Circuit Court for Cecil County
Case No. K-15-1364

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1296

September Term, 2016

DENNIS ALLEN CONTE, III

v.

STATE OF MARYLAND

Beachley,
Shaw Geter,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: October 26, 2017

After shooting three individuals during an altercation in North East, one of whom died, Dennis Allen Conte, III, appellant, fled to Elkton, where he was quickly apprehended by police officers responding to a "be on the lookout" for the suspected shooter and getaway vehicle. A jury in the Circuit Court for Cecil County convicted appellant of attempted second degree murder, three counts of first degree assault, possession of heroin with intent to distribute, and related crimes. He was sentenced to a total executed time of forty-five years.

Challenging those convictions and sentences, appellant raises three questions that we reorder and restate as follows[1]:

1. Did the hearing court err in denying appellant's motion to suppress evidence obtained following a *Terry* stop[2] that led to appellant's arrest and a search of his vehicle?

2. Did the trial court violate the prohibition against double jeopardy by changing its ruling on appellant's Motion for Judgment of Acquittal on

[1] Appellant presents the following questions in his brief:

1. Did the lower court err in considering, over objection, anonymous victim impact testimony at Mr. Conte's sentencing hearing?

2. Did the lower court err in "correct[ing]" its prior decision to grant Mr. Conte's Motion for Judgment of Acquittal as to possession of heroin, and allowing the charges of possession of heroin and possession of heroin with the intent to distribute to go forward to the jury?

3. Did the lower court err in denying Mr. Conte's motion to suppress evidence?

[2] A *Terry* stop is a brief investigative detention that takes its name from the seminal case addressing Fourth Amendment limits on such a seizure. *See Terry v. Ohio*, 392 U.S. 1 (1968).

the charge of heroin possession, and thereafter sending that charge, as well as a related charge of possession with intent to distribute, to the jury?

3. Did the sentencing court err in hearing unsworn statements from anonymous victim impact witnesses?

For the reasons that follow, we hold that the hearing court did not err in denying appellant's motion to suppress. Although we agree with appellant that the trial court erred in changing its ruling on the possession charge, it did not err in sending the possession with intent to distribute count to the jury. On the sentencing challenge, we conclude that appellant's complaints are not preserved for appellate review. Accordingly, we shall reverse in part and affirm in part.

BACKGROUND

Shortly after 3 a.m. on September 9, 2015, police and paramedics in Cecil County responded to a 911 report of multiple shootings in the Lakeside Park neighborhood of North East. Two victims, George Thodos and Shannon Burlin, survived, but Joshua Hodge later died of multiple gunshot wounds. Because appellant does not challenge the sufficiency of the evidence supporting his convictions, we summarize the trial record to provide context for the issues addressed in this appeal. *See Washington v. State*, 180 Md. App. 458, 461 n.2 (2008).

At trial, the State presented evidence that earlier that evening, appellant sent a group text message, stating that he was at 418 Lakeside Drive to offer "samples" of a "new batch" of heroin. Among those who received this message were Lakeside Park residents Joshua Hodge and Frank Thodos.

When George Thodos, Frank's cousin, learned that appellant was on Lakeside Drive, he informed Frank that he was going there to confront appellant. George had been angry since the week before, when appellant left Frank without a ride back from his mother's home in Elkton. Separately, Mr. Hodge and Ms. Burlin walked from their residence to 418 Lakeside Drive, planning to accept appellant's offer of samples. Coincidentally, they arrived at the same time as George Thodos.

When the three visitors entered the residence, George Thodos immediately assaulted appellant. Joshua Hodge broke up the fight. According to Shannon Burlin, while appellant was still down on his knees, he pulled a handgun from his waist area and starting firing. Ms. Burlin was shot once in the neck; Mr. Thodos was shot once in the hip; and Mr. Hodge was shot four times, in the abdomen, hip, thigh, and arm. The casings at the scene of the shooting were marked "380 auto."

Joshua Hodge and Shannon Burlin fled to the nearby residence of Justin Hodge, a family member who called 911. Joshua told Justin that "D shot me."

Witnesses reported to responding police officers that appellant, an African-American male known as "D," fled in a dark blue minivan with Delaware tags and that he was known to frequent Elkton near the former Brothers Pizza shop. Less than an hour after receiving a "be on the look-out" ("BOLO") broadcast relaying that information, Elkton police found appellant's vehicle in the parking lot next to that shop; they arrested appellant as he was hiding nearby.

Executing a search warrant for the van, police recovered heroin, both uncut and packaged for street sale, along with other packaging materials and three cell phones. Also in the van was a .38 semiautomatic handgun and ammunition, as well as ammunition for a .357 handgun.

Appellant admitted that he was present during the shootings but claimed self-defense. He testified that it was George Thodos who, after assaulting him, produced the gun and that the weapon fired as they struggled over it. After appellant got control of the gun, George Thodos ran, and appellant "fired one shot" at him.

The jury acquitted appellant of second degree murder in Joshua Hodge's death and attempted second degree murder in the shooting of Shannon Burlin. He was convicted of attempted second degree murder in George Thodos's shooting, as well as first degree assault against all three victims, possession of heroin, possession of heroin with intent to distribute, and use of a firearm in the commission of a crime of violence.

At sentencing, the court "rejected" documents submitted by individuals who were not present in court. Relatives of Mr. Hodge, some of whom remained anonymous with the court's permission, made victim impact statements. Appellant was sentenced to twenty-five years for first degree assault of Mr. Hodge, a consecutive twenty years for first degree assault of Ms. Burlin, ten years concurrent for the attempted murder of Mr. Thodos, ten years concurrent for possession with intent to distribute, and a mandatory five years for use of a handgun. The convictions for possession and first degree assault on Mr. Thodos were merged for sentencing purposes.

We shall add pertinent facts in our discussion of the issues raised by appellant.

DISCUSSION

I. Suppression Challenges

Appellant contends that he "was the subject of an unlawful stop, and an unlawful search of his person, and the fruit of those Fourth Amendment violations was the warrant – otherwise lacking probable cause – used to search a vehicle near the scene of his arrest." Specifically, he argues that (1) "[p]olice lacked reasonable suspicion to detain" him; (2) "[p]olice lacked reasonable suspicion to search [his] person"; (3) "[a]ssuming that [p]olice could search [his] person, the State failed to show a lawful basis for his continued detention" and arrest; and (4) "[t]he lower court erred in failing to suppress the fruit of the unlawful stop…or unlawful search[,]" which includes the drugs, paraphernalia, gun, ammunition, and cell phones recovered during the warrant search of his vehicle.

The State counters that appellant's suppression challenge must be limited to the two arguments defense counsel made at the suppression hearing, which were that police lacked probable cause for the arrest and that there was no probable cause for the warrant authorizing the search of appellant's van. On the merits of those two issues, the State argues that police had reasonable suspicion to stop appellant and then probable cause to arrest him after they found pills on him; that "the only information gleaned from Conte's arrest was his identity, which is not a suppressible 'fruit'"; and that given the witness

identifications of appellant and his vehicle, there was probable cause to support the search warrant.

After reviewing the record of the suppression hearing and the legal standards governing appellant's Fourth Amendment challenges, we shall address – and reject – each of his contentions in turn.

A. Fourth Amendment Suppression

The Fourth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, prohibits "unreasonable searches and seizures." U.S. Const., amends. IV, XIV. The Court of Appeals recently summarized the standards governing warrantless seizures and searches as follows:

> For the Fourth Amendment's purposes, a "seizure" of a person is any nonconsensual detention. There are two types of seizures of a person: (1) an arrest, whether formal or *de facto*, which must be supported by probable cause; and (2) a *Terry* stop, which must be supported by reasonable articulable suspicion. During a *Terry* stop, for the sake of the safety of the law enforcement officer and others, a law enforcement officer may frisk a person who the law enforcement officer has reason to believe is armed and dangerous.
>
> A law enforcement officer has reasonable articulable suspicion that a person is armed and dangerous where, under the totality of the circumstances, and based on reasonable inferences from particularized facts in light of the law enforcement officer's experience, a reasonably prudent law enforcement officer would have felt that he or she was in danger. Because a court considers the totality of the circumstances, the court must not parse out each individual circumstance; in other words, a court must not engage in a "divide and conquer" analysis. Indeed, a circumstance may be innocent by itself, but appear suspicious when considered in combination with other circumstances.
>
> Reasonable articulable suspicion is a commonsense, nontechnical concept that depends on practical aspects of day-to-day life; as such, a court

> must give due deference to a law enforcement officer's experience and specialized training, which enable the law enforcement officer to make inferences that might elude a civilian. That said, although reasonable articulable suspicion is a lesser standard than probable cause, it must be greater than an inchoate and unparticularized suspicion or hunch. And, a law enforcement officer may not frisk a defendant simply because the law enforcement officer initiated a lawful…stop.
>
> A frisk is different from a search of a person. Whereas a search has the broad purpose of discovering incriminating evidence, a frisk has the limited purpose of discovering weapons.

Norman v. State, 452 Md. 373, 386-88 (2017) (citations omitted) (plurality opinion), *pet. for cert. filed*, (U.S. Jun. 23, 2017) (No. 16-47).

We review the legality of any Fourth Amendment encounter, whether it is a *Terry* stop, a *Terry* frisk, or an arrest, as a mixed question of law and fact. *See id.* at 386-87. We look for clear error in the suppression court's first-level factual findings, then determine *de novo* whether there was a constitutionally sufficient basis to make the seizure or search in question. *See id.*; *Taylor v. State*, 448 Md. 242, 244 (2015); *Varriale v. State*, 444 Md. 400, 410 (2016). We look only to the suppression hearing record and view all evidence in the light most favorable to the prevailing party on each suppression issue. *See Varriale*, 444 Md. at 410.

B. The Suppression Record

At the outset of the suppression hearing on March 11, 2016, defense counsel stated that the issues were "twofold," explaining that appellant was challenging, first, "the illegal arrest of Mr. Conte by the Elkton police department based on lack of probable cause," and second, "a lack of probable cause in the search warrant which was issued for

what police believed to be Mr. Conte's vehicle." The court heard testimony from the three police officers who found appellant's van, arrested him, and obtained the search warrant.

Sergeant Kathleen Ford, a 22 year veteran of the Elkton Police Department, testified that on September 9, 2015, she received information about the Lakeside Drive shootings. "They had dispatched a description of a vehicle to be on the lookout for a suspect vehicle as an older dark blue minivan with unknown Delaware registration." The suspected driver was "a black male" who "went by the nickname of 'D.'" He "possibly would be coming to the Elkton area," according to "witnesses at the scene" who "said he frequented that area next to the old Brothers pizza shop. There's some apartments there."

After speaking with the duty officer in the Cecil County Sheriff's Department and consulting a database regarding suspects with that nickname, Sergeant Ford directed two other officers "to respond to that area to begin looking for any kind of vehicle that matched the description, and then…left the office to assist them in doing so." She recounted what happened thereafter:

> Officer Saulsbury located a vehicle which matched the description, had called out the tag to dispatch, advised that the vehicle was very warm to the touch as if it had just been driven and turned off. There was no condensation on the windows as there were [on] other cars next to it. So I was on my way to his location, which was the municipal lot just to the rear of old Brothers pizza, . . . I was on my way there from the police department and when I was at Bow Street and Main Street I stopped at the stop sign and I saw – it was the middle of the night, so 3:50 a.m. – and I saw a subject who was walking west on Main Street from the area that is cut between – that has the steps that cut between Main Street and that municipal lot – was walking down west on Main Street. As soon as they saw my vehicle, the subject stepped off the sidewalk onto the street and

> quickly began crossing the street, had like a large tan-colored shirt that was kind of pulled up around his ears and face and was hunched and walking at a quick pace, so…I immediately wanted to find out…what the person was doing, if it was coming from that vehicle. I turned to see where the person went and they immediately went out of my sight for like two seconds…as they turned the corner into the municipal lot behind Minihane's restaurant, and I hurried up and turned my vehicle into that lot to see where the person went. I didn't see him at first. I kind of used my area lights and went all through that parking lot. They weren't there. And I knew that I was so close behind him that the only place they could have gone was off – there's like a three or four foot wall drop into a grassy area to the left, and I kind of thought that was the only place they could have gone to be out of my sight. So I got out on foot and I asked Officer Saulsbury to respond to the location as well to help me search. And I was looking over the wall for him when I saw a subject crouched in the corner of the building directly underneath of me wearing the tan shirt with his hands and arms over his head. At that point…I ordered him to show me his hands and to lie face down on the ground, and he complied.

Before making direct contact with the pedestrian, Sergeant Ford was not able to discern the individual's height, weight, gender, or race, but "[t]here was no one else on the street." She found it significant that "immediate[ly] upon seeing me he changed their [sic] direction and quickened his pace…causing me to believe that they may be trying to evade a police officer[.]" After the pedestrian complied with her directions, she "jumped off the wall next to him and decided to detain him and search him for weapons to see if he was…in possession of a weapon."

Because Officer Saulsbury arrived at that moment, she "asked him to search him…since he was a male[.]" Although they did not find a weapon, they "found a bottle with some pills in it…on his person[.]" In accordance with "usual procedure," they took appellant "into custody and transport[ed]" him to the police station, where he was strip searched "for further drugs."

Sergeant Ford took a photo of appellant and transmitted it so it could be sent "to detectives at the scene in North East." Within "[a] few minutes[,]" she was informed "that it was a positive I.D." by witnesses at the shooting scene. In addition, the identification in appellant's wallet was matched to the last name on the registration for the van.

Detective Jeremy Strohecker, of the Cecil County Sheriff's Department, testified that he received information from witnesses at the scene of the shooting. "[T]he general consensus was" that the suspected shooter was "a black male wearing dark clothing," who "was known as 'D'" and "operates a dark blue minivan" with a Delaware registration. The suspect reportedly could "be headed to the Elkton area to Brothers, around Brothers pizza area, because he's known to frequent the area" and "believed to live in an apartment to the rear of" that location.

After a "BOLO" that "a particular vehicle and suspect description" was "sent out to other local law enforcement[,]" Detective Strohecker received information that appellant had been detained in Elkton and that his blue minivan had been located nearby. He determined that the vehicle was registered to appellant's sister. According to the sister, she and appellant had "swapped vehicles" without switching registrations.

Detective Strohecker obtained a search warrant for the vehicle. His warrant application, submitted at "1625" (i.e., 4:25 p.m.) on September 9, stated that on that date, police responded to a triple shooting at 418 Lakeside Drive, giving details of that crime and crime scene. Thereafter,

> [a] suspect and a vehicle description was broadcasted over the Police radio. Sgt Kathy Ford (*Elkton Town Police/Uniform Patrol*) observed the vehicle and a suspect matching the description a short time later in the Main Street of Elkton area. The suspect was positively identified as Dennis Allen Conte (B/M DOB 1/13/93), was taken into custody and transported to the Sheriff's Office.

Detective Strohecker further stated that he was

> satisfied that there is probable cause to believe that there is now being concealed certain evidence, namely:
>
> That the vehicle, 2004 Chevrolet Venture bearing Delaware registration PC303813 may well contain…
> *Telephone communication information
> *Documents, Tape Recordings, Photographs, etc
> *Articles of Personal Property, etc
> *Physical Evidence
> (as more completely outlined above)

Elkton Police Officer Thomas Saulsbury testified that he responded to the BOLO for the suspect and vehicle involved in the Lakeside Drive shootings. In the parking lot behind the building identified in the BOLO, he observed a blue minivan matching the suspect vehicle description. The vehicle "was warm," indicating that it "had just been driven recently." Because "it was a little chillier that night[,]…there was condensation on all the other vehicles except for this vehicle, which led [him] to believe it had just possibly shown up." After notifying dispatch, Officer Saulsbury learned "that the vehicle belonged to…Deanna, Deonna Conte[.]"

At that point, Sergeant Ford advised him that "she observed a black male walking down Main Street towards Bow Street," near the "stairway that leads from the area that we found the vehicle up to Main Street." Because the pedestrian "could have been the driver of the vehicle," Sergeant Ford "started heading towards him to attempt to make

contact." As Officer Saulsbury also "headed towards that direction," he "heard Sergeant Ford yelling" and ran to find "her on top of the black male[.]" He performed a pat-down at the scene and "recovered…a pill bottle with unknown pills" and "identification for Dennis Allen Conte."

Claiming that the detention was unjustified, defense counsel argued, with respect to the first suppression issue, that police did not have sufficient grounds to link appellant

> to the vehicle which Officer Saulsbury found down in the parking lot. I don't believe that was an arrest that was based on probable cause or even at that point in time reasonable suspicion, and I would argue that, based on that illegal arrest, certain information was gathered from Mr. Conte and certain evidence was gathered, and based on that illegal arrest I believe that all that evidence should be suppressed.

Second, defense counsel argued, the "four corners of the search warrant" did not "contain probable cause for the issuance of that…warrant." In counsel's view, the warrant application did not contain "enough information to determine there was probable cause that Mr. Conte was, in fact, the suspect" or that the parked "vehicle could harbor some evidence of that crime."

The hearing court denied the motion to suppress, detailing its factual findings and legal conclusions as follows:

> All right. The Court listened carefully to the testimony and has re-read the warrant.
>
> Going through the history, there's a shooting in North East. There is a vehicle that's identified as various colors, but everybody is consistent that it's a dark minivan with Delaware plates. A BOLO is sent out pursuant to that and the information that the suspect frequents the area in the municipal parking lot and in the area of formerly known as Brothers pizza shop. The Elkton officers go to that area to investigate and they find a vehicle

matching the description of the minivan with Delaware plates that's dark blue that coincidentally has a warm engine and no condensation, which differs it from every other vehicle in the parking lot. That is, the others are cold without condensation. This vehicle has been driven recently and doesn't have the condensation that the other cars have. This is at 3:00 a.m., No one else is out and about, and the police officers see an individual walking in the area of the stairs. To get from the parking lot to Main Street one can go either up Bow Street or up the stairs, so it is – one can make the conclusion that this person walking near Main Street has come from the parking lot. The stairs go from Main Street to the parking lot and no place else. The description of a black male is admittedly vague and it's the only description. On the other hand, this is the only person out and about near a dark blue minivan. So he's later found in the area of the parking lot within I would guess around a hundred yards from the parking lot based on where he was found behind the wall and the grassy area behind the barber shop that is on Main Street. Again, a very short distance. He's found hiding and trying to hide behind the wall there. Certainly at that point given the vehicle, the only person out and about, the vehicle matches the description given in the BOLO, the suspect is near the vehicle and then hides after the officer, after the sergeant sees him. The Court certainly finds there's probable cause for a *Terry* stop at that point, and once he's searched pursuant to the stop and pills are found in his pocket, there is probable cause for further investigation and, in fact, an arrest for having the pills.

So the Court finds that the stop, that is, Sergeant Ford's stop and Sergeant Ford and Officer Saulsbury's seizure of Mr. Conte is appropriate and legal and, therefore, your request of a motion to suppress that seizure is denied.

As to the search warrant, the Court notes that this says, "A suspect and vehicle description was broadcasted over the police radio. Sergeant Kathy Ford observed the vehicle and suspect matching the description a short time later in the Main Street of Elkton area." Sergeant Ford clearly relied on that information. In the Court's opinion it does not have to be set out as a specific description. This tells what action was taken, not what was being looked for here, and the Court finds that she, too, acted appropriately there, and that the warrant, looking at the four corners of the application and affidavit for the search warrant as well as the warrant itself is sufficient to permit the officers involved to search the – seize and search the vehicle involved.

C. Appellant's Fourth Amendment Challenges

1. *Terry* Stop

Appellant contends that "when Sgt. Ford stopped the individual of unknown race or gender, she lacked reasonable suspicion to believe that individual was associated with the minivan" or with "the crime in this case." In appellant's view, "the connection between the vehicle and the crime was tenuous, [and] the connection between [him] and the vehicle was spurious." Specifically, he argues:

> It is, ultimately, the stop of Mr. Conte which is at issue and, thus, it was incumbent upon the State to draw a connection between the vehicle and the offense, and in turn, between Mr. Conte and the vehicle, in order to draw the necessary connection between Mr. Conte and the offense. In this regard, there was truly no reason to stop Mr. Conte other than the fact that he was the first person seen after police discovered the vehicle. While there were no other individuals in the area, the record equally showed that there were "some apartments there." Hence, pedestrian traffic – on Main Street – should not be considered either unusual, nor something which would link the pedestrian to the van police had discovered (as opposed to the other vehicles found parked in the vicinity). Police knew that an African-American man was involved in the shooting and Sgt. Ford candidly admitted that she did not know the gender, race, height or weight of the person she stopped prior to the seizure. Indeed, the only basis for the stop was the fact that Sgt. Ford saw an individual walking down Main Street, and that individual began to walk away and obscure his face after discerning that [he] was being followed by police. While this piqued Sgt. Ford's interest, and caused her to believe the individual was evading police, these acts did not create a connection between the individual, the van, or the offense. The officer merely had a hunch for the stop.

The State responds that this argument was not preserved because defense counsel did not make it at the suppression hearing. Instead, the State asserts, the only two arguments presented by defense counsel were that (1) appellant was illegally arrested, leading to the gathering of "certain information" and "certain evidence" that must be

excluded, and (2) the search warrant for appellant's vehicle was not based on enough facts, independent of the unlawful arrest, to establish probable cause.

Appellant replies that defense counsel preserved all possible Fourth Amendment challenges by arguing that "certain information was gathered from Mr. Conte…and based on that illegal arrest I believe that all that evidence should be suppressed."

Maryland Rule 4-252(a)(3) provides that a motion to suppress evidence based on "[a]n unlawful search [or] seizure" must "be raised . . . in conformity with this Rule and if not so raised [is] waived[.]" This rules requires that a motion to exclude evidence under the Fourth Amendment must "state the basis for suppression of evidence, and set forth the legal authority on which it is based." *Sinclair v. State*, 444 Md. 16, 29 (2015). "'The obvious and necessary purpose…is to alert both the court and the prosecutor to the precise nature of the complaint, in order that the prosecutor have a fair opportunity to defend against it and that the court understand the issue before it.'" *Id*. (quoting *Denicolis v. State,* 378 Md. 646, 660 (2003)).

We agree that the two issues identified by defense counsel at the suppression hearing did not include an express challenge to the *Terry* stop. Yet, at the close of evidence, defense counsel reviewed the events leading up to appellant's detention, then argued that he did not "believe that was an arrest that was based on probable cause or even at that point in time reasonable suspicion[.]" In denying appellant's motion, the hearing court expressly ruled that "there's probable cause for a *Terry* stop" and that "the stop, that is, Sergeant Ford's stop…is appropriate and legal[.]" Because the legality of

that stop was addressed in argument and decided by the court, we will review that determination. *See* Md. Rule 4-252; Md. Rule 8-131(a).

Given that the purpose of a *Terry* stop is "to prevent or to detect crime[,]" any "reasonable articulable suspicion for a stop must be framed in terms of that purpose." *Ames v. State*, 231 Md. App. 662, 671 (2017). In evaluating a suppression challenge to a particular *Terry* stop, courts generally consider the following "reasonable suspicion" factors:

> (1) the particularity of the description of the offender or the vehicle in which he fled; (2) the size of the area in which the offender might be found, as indicated by such facts as the elapsed time since the crime occurred; (3) the number of persons about in that area; (4) the known or probable direction of the offender's flight; (5) observed activity by the particular person stopped; and (6) knowledge or suspicion that the person or vehicle stopped has been involved in other criminality of the type presently under investigation.
>
> All of these variables, considered as a whole picture, must establish a "minimum level of objective justification" of the seizure. Our determination will not rest on the actual motivations of the police officer. Rather, the objective justification requires us to evaluate whether a reasonable and prudent police officer would have been warranted in believing that Petitioner had been involved in criminal activity.

Cartnail v. State, 359 Md. 272, 289 (2000) (quoting 4 Wayne R. LaFave, *Search and Seizure* § 9.4(g), at 195 (3d ed.) (1996 & 2000 Supp.)); *see Stokes v. State*, 362 Md. 407, 420-21 (2001).

Applying these factors, we conclude that Sergeant Ford lawfully stopped appellant "to detect crime," based on a reasonable suspicion that he was involved in the Lakeside Drive shootings. Based on the first four factors – description, area, presence of others,

and direction of flight – both appellant and the van were directly linked to the shootings on Lakeside Drive, through the BOLO based on the report of witnesses who identified appellant, his vehicle, and his likely destination. The information received by Sgt. Ford was that the shooter, who had just fled in an older model dark blue minivan with Delaware plates, was a black male known as "D." Witnesses predicted that he might drive to the area near a specific building in Elkton, the former Brothers Pizza, which was adjacent to where he reportedly lived. Shortly after being dispatched by Sergeant Ford, Officer Saulsbury found a van matching that description in all respects, parked in the pinpointed location. The van differed from all surrounding parked vehicles because it was the only one with indicia of having recently been driven, in that it was both warm to the touch and without condensation. This was sufficient to establish a reasonable suspicion that the van was the vehicle in which the Lakeside Drive shooter fled.

Those same four factors, when considered in combination with the fifth factor – "the observed activity by the person stopped" – also support a reasonable suspicion that the individual detained by Sergeant Ford had just arrived in the suspected getaway vehicle and was therefore involved in the shootings. The veteran sergeant was driving toward where the van was parked when, at 3:50 a.m., she observed a single individual on foot. He was near the stairs that led directly to the street from the lot where the van had recently been parked. That location also was near the apartments identified as the suspected shooter's residence. Upon seeing Sgt. Ford's marked patrol car, the pedestrian immediately crossed the street, hurried away, and disappeared. Knowing the area well,

Sgt. Ford quickly located the individual hiding, crouched at the bottom of a wall, against a building with a jacket pulled over his or her head. Although Sgt. Ford could not discern gender or race, the evasive behavior of this lone pedestrian, at a location and time consistent with the anticipated flight of the suspected shooter, provided an objectively reasonable basis to suspect that the pedestrian had just arrived in the suspected getaway vehicle. Because "a reasonable and prudent police officer would have been warranted in" stopping the pedestrian based on a reasonable suspicion that he was involved in the shootings, the hearing court did not err in declining to suppress evidence on the basis of the *Terry* stop.

2. *Terry* Frisk

Appellant next argues that,

> assuming that police could lawfully stop [him,]" they had no basis to search his person. Sgt. Ford testified that the decision to search Mr. Conte was automatic: upon seizing Mr. Conte she "decided to detain him and search him for weapons to see if he was, in fact, in possession of a weapon." Likewise, the motions court found only that Mr. Conte was "searched pursuant to the stop[.]"

In appellant's view, the suppression court "erred in conflating the ability to conduct a '*Terry* stop' with the narrow and unrelated ability to conduct a '*Terry* search'" because "Maryland law is clear" that "the frisking officer [must] himself expressly articulate the specific reasons he had for believing that the frisk was necessary." *Ames v. State*, 231 Md. App. 662, 674 (2017); *see also Graham v. State*, 146 Md. App. 327, 359-60 (2002) ("For a good frisk, it is not enough that in the abstract facts have been developed that might, objectively, permit some officer somewhere to conclude that the

suspect or stopped was armed and dangerous. It is required that the frisking officer actually articulate the factors that lead to his reasonable suspicion that a frisk was necessary for his own protection."). Appellant argues that his *Terry* frisk was unlawful because "neither Sgt. Ford nor Officer Saulsbury testified concerning any reason to believe that [appellant] was armed and dangerous."

To be sure, the State generally bears the burden of production and proof to show that a warrantless Fourth Amendment intrusion was constitutionally justified. *See generally Grant v. State*, 449 Md. 1, 17 (2016) ("The government has the burden of overcoming…presumption" that a warrantless intrusion was unreasonable.). As appellant points out, the State generally cannot satisfy its burden without presenting evidence detailing the circumstances surrounding a challenged search. *Cf., e.g., id.* at 29 (2016) ("where the evidence of Deputy Atkins' detection of marijuana odor was 'not clear[,]' the State failed to meet its burden of showing that Deputy Atkins' warrantless search was lawful"); *Ames*, 231 Md. App. at 680-81 ("As Officer Aungst performed his 'open-handed pat-down of [the appellant's] outer garments,' he felt nothing in the waistband but he did detect a soft 'large bulge' in the appellant's left front pants pocket. We know of no theory by which a soft bulge could reasonably be interpreted to be a gun, a knife, a blackjack, or brass knuckles.").

The same evidence that raised a reasonable suspicion that the person stopped by Sergeant Ford was the suspect who just shot three people also raised a reasonable suspicion that he was armed and dangerous. *Cf., e.g., Faulkner v. State*, 54 Md. App.

113, 120–21 (1983) ("The 'frisk' for weapons was a justifiable response to the officer's reasonable belief that he was dealing with a possibly armed and dangerous suspect" in a shooting the previous day), *aff'd on other grounds*, 301 Md. 482 (1984). Because appellant did not challenge that frisk, however, neither Sergeant Ford, nor Officer Saulsbury, expressly articulated that concern. We agree with the State that by failing to raise any complaint regarding the frisk at the suppression hearing, appellant waived his right to challenge that search in this Court. *Cf., e.g., Ray v. State*, 435 Md. 1, 19 (2013) (holding this rule "dictates that Petitioner, by failing to advance before the Circuit Court the theory that his unlawful arrest requires suppression of all evidence that was the fruit of that unlawful arrest, waived the right to have that claim litigated on direct appeal"); *Savoy v. State*, 218 Md. App. 130, 142 (2014) ("Because appellant did not raise his *Miranda* theory of suppression in the circuit court, we hold that pursuant to Rule 4–252, that argument is affirmatively waived.").

3. Scope of Frisk and Probable Cause for Arrest

Appellant alternatively contends that, "[e]ven if police could lawfully seize [him] and search his person, police did not obtain a valid basis to continue their seizure and…did not develop probable cause for an arrest based on the fruit of that search," because "[t]here was no testimony showing how or why Officer Saulsbury believed the incriminating nature of the pill bottle was 'immediately apparent.'" Citing our recent warning in *Ames*, 231 Md. App. at 679-85, against converting a *Terry* frisk for weapons into a broader search for evidence, he argues:

> there was a stop, a pat-down search, and recovery of a "pill bottle," with absolutely no evidentiary support for how that pill bottle was found within the limited scope of a valid *Terry* search. As *Ames* states, an officer must "proceed[] with the pat-down until he was satisfied that the appellant had no weapons" because "[w]hatever else the appellant may have had on his person was constitutionally beside the point." [*Ames*, 231 Md. App. at 681.] Likewise, in this case; the State failed to show that the police discerned the "pill bottle" within the scope of a valid search of Mr. Conte's person, and certainly did not show that the discovery of this bottle provided probable cause.

Fourth Amendment case law is clear that the permissible scope of a *Terry* frisk is narrow because

> [a] frisk is different from a search of a person. Whereas a search has the broad purpose of discovering incriminating evidence, a frisk has the limited purpose of discovering weapons. In *In re David S.*, 367 Md. 523, 545 (2002), [the Court of Appeals] stated:
>
> > The objective [of a frisk] is to discover weapons readily available to a suspect that may be used against the officer, not to ferret out carefully concealed items that could not be accessed without some difficulty. General exploratory searches are not permitted, and police officers must distinguish between the need to protect themselves and the desire to uncover incriminating evidence.
>
> (Citation, brackets, and internal quotation marks omitted). In other words, "[t]he officer may not exceed the limited scope of a pat[ ]down for weapons to search for contraband."

Norman, 452 Md. at 388 (some citations omitted).

During a *Terry* frisk, therefore, an officer may seize from the detainee's person an item that is not a weapon only when the illegality of that item is "immediately apparent." *See Minnesota v. Dickerson*, 508 U.S. 366, 375-76 (1993). As Judge Moylan explained in *Ames*, under the so-called "plain feel" doctrine,

> [j]ust as with the plain view doctrine, warrantless seizure is only permitted if the "contour or mass" of the object that is felt "makes its identity

> immediately apparent" as contraband, to the probable cause level. A mere piquing of curiosity and a desire to investigate further do not suffice. *Dickerson* made it clear, 508 U.S. at 378, 113 S. Ct. 2130, that any further "squeezing, sliding, and otherwise manipulating" of the object in order to confirm the initial suspicion is not permitted.

231 Md. App. at 681 n.3.

We agree with appellant that this suppression record does not contain evidence from which we could determine that the pill bottle was recovered during an appropriately limited "plain feel" *Terry* frisk, or that the unidentified pills in that bottle supplied probable cause for his arrest. But, as we have explained, this gap in the suppression record reflects that the only challenged component of appellant's street encounter was whether police had enough information linking appellant to the van and the shootings to justify their warrantless stop. Defense counsel never argued that the *Terry* frisk went beyond a pat down for weapons. Nor did defense counsel contest whether the pills recovered from appellant provided probable cause for appellant's arrest. Although the suppression court ruled that the stop was justified, and that the ensuing arrest based on the evidence during that stop was lawful, it did not address the legality of the search that yielded such evidence or explain why that evidence established police probable cause to arrest appellant. Having failed to present these grounds to the suppression court, appellant may not raise them for the first time on appeal. *See* Md. Rule 4-252.

4. Search Warrant

Appellant, "piggybacking" on the foregoing Fourth Amendment complaints, challenges the admission of the incriminating evidence recovered during the warrant

search of his vehicle. This included drugs, paraphernalia, and cell phones supporting the charges of possession with intent to distribute, as well as the handgun and ammunition supporting the State's theory that the gun used in the shootings belonged to appellant. Appellant contends that, when unconstitutionally obtained information is excised from the warrant application, there was no probable cause for the warrant.

The Court of Appeals recently synthesized the legal standards governing judicial review of a search warrant, as follows:

> The Fourth Amendment to the United States Constitution prohibits the issuance of any warrant except "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The Supreme Court has emphasized that "the probable cause standard is a 'practical, nontechnical conception' that deals with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" Thus, "'the *quanta*…of proof' appropriate in ordinary judicial proceedings are inapplicable to the decision to issue a warrant. Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the [probable-cause] decision."
>
> Probable cause is, moreover, "a fluid concept," "incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances[.] The facts and circumstances set forth in the affidavit, viewed in their totality, need only provide "*a fair probability* that contraband or evidence of a crime will be found in a particular place." The Supreme Court has further noted that probable cause may be based on "common-sense conclusions about human behavior."
>
> The Supreme Court has identified "the Fourth Amendment's strong preference for searches conducted pursuant to a warrant." Moreover, because "[r]easonable minds frequently may differ on the question whether a particular affidavit establishes probable cause," the Court has "thus concluded that the preference for warrants is most appropriately effectuated by according 'great deference' to a magistrate's determination."

> Consequently, "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall."
>
> The deference owed to the judge who issued the warrant has produced the following standard by which a warrant is assessed for compliance with the dictates of the Fourth Amendment: **"[S]o long as the magistrate had a 'substantial basis for…conclud[ing]' that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more."** As a result, once the reviewing court finds a substantial basis for the probable cause determination, that court is required to uphold the warrant.

Moats v. State, __ Md. __, No. 89, Sept. Term 2016, 2017 WL 3764567, at *7-8 (Aug. 31, 2017) (citations omitted; emphasis added).

If a warrant application contains information obtained as a result of an unlawful search or seizure, a reviewing court must determine whether, after such "constitutionally tainted information is excised from the warrant, the remaining information is sufficient to support a finding of probable cause." *Williams v. State*, 372 Md. 386, 419 (2002). We need not make that determination here, however, because the *Terry* stop was lawful, and appellant waived any challenge to the scope of the *Terry* frisk and the grounds for his arrest. As appellant tacitly concedes, the unedited contents of the warrant application established a "fair probability" that appellant's vehicle, which was found just "a short time" after the shootings, would contain evidence incriminating appellant in those crimes. *Cf., e.g., State v. Ward*, 350 Md. 372, 389 (1998) (finding substantial basis for warrant to search vehicle for gun used in murder, based on affidavit alleging defendant drove vehicle within 48 hours, because "[i]nasmuch as his handgun could be considered an item of continuing utility and value to him," the defendant "might be moving the gun and

ammunition between his residence and his vehicle, so that there was probable cause to believe that evidence of the crime could be found in [the] vehicle"); *Abeokuto v. State*, 391 Md. 289, 338 (2006) (finding substantial basis for warrant to search defendant's vehicle, in which murdered child was last seen); *State v. Johnson*, 208 Md. App. 573, 605 (2012) (recognizing that substantial basis for search warrant may arise from information that a weapon used by a defendant who is arrested shortly after crime "was likely to be found in a place accessible to him – his home or car").

5. Conclusion

Finding no preserved Fourth Amendment violation, we conclude that the hearing court did not err in denying appellant's motion to suppress.

II. Double Jeopardy Challenges

In his second assignment of error, appellant challenges his convictions for possession of heroin with intent to distribute (Count 7) and possession of heroin (Count 8). He contends that the trial court violated the prohibition against double jeopardy when, after initially granting his motion for a judgment of acquittal on the possession charge, the court later "corrected" that ruling and sent that count to the jury for a verdict. In addition, appellant argues that his conviction for possession of heroin with intent to distribute must be reversed because the acquittal on the possession charge necessitated acquittal on that related charge.

The State contends that neither conviction is barred by double jeopardy because "the trial court was permitted to 'correct' its initial decision granting Conte's motion for

judgment of acquittal after it realized, almost immediately, that it had mistakenly failed to consider the possibility of constructive possession." Characterizing the acquittal as "a preliminary ruling," the State argues that "[d]ouble jeopardy principles did not prevent the court from correcting that initial mistake after ongoing discussion with counsel brought the error to its attention almost immediately."

For the reasons explained below, we must reverse appellant's conviction for possession of heroin under Count 8, but we shall affirm his conviction for possession of heroin with intent to distribute under Count 7.

A. Double Jeopardy Based on Judgment of Acquittal

"Both the Fifth Amendment to the Constitution of the United States and the common law of Maryland provide for a prohibition on double jeopardy." *Scott v. State*, 454 Md. 146, 152 (2017). "An acquittal effectively bars retrial of a defendant because double jeopardy principles 'forbid[ ] a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.'" *Giddins v. State*, 393 Md. 1, 18-19 (2006) (internal citations omitted). Accordingly, "'once the trier of fact in a criminal case, whether it be the jury or the judge, intentionally renders a verdict of not guilty, the verdict is final and the defendant cannot later be…found guilty of the same charge.'" *Johnson v. State*, 452 Md. 702, 725 (2017) (internal citations omitted).

"The Supreme Court has defined an acquittal as the 'resolution, correct or not, of some or all of the factual elements of the offense charged.'" *Giddins*, 393 Md. at 19

(quoting *Smith v. Massachusetts*, 543 U.S. 462, 468 (2005)). "[T]he grant of a motion for judgment of acquittal has the same force and effect as the return of a verdict of not guilty by the trier of fact." *Brooks v. State*, 299 Md. 146, 151 (1984).

The bar of double jeopardy cannot be lifted simply because counsel persuades the court that its decision to grant a judgment of acquittal was wrong. For example, in *Pugh v. State*, 271 Md. 701, 705-06 (1974), the Court of Appeals cautioned that "once a verdict of not guilty has been rendered at…a criminal trial, that verdict is final and cannot be set aside[,]" even when that "acquittal was based on a mistake of law or a mistake of fact." In *Pugh*, as in this case, the State argued that the trial court did not intentionally acquit on the challenged charge. The *Pugh* Court disagreed, explaining that

> where a judge "obviously inadvertently" says one thing when he means something else, and immediately thereafter corrects himself, a "verdict" would not be rendered for purposes of…the prohibition against double jeopardy. However, the trial judge's initial statement of "not guilty" in this case was not "inadvertent" or a "slip of the tongue." Instead it represented an intended decision based upon the judge's view that the prosecution had failed to prove possession of cocaine in sufficient quantity as to indicate an intent to distribute. When the prosecution then argued that its case was grounded upon an actual sale, rather than an inference of distribution based on possession of the drug in sufficient quantity, the trial judge changed his mind. He decided that, in light of this theory of the prosecution, the evidence was sufficient to show distribution or an intent to distribute the drug.
>
> **Once a trial judge intentionally renders a verdict of "not guilty" on a criminal charge, the prohibition against double jeopardy does not permit him to change his mind.**

Id. at 707 (emphasis added).

Similarly, in *Brooks,* 299 Md. at 153-55, the trial court, concluding that the evidence was insufficient to establish a conspiracy, granted a motion for a judgment of acquittal on that count, but later reversed that ruling and submitted the conspiracy charge to the jury. The Court of Appeals held that the ruling on the motion was an acquittal for double jeopardy purposes because it

> represented an intended decision based upon the judge's view that the prosecution had failed to prove" that Brooks conspired to commit armed robbery.…He was belatedly persuaded in the light of the prosecution's tardy argument that the issue was for the jury. **As in *Pugh,* both the State's argument and the judge's new ruling came too late.…The grant of the motion for judgment of acquittal was a bar to further criminal proceedings on the same charge**.…It follows that the trial judge erred in striking his grant of the motion for judgment of acquittal and thereafter denying the motion, and in his actions resulting therefrom, namely, permitting the offense to go to the jury and instructing the jury with respect to that offense.

Id. at 155 (emphasis added) (citations omitted).

B. Relevant Record

Here, at the close of the State's case, defense counsel moved for a judgment of acquittal on multiple counts, including possession of heroin with intent to distribute (Count 7) and possession of heroin (Count 8). After hearing argument, the court ruled, prompting the following colloquy:

> THE COURT: All right. The Court agrees with you, [defense counsel], as to Count 8. There was nothing found on him, on the defendant. No CDS anyway. And so a simple possession fails at that point. But Count 7 remains. That's a jury question. So, Madam Clerk, as to Count 8, the motion is granted.
>
> [DEFENSE COUNSEL]: Your Honor, if I may, just again to make the record, I would respectfully submit that the Court's decision with that is inconsistent in that certainly Count 8 refers to the CDS that was possessed

for the purpose of possession with intent. So I believe that if the Court feels that the State did not meet its burden with Count 8, it must follow that the State did not meet their burden with Count 7.

THE COURT: But isn't there constructive possession as to Count 7? You said there was nothing found on him. Let me look at the indictment. I may have misspoken here. My thought process is entirely that there was nothing found on him. I think there is a constructive possession.

[PROSECUTOR]: Which the State thinks would be equally applicable to both the count[s] of possession and possession with intent.

THE COURT: You're right, Mr. [Prosecutor]. There was nothing found on him. It's a jury question as to whether there is a constructive possession issue I'm thinking due to the standards. So the Court does not grant the motion.

[DEFENSE COUNSEL]: I was going to say, so I just talked myself out of a judgment of acquittal on Count 8?

THE COURT: As a matter of fact, you've corrected an error that the Court made. And it has other – I'll leave it alone at that and talk to both counsel about it later.

[DEFENSE COUNSEL]: Again, Your Honor –

THE COURT: So denied as to both at this point. I'm sorry, [defense counsel].

[DEFENSE COUNSEL]: I understand, Your Honor.

THE COURT: I do agree that nothing was found on him.

[DEFENSE COUNSEL]: Correct.

THE COURT: That I agree with. The rest is a jury question.

C. Appellant's Double Jeopardy Challenges

We agree with appellant that his conviction on the Count 8 possession charge must be reversed because the trial court, however briefly, intentionally acquitted him of that

count. After the court announced that, for lack of evidence "found on" appellant, it was granting the motion for acquittal "as to Count 8," it expressly instructed the court clerk that "the motion is granted." Although the court quickly realized its mistake in overlooking a constructive possession theory, that ruling was neither conditional nor preliminary. Following *Pugh* and *Brooks*, we must reverse appellant's conviction on Count 8.

We reach a different conclusion regarding the conviction for possession with intent to distribute under Count 7. Because there was no acquittal on Count 7, jeopardy did not attach, and the court's decision to send that charge to the jury for a verdict did not violate the prohibition against double jeopardy.

We are not persuaded otherwise by appellant's citation to *Wright v. State*, 307 Md. 552, 562 (1986), *abrogated in part on other grounds by Price v. State*, 405 Md. 10 (2008). In *Wright*, the Court of Appeals held that a trial judge's grant of a motion for judgment of acquittal on an armed robbery charge necessarily amounted to an acquittal on the felony murder charge stemming from the alleged robbery. Pertinent to this case, the *Wright* Court explained that

> the grant of a motion for judgment of acquittal at the close of the prosecution's case, on the ground that the prosecution's evidence was insufficient for the charge to be submitted to the jury, is in substance a verdict of acquittal on that charge to the same extent as a jury's verdict of acquittal at the conclusion of the case…
>
> Since the petitioner Wright was, therefore, acquitted of the underlying offense, we believe that the later submission of the felony murder charge to the jury and Wright's conviction of felony murder was contrary to the settled principle, under both the Fifth Amendment and

> Maryland common law, that an acquittal on the merits is ordinarily final and precludes further trial proceedings upon the same charge. This is true even if the acquittal is based upon an error of law or an incorrect resolution of the facts…
>
> [T]he rule is not limited to the situation where the government attempts to institute a wholly new prosecution on the same charge after a judgment in an earlier prosecution. Rather, the acquittal on the merits terminates the initial jeopardy on a charge, normally precluding any type of further criminal proceedings on the same charge or, in some instances, on a related charge.

Id. at 562-63 (citations omitted).

The *Wright* Court recognized that when determining whether an acquittal on one charge also acts as a double jeopardy bar to a related charge,

> **[t]he critical question is whether the trial court's action . . . constituted "a resolution, correct or not, of some or all of the factual elements of the offense charged."** A critical factual element of the felony murder charge was the commission of the attempted armed robbery, and the trial court's decision at the close of the State's case resolved this in favor of the defendant Wright.
>
> Moreover, **in determining the applicability of the double jeopardy prohibition in a particular situation, a court must primarily examine the substance of what occurred and not simply the procedural form.** When the trial court in the case at bar ruled that the State's evidence was insufficient to establish that Wright committed the attempted robbery and acquitted Wright of attempted robbery, the trial court in effect acquitted Wright of felony murder. The trial court recognized this at the time, for it denied the motion for judgment of acquittal on the murder count only because that count also embodied a charge of willful, deliberate and premeditated murder under Art. 27, § 407. The trial court again recognized this at the conclusion of the trial when it stated that "felony murder…was not in the case at the end of the State's case." Furthermore, at the end of the State's case, the trial court had specifically stated that Wright need not put on a defense with respect to attempted robbery.

Id. at 569-71 (citations omitted) (some internal quotation marks omitted) (emphasis added).

In this case, the trial court did not resolve a factual issue that necessitates acquittal on the possession with intent to distribute charge; nor did the court intend to acquit appellant of that offense. Whereas the factual finding made in *Wright* (i.e., that Wright did not commit an attempted robbery) necessarily precluded the prosecution in question (i.e., felony murder based on an underlying attempted robbery), the factual finding made by the trial court in this case (i.e., that there were no drugs on appellant) did not preclude prosecution for either possession of heroin or possession of heroin with intent to distribute. As the trial court correctly but belatedly recognized, even though there was no heroin found on appellant, he could have had constructive possession of what was found in his vehicle, which would have been sufficient to convict him of both offenses. *See generally Neal v. State*, 191 Md. App. 297, 316 (2010) ("A person has constructive possession over contraband when he or she has dominion or control over the contraband itself or over the premises or vehicle in which it was concealed.").

Moreover, the trial court did not intend to acquit appellant on that charge. To the contrary, the court stated, "[t]hat's a jury question" and "Count 7 remains." After counsel pointed to the inconsistency with the acquittal on Count 8, the trial court acknowledged that ruling was in "error," but did not compound that error by also acquitting him on Count 7.

Based on this record, only the conviction and sentence on Count 8 must be vacated.

III. Sentencing Challenge

Appellant's final issue is one he frames as a matter of first impression in this State: whether allowing victim impact statements at sentencing, from anonymous witnesses who were not sworn, violates a criminal defendant's constitutional or statutory rights? For the reasons explained below, we decline to answer that question because it is not preserved for appellate review.

A. The Sentencing Record

After the sentencing court refused to consider a number of anonymous letters that had been submitted before the sentencing hearing, the State and the Victim's Representative asked the court to allow victim impact witnesses who were present in the courtroom to make statements without giving their names or addresses. Defense counsel agreed to forego addresses but opposed the request for anonymity, arguing that there was no need for confidentiality and that disclosure of names was necessary to afford appellant his due process right to confront such witnesses.

The court, citing the nature of appellant's crimes and the small size of the community where they occurred, stated it was "troubled that there is intimidation, an aura of intimidation surrounding this[.]" Without determining whether there was an actual threat to those witnesses, the court granted the motion permitting them to remain anonymous, ruling that appellant would still have an adequate opportunity to question them.

All eight victim impact statements were made in open court by relatives of the deceased victim, Joshua Hodge. There is no indication in the record that these

individuals were under oath. Introduced by counsel for the Victims' Representative as "family members," they addressed the impact of Mr. Hodge's death, recounting their losses without adding any factual information pertaining to the shooting. Their presentations were brief, consuming only thirteen total pages of transcript.

Two victim impact witnesses, both sisters of Mr. Hodge, identified themselves by name. Four of the other six witnesses remained anonymous but identified their family relationship to Mr. Hodge (i.e., a niece, brother, fiancée, and nephew). The witness who identified herself only as Mr. Hodge's fiancée of 22 years was presumably recognizable to the defense as Shannon Burlin, who was shot by appellant and testified against him at trial. One of the two anonymous witnesses who did not identify names or family relationships, asked the court, in three sentences, "to show no mercy, as the night that this all took place, [appellant] had the chance to show mercy and he did not." The other, also limiting his remarks to three sentences, told the court that "there was a good man taken that night that didn't deserve it." Defense counsel did not question any of the witnesses.

B. Appellant's Challenges

Appellant contends that both the unsworn and the anonymous nature of these victim impact statements violated his constitutional rights of confrontation and due process, as well as Maryland statutory law. He argues that anonymity was not shown to be necessary to protect the witnesses' safety and was not harmless because it denied him his "basic" right to know who he was confronting. In support, he posits a hypothetical scenario in which obtaining the name of a victim impact witness affords a defense

attorney an opportunity to conduct a criminal background investigation that uncovers an impeachable conviction for a *crimen falsi*.

The State responds that the only challenge asserted to the sentencing court was appellant's constitutional objection to anonymity, which defense counsel subsequently waived by failing to question the anonymous witnesses or to proffer how his sentencing presentation had been harmed. On the merits, the State argues that the constitutional right to confront witnesses does not apply in sentencing and that there is neither a due process requirement, nor a state law that a victim impact witness must be sworn or identified by name. Furthermore, the State asserts, any error in allowing the anonymous statements "would be harmless beyond a reasonable doubt" because

> [a]lthough [appellant] had a statutory right to cross-examine the witnesses, that right was limited to "factual statements made to the court." Crim. Proc. § 11-403(c)(2). While [appellant] offers hypotheticals and Shakespeare quotes about what he would have done had he been provided the witnesses' names, he does not point to a single specific "factual statement" (to the extent there were any) that he was unable to effectively cross-examine without the witness's name. Nor did [defense counsel] even attempt…to cross-examine any of the witnesses or offer any evidence to rebut their testimony. Thus, although [appellant] objected to withholding the witnesses' names, the record shows he would not have done anything with those names had they been disclosed. Resentencing is therefore unwarranted.

The Victim's Representative, Kim Hogate (sister of Joshua Hodge), in a separate brief filed by counsel with the Maryland Crime Victims' Resource Center, Inc., joins the State in arguing that appellant was not prejudiced because defense counsel did not ask for the witnesses to be sworn and did not conduct any cross-examination, and because the anonymous witnesses were sufficiently identified as relatives of the victim to permit

evaluation of their bias, credibility, and motive to testify. In addition, the Victim's Representative agrees with the State that there is no constitutional mandate or procedural requirement that the names of victim impact witnesses must be disclosed or that victim impact witnesses must testify under oath.

C. Preservation Problems

We agree that appellant cannot complain that the victim impact statements were not made under oath, because defense counsel did not request that the witnesses be sworn or otherwise object to admission of their statements on the ground that they were not. *Cf. Schaefer v. Cusack*, 124 Md. App. 288, 313 (1998) (waiver by failure to timely object to testimony of unsworn witness); 6 L. McLain, *Maryland Evidence – State and Fed.*, § 603:1(c) (May 2017 update) ("Objection to a witness's testifying who has not made an oath or affirmation will be considered waived unless made before the testimony or, if the witness is not on the stand, as soon as it should be apparent that the witness is testifying.").

Nor did defense counsel argue that appellant had a right, under Maryland statutory law, to know the names of victim impact witnesses. The sole objection made by defense counsel was that allowing victim impact witnesses to remain anonymous "violate[d] [appellant's] right to due process to confront the witnesses against him[.]" In making that specific objection, counsel waived all other grounds for challenging the sentencing procedure. *See Brecker v. State*, 304 Md. 36, 39-41 (1985). We therefore limit our

discussion to appellant's claim that the anonymous victim impact statements violated his constitutional rights of confrontation and/or due process.

An appellate court may overturn a sentence that results from a violation of constitutional rights. *See generally Cruz-Quintanilla v. State*, 455 Md. 35, 41 (2017) ("A given sentence is subject to review on any of three potential grounds" including "whether the sentence constitutes cruel and unusual punishment or violates other constitutional requirements"); *Medley v. State*, 386 Md. 3, 6 (2005) ("We may overturn a sentence…if we conclude that…it violates constitutional standards."). In support of his constitutional complaints, appellant relies on *Smith v. Illinois*, 390 U.S. 129, 131 (1968), holding that a criminal defendant exercising his or her Sixth Amendment right of confrontation had the right to know the name of a testifying witness, and *Beasley v. State*, 271 Md. 521, 533-36 (1974), holding that the right to cross-examine a witness regarding the names of the defendant's co-conspirators may be restricted based on an "actual threat" to the testifying witness.

These cases are inapposite because they involved prosecution witnesses at trial. "It has long been recognized in this State that the procedure in the sentencing process is not the same as that in the trial process." *Miller v. State*, 67 Md. App. 666, 671 (1986). Most importantly, the right of confrontation does not extend to sentencing. *See United States v. N. Powell*, 650 F.3d 388, 393 (4th Cir. 2011) ("[I]n holding that the Confrontation Clause does not apply at sentencing, we join every other federal circuit court that hears criminal appeals."); *Driver v. State*, 201 Md. 25, 32 (1952) ("[T]he

sentencing judge may consider information, even though obtained outside the courtroom, from persons whom the defendant has not been permitted to confront or cross-examine.").

Moreover, due process requires only that the evidence considered by a sentencing court have "some minimal level of reliability." *Powell*, 650 F.3d at 393. Victim impact evidence may serve an important purpose in sentencing without running afoul of due process constraints. In rejecting a due process challenge to another type of victim impact evidence (i.e., a victim impact video showing "in life" photographs of the victims), this Court recently pointed out that

> under Maryland constitutional and statutory law, "trial judges *must* give appropriate consideration to the impact of the crime upon the victims[,]" and "[a]n important step towards accomplishing that task is to accept victim impact testimony wherever possible." *Cianos v. State*, 338 Md. 406, 413 (1995) (emphasis in original); *accord Ball v. State*, 347 Md. 156, 195 (1997).
>
> To be more precise, Article 47 of the Maryland Declaration of Rights provides that "[a] victim of crime shall be treated by agents of the State with dignity, respect, and sensitivity during all phases of the criminal justice process" and that victims are entitled, "upon request and if practicable…to be heard at a criminal justice proceeding, as these rights are implemented…by law." Consistent with that constitutional mandate, victims of crime in Maryland are statutorily granted the opportunity to offer documentary and testimonial evidence at sentencing proceedings. *See, e.g.*, Md. Code (2001, 2008 Repl. Vol.), Criminal Procedure Article ("CP"), § 11–402(d) (providing that a sentencing court "shall consider the victim impact statement in determining the appropriate sentence"); CP § 11–403(b) (authorizing a sentencing court to take testimony, during a sentencing hearing, from the representative of a murder victim); Md. Code (1999, 2008 Repl. Vol.), Correctional Services Article ("CS"), § 6–112(c) (mandating that a presentence investigation report, in a case in which the State seeks a sentence of life imprisonment without the possibility of parole, include a victim impact statement as provided under CP § 11–402

> and that the sentencing court "shall consider" that statement). *See also* Md. Rule 4–342 (e)(2) ("The right of a victim or a victim's representative to address the court during a sentencing hearing under this Rule is governed by Code, Criminal Procedure Article, § 11–403.").

Lopez v. State, 231 Md. App. 457, 479-80, *cert. granted*, 453 Md. 8 (2017). We also recognized that when victim impact evidence is presented to a sentencing judge, rather than a jury, it may be harmless. *See id.* at 487 (Even if admission of victim impact video at sentencing hearing "constituted error, that error amounted to no more than harmless error.").

In this case, we shall not decide whether the sentencing court's consideration of anonymous victim impact statements prejudicially violated appellant's rights under the Confrontation Clause or due process, because the record of this sentencing hearing does not present those questions. Defense counsel, despite insisting that appellant needed to know the names of all victim impact witnesses, did not differentiate the identified witnesses from the anonymous witnesses; instead, he elected not to pose a single question to any of them. Nor did counsel object as each anonymous witness made his or her statement (or otherwise request a continuing objection). In his brief remarks to the sentencing court following appellant's allocution, counsel did not refer to any of those eight victim impact statements. Nor did he ever suggest to the court that appellant's sentencing presentation was hamstrung by the anonymity of six of those witnesses.

In these circumstances, *Ball v. State*, 347 Md. 156 (1997), is instructive. There, the defendant made an analogous argument that "the admission of victim impact statements in a PSI report violate[d] an accused's constitutional right, in a criminal

proceeding, to be confronted with the witnesses against him." *Id*. at 199. Acknowledging that question "ha[d] not previously been considered[,]" the Court of Appeals held that the defendant's "failure to avail himself of [the opportunity to confront the victim impact witnesses] does not translate into a denial of his right of confrontation." *Id*. The Court reasoned:

> Appellant was provided with copies of the victim impact statements well in advance of the commencement of the sentencing proceedings. He was, in fact, successful in having certain portions of those statements redacted. Notwithstanding Appellant's access to the statements and awareness of the individuals who authored them, he made no attempt to subpoena the authors to appear at sentencing and undergo cross-examination. **The tactical decision to forego cross-examination of witnesses does not amount to a denial of the right of confrontation.** In addition, Appellant had the opportunity to present evidence in rebuttal to any information contained in the victim impact statements. Appellant's claim that his confrontation rights were violated, therefore, is without merit.
>
> **In light of Appellant's decision not to pursue cross-examination of the authors of the statements, it is unnecessary for us to decide whether the Confrontation Clause requires that cross-examination be allowed upon request.**

Id. at 200-01 (citation omitted; emphasis added).

Applying that reasoning, we conclude that appellant's decision not to pursue cross-examination of the anonymous sentencing witnesses did not amount to a denial of the right of confrontation or due process. All eight witnesses briefly addressed the impact of Mr. Hodge's absence from their lives. Defense counsel elected not to question any of them and did not seek exclusion of the anonymous witness's statements. In light of that tactical decision, appellant was not denied his right of confrontation or his right to due process. Consequently, it is unnecessary for us to decide whether the Confrontation

Clause or due process precludes anonymous victim impact statements at sentencing. *See id.* *See generally Myer v. State*, 403 Md. 463, 475 (2008) ("This Court generally follows the principle that we will not reach a constitutional issue when a case can properly be disposed of on a non-constitutional ground.").

JUDGMENT OF CONVICTION AND SENTENCE ON COUNT 8 (POSSESSION OF HEROIN) VACATED. REMAINING CONVICTIONS AND SENTENCES AFFIRMED. COSTS TO BE PAID 2/3 BY APPELLANT, 1/3 BY CECIL COUNTY.