UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 522

September Term, 2016

TAEVON BAILEY

v.

STATE OF MARYLAND

Arthur,
Reed,
Zarnoch, Robert A.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Reed, J.

Filed: June 8, 2017

A jury in the Circuit Court for Baltimore City convicted Taevon Bailey, appellant, of possession of a firearm by a prohibited person, wearing/carrying a handgun, and possession of ammunition by a prohibited person. The circuit court merged the conviction for wearing/carrying a handgun into the conviction of possession of a firearm by a prohibited person and subsequently sentenced appellant to a twelve-year prison term for the latter conviction, with all but five years suspended, and a concurrent sentence of one year for possession of ammunition by a prohibited person, to be followed by a three-year period of probation. Appellant noted this appeal and presents three questions for review:

1. Did the court err by declining to suppress evidence when the State failed to disclose that Officer Norman Jones would testify as an expert witness?

2. Did the court below err by finding the State's witness, Officer Norman Jones, qualified as an expert witness?

3. Did the court below err by denying Appellant's motion to suppress evidence?

For the reasons stated below, we answer these questions in the negative and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Around 10:00 p.m. on October 7, 2014, Baltimore City Police Department Officer Norman Jones was on patrol with Officers Anthony Casabona and Nicholas Billings. The officers were in an unmarked police vehicle in the 2700 block of Coldspring Lane. At the intersection with Park Heights Avenue, Officer Jones observed a black male wearing black cargo pants, a navy blue hoodie, and a black "bubble" vest on a bicycle conversing with an unknown number of occupants in a green minivan. Officer Jones testified that the man on the bicycle, whom he identified as appellant, appeared to engage in a drug transaction with

the occupant(s) of the minivan.[1] Officers Jones and Billings exited their vehicle in an attempt to speak with appellant and investigate further.

Officers Jones and Billings, in full police uniform, approached appellant. Officer Jones yelled at appellant to stop, but appellant pedaled away. Realizing the futility of a foot pursuit, Officers Jones and Billings canvassed the area in an effort to locate appellant. Approximately two or three minutes later, Officers Jones and Billings located appellant, who was on foot and breathing heavily, in the 3000 block of Oakford Avenue – a block away from Coldspring Lane. Appellant was no longer wearing the black vest. Officer Jones asked appellant to come toward him, but appellant ran away from the officers, instead.

Officers Jones and Billings pursued appellant on foot. Shortly after the pursuit began, Officer Jones observed appellant reach down to the waistband of his pants with his right hand and retrieve a large black handgun, which appellant then threw across his body to land loudly on concrete in a front yard. A short time after appellant abandoned the gun, Officer Jones apprehended appellant and placed him in handcuffs.

Officers Casabona and Jones retrieved the abandoned gun, which was loaded. Officer Jones rendered the weapon safe, meaning he unloaded it and recovered the ammunition. Later, the gun was determined to be an operable, .45 caliber handgun.

DISCUSSION

Prior to trial, appellant moved to suppress the recovered gun, arguing that he was "forced" to abandon it because police did not have a reasonable suspicion to stop him. At

[1] The court accepted Officer Jones as an expert in the characteristics of armed persons and in the methods of the distribution of controlled dangerous substances.

the suppression hearing, the State's only witness was Officer Jones, who was accepted over objection as an expert in the characteristics of armed persons and in the distribution of marijuana. After hearing testimony from Officer Jones and argument from counsel, the court denied the motion to suppress, determining that police had not stopped appellant when he abandoned the gun. The court went on to state that, even under a *Terry* analysis,[2] police had a reasonable articulable suspicion to stop appellant because they had witnessed him engage in a possible drug transaction and subsequently flee from police when asked to stop.

1. Discovery Violation

On appeal, appellant contends that the suppression court erred in declining to impose sanctions on the State for their failure to designate Officer Jones as an expert witness. Appellant argues that the State was required by Rule 4-263 to disclose that Officer Jones would testify as an expert witness. Appellant asserts that if there is no discovery violation in this instance, then police officers may become expert witnesses whenever the State chooses and without their expert designation being revealed to defense counsel until the day of trial. Appellant maintains that the State's failure to designate Officer Jones as an expert "had an impact" on his ability to mount a defense, although he does not specify how.

[2] Here, the court was referring to the United States Supreme Court case *Terry v. Ohio*, 392 U.S. 1 (1968).

The State responds that Officer Jones was listed in discovery as a witness, and his reports and opinions were provided prior to trial. Moreover, the State notes, Officer Jones's testimony at the suppression hearing and trial did not differ markedly from his testimony at appellant's first trial, which resulted in a mistrial.[2] The State maintains that the discovery rules are meant to avoid surprises, and there was no surprise here, notwithstanding the fact that the State failed to designate Officer Jones as an expert in the first trial. Furthermore, the State contends that if there was a discovery violation, any error was harmless because Officer Jones's testimony was not expert in nature and, therefore, he did not need to be designated as such. Additionally, the State asserts that Officer Jones's testimony relative to a possible drug transaction was irrelevant to the material issue of whether appellant illegally possessed a handgun.

"We review *de novo* whether a discovery violation occurred." *Thomas v. State*, 168 Md. App. 682, 693 (2006) (citing *Cole v. State*, 378 Md. 42, 56 (2003)), *aff'd*, 397 Md. 557 (2007). Rule 4-263(d)(8) requires the State to provide to the defense,"[a]s to each expert consulted," the following:

> (A) the expert's name and address, the subject matter of the consultation, the substance of the expert's findings and opinions, and a summary of the grounds for each opinion;
>
> (B) the opportunity to inspect and copy all written reports or statements made in connection with the action by the expert, including the results of any physical or mental examination, scientific test, experiment, or comparison; and

[2] Appellant's first trial occurred in January 2016. Following the declaration of mistrial, the State decided to retry appellant, and new counsel for appellant filed a motion to suppress.

> (C) the substance of any oral report and conclusion by the expert[.]

In addition, for all witnesses, the State must provide the witness's name, written statements, and – with certain exceptions – contact information. Rule 4-263(d)(3). Subsection (h) of that rule provides that the State must disclose the identities of witnesses "within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213(c)[.]" We have remarked that "[t]he purpose of the discovery rules is to 'assist the defendant in preparing his defense, and to protect him from surprise.'" *Joyner v. State*, 208 Md. App. 500, 528 (2012) (quoting *Hutchins v. State*, 339 Md. 466, 473 (1995)).

In this case, the circuit court concluded that there was no discovery violation, remarking: "Obviously, the officer's name was provided and his participation in the event and the summary that it was based on his observations and training, along with any other officers, so I don't believe there's a discovery violation here[.]"Appellant does not contend that the State failed to disclose Officer Jones's identity or his reports in discovery. Appellant's argument, rather, is that the State failed to designate Officer Jones as an expert.

We are not persuaded that there has been a discovery violation. The State disclosed the identity of Officer Jones and his reports in discovery, and there was certainly no surprise to appellant in the State's calling of Officer Jones as a witness at either the suppression hearing or trial. Moreover, there is no requirement in Rule 4-263(d) that the State categorize its witnesses as expert or non-expert. *See Knoedler v. State*, 69 Md. App. 764,

768 (1987) (stating that discovery rules did not require categorization of witnesses).[3] We fail to perceive how the State fell short of its discovery obligations in this case or how appellant was "impacted" by the State's failure to designate Officer Jones as an expert witness in discovery.

2. Expert Testimony

Appellant next argues that the court erred in permitting Officer Jones to testify as an expert witness. He notes that at the time of the events in this case, Officer Jones was just one month removed from graduating from the police academy. He asserts, therefore, that Officer Jones lacked the experience necessary to qualify as an expert. He maintains that the admission of Officer Jones's expert testimony was erroneous and not harmless, although he again does not specify how.

The State contends that the court did not abuse its discretion in designating Officer Jones as an expert witness. As to the suppression hearing, the State argues that, pursuant to *Matoumba v. State*, 390 Md. 544, 551 (2006), there was no requirement that Officer Jones testify as an expert. Regarding trial, the State contends that Officer Jones had sufficient training and experience to qualify as an expert, and that the court did not abuse its discretion in accepting expert testimony from Officer Jones.

[3] In that case, we interpreted the predecessor rule to the current Rule 4-263(d). Then-Rule 4-263(b)(1) required the State to disclose, upon request, the name and address of witnesses the State expected to call at trial, and Rule 4-263(b)(4) provided that the State must, upon request, "[p]roduce and permit the defendant to inspect and copy all written reports or statements made in connection with the action by each expert consulted by the State . . . and furnish the defendant with the substance of any such oral report and conclusion[.]"

We have held that "'[t]he admissibility of expert testimony is a matter largely within the discretion of the trial court, and its action in admitting or excluding such testimony will seldom constitute a ground for reversal.'" *City Homes, Inc. v. Hazelwood*, 210 Md. App. 615, 675 (2013) (quoting *Taylor v. Fishkind*, 207 Md. App. 121, 137 (2012)). We have also remarked that "it is well settled that 'the determination by the trial court of the experiential qualifications of a witness will only be disturbed on appeal if there has been a clear showing of abuse of the trial court's discretion.'" *Wantz v. Afzal*, 197 Md. App. 675, 682 (2011) (quoting *Rollins v. State*, 392 Md. 455, 499-500 (2006)). A court abuses its discretion where the ruling is "'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Patterson v. State*, 229 Md. App. 630, 639 (2016) (quoting *McGhie v. State*, 224 Md. App. 286, 298 (2015), *aff'd*, 449 Md. 494 (2016)).

Rule 5-702 permits the trial court to admit expert testimony "if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue." In this case, appellant challenges Officer Jones's qualifications. An expert must be "qualified as an expert by knowledge, skill, experience, training, or education[.]" Rule 5-702(1). "'To qualify as an expert, one need only possess such skill, knowledge, or experience in that field or calling as to make it appear that [the] opinion or inference will probably aid the trier [of fact] in his search for the truth.'" *Donati v. State*, 215 Md. App. 686, 742 (2014) (quoting *Morton v. State*, 200 Md. App. 529, 545 (2011)).

At the May 5, 2016, suppression hearing, Officer Jones testified that he had graduated from the police academy on September 5, 2014. He stated that at the academy,

he had received forty hours of training in the enforcement of drug laws, as well as eight hours of training in the characteristics of armed persons. Officer Jones also testified that he had received an additional eight hours of training in the characteristics of armed persons in November 2015. Furthermore, Officer Jones stated that prior to October 7, 2014 – the date of appellant's arrest – he had participated in five controlled dangerous substance investigations and "over a hundred" since then. Officer Jones also testified that he had participated in fifteen to twenty firearms-related arrests. The court designated Officer Jones as an expert in the methods of the distribution of marijuana and the characteristics of armed persons, remarking: "I am satisfied that his training puts him in a superior position to a civilian who may be a member of the jury or to a civilian who may be a member of the judiciary and that his observations on the street are very, very full over a two year period[.]"

We note, first, that the State is correct in that the expert witness qualification requirement does not apply at suppression hearings. *See Matoumba*, 390 Md. at 551 (explaining that "the [r]ules [of evidence] . . . are inapplicable to suppression hearings."). Therefore, it simply cannot be that the court abused its discretion in designating Officer Jones as an expert at appellant's suppression hearing on May 5, 2016.

As to trial, Officer Jones testified to his training and experiences in the same manner as at the suppression hearing. The court designated him an expert in the distribution of controlled dangerous substances and the characteristics of armed persons. In a subsequent bench conference – which occurred long after Officer Jones's designation as an expert witness – appellant's counsel attempted to elaborate on his objection to the designation relative to the characteristics of armed persons. The circuit court remarked that Officer

Jones had not offered expert testimony as to that field of expertise: "As to the other things, he saw the man running, pulled out a gun and thr[e]w it. No expert opinion there." Appellant's counsel did not request any remedy or continue to press the objection.

Assuming that the objection is preserved, we perceive no abuse of discretion in the court's designation of Officer Jones as an expert witness. Notwithstanding that Officer Jones did not subsequently offer expert testimony as to the characteristics of armed persons, his training and experience were sufficient to qualify him as an expert in the fields in which he was designated. Officer Jones's "relative inexperience," as appellant puts it, when compared to a hypothetical long-serving police veteran does not automatically bar him from being qualified as an expert. Besides, what matters is the level of Officer Jones's experience on the date he testified, not on the date of appellant's arrest.[5] Finally, we are not persuaded that appellant's fears of police officers being transformed into expert witnesses at large will occur. *See Prince v. State*, 216 Md. App. 178, 201-03 (2014) (noting that police officers are not expert witnesses merely because of vocation).

3. Motion to Suppress

Lastly, appellant contends that the court erred in denying the motion to suppress. Appellant argues that, because Officer Jones acted without a reasonable articulable suspicion in stopping him, the recovered gun is the product of an unconstitutional seizure. The State maintains that the court acted properly in denying appellant's motion because appellant abandoned the gun, meaning there was no stop, unconstitutional or otherwise,

[5] Appellant's second trial took place approximately a year and a half after his arrest.

leading to the recovery of the gun. The State also contends that even if analyzed as a *Terry* stop, Officer Jones had a reasonable articulable suspicion to stop appellant, rendering the search constitutional.

The Court of Appeals has noted:

> "In reviewing a Circuit Court's grant or denial of a motion to suppress evidence under the Fourth Amendment, we ordinarily consider only the information contained in the record of the suppression hearing, and not the trial record. Where, as here, the motion is denied, we view the evidence and all reasonable inferences drawn therefrom in the light most favorable to the prevailing party on the motion. Although we extend great deference to the hearing judge's findings of fact, we review independently the application of the law to those facts to determine if the evidence at issue was obtained in violation of law and, accordingly, should be suppressed."

Chase v. State, 449 Md. 283, 289 n.3 (2016) (quoting *Williamson v. State*, 398 Md. 489, 500 (2007)). *See also Grant v. State*, 449 Md. 1, 14-15 (2016) (citing *State v. Wallace*, 372 Md. 137, 144 (2002)) (noting that review of legal issues in denial of motion to suppress is *de novo*).

We have held that a chase is not a seizure pursuant to the Fourth Amendment: "[T]he constitutional measurement of Fourth Amendment justification for a *Terry* stop takes place **only** at the end of a chase, when the police lay hands on a suspect and subject him to actual detention, to wit, a *Terry* stop." *State v. Sizer*, 230 Md. App. 640, 658 (2016) (emphasis added). "The antecedent chase, until it achieves its purpose, is not yet subject to Fourth Amendment analysis for it is neither a 'search' nor a 'seizure.'" *Id.* Indeed, even a command to stop is not subject to Fourth Amendment analysis if the subject does not yield

to that command. *See Williams v. State*, 212 Md. App. 396, 408 (2013) (citing *California v. Hodari D.*, 499 U.S. 621, 626 (1991)).

Hodari D. is illustrative of this principle. In that case, two police officers were patrolling a high-crime area. 499 U.S. at 622. When they turned a corner, they observed four or five young men in a huddle, and the young men fled when they saw the officers. *Id.* at 622-23. The officers chased the young men, and, during the pursuit, Hodari D., one of the young men, threw a small rock, which was later determined to be cocaine. *Id.* at 623. Immediately after Hodari D. threw the rock, he was apprehended. *Id.* The United States Supreme Court determined that Hodari D. was not stopped or seized at the time he abandoned the rock: "The narrow question before us is whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield. We hold that it does not." *Id.* at 626.

Accordingly, like the abandoned cocaine in *Hodari D.*, the gun in this case was not the product of a search or seizure, as appellant discarded it prior to being apprehended by Officer Jones. There was, therefore, no constitutional problem with the recovery of the gun, and the circuit court's denial of appellant's suppression motion was correct.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.