and information contained in the record of the

suppression hearing." *Longshore v. State*, 399 Md. 486, 498 (2007) (citations omitted). The appellate court will view all evidence and draw all reasonable inferences in the light most favorable to the prevailing party, in this case, the State. *Id.* (citations omitted).

Although deference is paid to the circuit court in its findings of fact when facts are in dispute, unless they are clearly erroneous, "the reviewing court makes its own independent constitutional appraisal, by reviewing the law and applying it to the peculiar facts of the particular case." *Jones v. State*, 343 Md. 448, 457-58 (1996) (citations omitted).

II. Gibson's frisk was legal.

Lt. Biskach and Ofc. Garvey had the authority to order Gibson and the other passengers out of the car to effectuate the vehicle search to which the driver had consented. The Supreme Court, in *Maryland v. Wilson*, 519 U.S. 408, 415 (1997), held that "an officer making a traffic stop may order passengers to get out of the car pending completion of the stop." It explained:

> [A]s a practical matter, the passengers are already stopped by virtue of the stop of the vehicle. The only change in their circumstances which will result from ordering them out of the car is that they will be outside of, rather than inside of, the stopped car. Outside the car, the passengers will be denied access to any possible weapon that might be concealed in the interior of the passenger compartment. It would seem that the possibility of a violent encounter stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop. And the motivation of a passenger to employ violence to prevent apprehension of such a crime is every bit as great as that of the driver.

Id. at 413-14.

Beyond a brief detention, "other intrusive police actions are permitted when they are conducted in furtherance of the goal of protecting the safety of the officer . . . . Pat-down searches, known commonly as frisks, '[are] not to discover evidence, but rather to protect the police officer and bystanders from harm.'" *Longshore*, 399 Md. at 508-09 (internal citations omitted). An officer can conduct a pat-down when he "has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." *Id*. (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)). We must give weight to the officer's "specific reasonable inferences which he is entitled to draw from the facts in light of his experience" when determining if his actions were reasonable. *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)).

While reasonable suspicion is "more than an 'inchoate and unparticularized suspicion or 'hunch,'" *id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)), it is also a "common sense, nontechnical conception that considers factual and practical aspects of daily life and how reasonable and prudent people act." *Crosby v. State*, 408 Md. 490, 507 (2009). The court must determine whether an officer acted with reasonable suspicion "based on the totality of the circumstances," meaning that the court cannot "parse out each individual circumstance for separate consideration." *Id.* (citations omitted). Gibson challenges the circumstances of the reasonable suspicion but maintaining that (1) it was not enough that the stop occurred in an area where drugs were sold; (2) Gibson's nervousness was not necessarily indicative of wrongdoing; and (3) the totality of the

circumstances does not amount to reasonable, articulable suspicion. We disagree with Gibson and hold that the officers had reasonable suspicion, under a totality of the circumstances, that Gibson was armed and could pose a threat to officer safety.

i. Traffic stop occurred in a high crime area

The Prospect Heights neighborhood, from which the vehicle Gibson was in was arriving, was known to the officers to be an area in which an open air drug market operated. Gibson argues that "a person's presence in a high crime area in not enough to support reasonable suspicion that the person has committed or is about to commit a crime." He cites *Brown v. Texas*, 443 U.S. 47, 52 (1979), which states, "The fact that appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct." We do not disagree with Gibson on this assertion: presence in a high crime area *alone* is not enough to amount to reasonable suspicion of wrongdoing.

However, being that the test for reasonable suspicion is totality of the circumstances, the nature of the area is in fact a relevant factor in determining reasonable suspicion. *See Illinois v. Wardlow,* 528 U.S. 119, 124 (2000) (explaining that a stop occurring in a 'high crime area' is a relevant contextual consideration in a *Terry* analysis); *Bost v. State*, 406 Md. 341, 359-60 (2008) ("The nature of the area is a factor in assessing reasonable suspicion.") Here, Gibson's presence in Prospect Heights was relevant only in the context of the other behaviors he exhibited that amounted to

reasonable suspicion, and is not solely relied on as the officers' basis of reasonable suspicion.

ii. Gibson's nervous behavior

Gibson argues that his behavior in the car, his apparent nervousness and lack of eye contact, did not suggest that he was in possession of contraband. For support of his position, Gibson points us to *Ferris v. State*, 355 Md. 356, 389 (1999), which cautions against placing too much emphasis on an individual's nervousness demeanor when determining reasonable suspicion. The Court of Appeals in *Ferris* addressed the question of whether an officer had reasonable, articulable suspicion to "seize" an individual by keeping him on the side of the road after he was pulled over. One of the justifications for the seizure given by the officer in *Ferris* was that the suspect appeared "nervous" while in the car, saying he "did appear a little nervous, a little fidgety." *Id.* at 362; 387-88. The Court of Appeals explained that the suspect's nervousness was not one that "can fairly be characterized as especially 'dramatic,' or in some other way be objectively indicative of criminal activity" because the suspect's "unexceptional nervousness, in reaction to encountering [the officer], was simply too ordinary to suggest criminal activity." *Id.* at 389. The *Ferris* Court commented that "[t]he innocent and the guilty may both frequently react with analogous trepidation when approached by a uniformed police officer." *Id.* 388.

However, several subsequent Court of Appeals cases have clarified and distinguished *Ferris*. In *McDowell v. State*, the Court of Appeals observed that "conduct,

including nervousness, that may be innocent if viewed separately, can, when considered in conjunction with other conduct or circumstances, warrant further investigation." *McDowell v. State*, 407 Md. 327, 337 (2009). Further, in *Nathan v. State*, 370 Md. 648, 665 n. 5 (2002) *cert. denied*, 537 U.S. 1194 (2003), the Court of Appeals distinguished *Ferris* on the basis that his nervousness, *i.e.* looking back at the police car and appearing jittery, was "ordinary nervousness," but that atypical nervousness may be considered in determining reasonable suspicion. *See also Russell v. State*, 138 Md. App. 638, 653 (2001) (finding reasonable suspicion for a pat-down where passenger in pulled over vehicle, in a high crime area, was nervous and was attempting to conceal something in his pocket). The Supreme Court has also noted that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion. *Wardlow*, 528 U.S. at 124.

Here, both officers testified that Gibson's behavior was unusual. Unlike the other passengers in the car who looked at and acknowledge the officers, Gibson was looking straight ahead of him and "would not make eye contact and was silent the whole time." His nervousness was not "unexceptional" or "too ordinary." Indeed, both officers testified that, from their training and experience, his behavior was not typical. Notably, Gibson exhibited this unusually nervous behavior throughout the duration of the stop, as both Lt. Biskach and Ofc. Garvey observed him acting the same way. *See United States v. Mason*, 628 F.3d 123, 129 (4th Cir. 2010) (noting that nervousness as a factor in determining reasonable suspicion was particularly important because it did "not subside, as occurs normally, but became more pronounced as the stop continued").

As the State notes, the evidence must be considered 'through the prism of the training and experience" of the two officers. Lt. Biskach had been a police officer for twenty-nine years and had made hundreds of drug-related arrests in the Prospect Heights neighborhood because of its open air drug market. Ofc. Garvey had been a Hurlock police officer for almost four years and had stopped thousands of vehicles with multiple passengers in them. Reasonable suspicion analysis requires a particular emphasis on the officers' "own experience and specialized training to make inferences from and deduction about the cumulative information available to them that 'might elude an untrained person.'" *United States v. Arvizu,* 534 U.S. 266, 273 (2002). Both officers had an extensive basis on which to assess Gibson's behavior relative not only to the other passengers in the car at the time, but to other individuals in that community.

iii. Totality of the circumstances

Because we do not "base a judgment on whether [the] individual components, standing alone, will suffice," *McDowell*, 407 Md. at 337, we must look at all the circumstances of the frisk together to determine if there existed reasonable suspicion. Gibson relies on *Ransome v. State*, 373 Md. 99, 100 (2003) for the claim that the circumstances do not amount to a stop and frisk:

> The State of Maryland contends that it is permissible for a police officer who observes a man doing nothing more than standing on a sidewalk on a summer night talking with a friend, to stop and frisk that person because (1) they were in a high-crime area, (2) the man had a bulge in his front pants pocket, (3) the man gazed at the unmarked police car containing three plain-clothed officers as it drove by and slowed to a stop, and (4) when the three officers got out of the car, approached the man, identified themselves as police officers, and one began to ask him questions, the man appeared

> nervous and avoided eye contact with the officer. The State is wrong. *Terry v. Ohio,* 392 U.S. 1, (1968) does not go quite that far.

However, Gibson seeks to extend *Ransome* beyond its scope. The Court of Appeals' main point in *Ransome* was that officers went beyond their authority if they approached someone on the street merely because they noticed a bulge in their pocket. *Id.* at 107-08. The circumstances in Gibson's case differs as to the overall encounter with the police and when and how the individual exhibited his nervousness. Other than being set in a high crime area, the two cases do not share any other factors.

Gibson's unusually nervous behavior, his evasiveness, his attempt to go unnoticed, and the fact that he was coming from a high crime area, were enough to amount to reasonable, articulable suspicion, justifying Ofc. Garvey in patting Gibson down when he asked him out of the car. *See Russell* 138 Md. App. at 653-54 (concluding that because the traffic stop occurred in a high crime area, the suspect's unusual nervousness, and his attempt to conceal something in his pocket, the officer "had reasonable articulable suspicion" to detain and conduct a pat-down"); *see also Matoumba v. State*, 162 Md. App. 39, 49 (2005) (holding that the circumstances "surely warrant a prophylactic frisk to assure public and police officer safety" where the suspect's "nervous conduct and obvious attempt to conceal some item behind his back, the dangerous nature of the area where the traffic stop occurred, and the initial reasonableness of the stop"); *c.f. Nathan v. State*, 370 Md. 648, 664-65 (2002) (reasoning that under *Terry*, police had reasonable suspicion to detain suspects because the suspects' extreme nervousness, failure to produce identification, the passenger feigning sleep when the vehicle was initially

stopped, the driver's evasive answers regarding his travel plans, the inconsistent versions of the trip itinerary and purpose provided by the suspects, among other things, "were sufficient grounds, taken together, reasonably to warrant an investigative detention.").[1]

III. The officer's use of force to pull Gibson to the ground did not amount to an arrest.

Additionally, Gibson contends that the officer's forcible take-down after he twice pulled away from Ofc. Garvey was "tantamount to an arrest," for which the officer needed probable cause. Whether a show of force or prolonged detention constitutes an arrest or merely a *Terry* stop depends upon "the totality of the circumstances." *Chase v. State*, 224 Md. App. 631, 644 (2015). "[E]ven if the officers' physical actions are equivalent to an arrest, the show of force is not considered to be an arrest if the actions were justified by officer safety or permissible to prevent the flight of a suspect." *Id.* at 643; *see also Longshore*, 399 Md. at 509 (explaining that "Maryland has recognized very

[1] In this case, we are mindful that while nervousness in a high crime area alone is not enough to justify a *Terry* stop-and-frisk, the case law indicates that a frisk is appropriate when the suspect exhibits "nervousness plus." That is, the suspect must show behavior beyond jitteriness and anxiousness that could be a normal reaction to a police encounter.

In this case, Gibson's exhibited nervousness was coupled with extremely evasive behavior: unnaturally avoiding eye contact with the police officers, staring straight ahead, and not moving during the duration of the stop, which together with his presence in an open air drug market created enough reasonable suspicion for the officers to perform a noninvasive search. *Bost v. State*, 406 Md. 341, 358 (2008) (stating that along with presence in a high crime area, "[o]ur cases have also recognized that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion." (quoting *Wardlow,* 528 U.S. at 124-25 (2000) (internal citations omitted)).

limited instances in which a show of force, such as placing a suspect in handcuffs, is not an arrest. This Court has upheld the use of such force when done to protect the officer . . . and the intermediate appellate court has upheld use of such force when done to prevent a suspect's flight") (citations omitted)). In determining whether an arrest occurred, several factors are taken into consideration, including "the length of the detention, the investigative activities that occur during the detention, and the question of whether the suspect is removed from the place of the stop to another location." *Chase*, 224 Md. App. at 643-44.

In the instant case, the factors favor the conclusion that the detention was not an arrest. The "take-down" took was a result of Gibson evading the frisk, which he was not privileged to do. *See Hicks,* 189 Md. App. at 125. The detention on this basis was brief, because Gibson then blurted out that he had a "piece" in his pocket, which the officers understood to mean "gun" or "drugs," giving them probable cause to effectuate an actual arrest. *See Crosby*, 408 Md. at 506 ("[A] *Terry* stop may yield probable cause, allowing the investigating officer to elevate the encounter to an arrest or to conduct a more extensive search of the detained individual."). Moreover, *In re David S.*, 367 Md. 523, 539-40 (2002), describes a similar situation in which the officers were justified in the hard "take-down" of the suspect:

> We hold that the stop was a legitimate *Terry* stop, not tantamount to an arrest. Several police officers conducted a "hard take down" of respondent. *See Lee,* 311 Md. 642, 537 A.2d 235. The officers, with their weapons drawn, forced respondent to the ground and placed him in handcuffs. This conduct was not unreasonable because the officers reasonably could have suspected that respondent posed a threat to their safety. Considering the

> totality of the circumstances, as they appeared to the officers at the time, in order to maintain their safety, handcuffing respondent and placing him on the ground for a brief time was reasonable and did not convert the investigatory stop into an arrest under the Fourth Amendment. Although this is a severe form of intrusion, we conclude that under the circumstances, it was reasonable.

Like the officers in *In re David S.*, Ofc. Garvey too had concern for his personal safety. The initial suspicion evoked by Gibson's atypical behavior combined with his resistance of the frisk indicated that Gibson may pose a harm to the officers.

Gibson's motion to suppress was appropriately denied because the evidence he sought to keep out was appropriately obtained during the course of a legal frisk conducted with reasonable suspicion.

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