Circuit Court for Dorchester County
Case No. C-09-CR-18-000135

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2346

September Term, 2018

DARRICK MAURICE JONES

v.

STATE OF MARYLAND

Meredith,*
Berger,
Nazarian,

JJ.

Opinion by Meredith, J.

Filed: November 24, 2020

*Meredith, Timothy E., J., now retired, participated in the hearing of this case while an active member of this Court, and after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the preparation of this opinion.

Darrick Jones, appellant, asserts that the Circuit Court for Dorchester County erred in denying his motion to suppress evidence of drugs discovered during a traffic stop that took place on May 2, 2018. After the circuit court denied the motion, Jones pled not guilty on an agreed statement of facts and was convicted of possession of cocaine with intent to distribute. He now asks this Court: "Did the [circuit] court err by denying [his] motion to suppress?" We shall affirm the judgment of the Circuit Court for Dorchester County.

PROLOGUE

The Court of Appeals noted in *Pacheco v. State*, 465 Md. 311, 320 (2019):

> In 2014, the General Assembly decriminalized possession of less than ten grams of marijuana. *Robinson v. State*, 451 Md. 94, 152 A.3d 661 (2017). The legislature made such possession a "civil offense" and mandated that a "police officer shall issue a citation to a person who the police officer has probable cause to believe has committed [that civil offense]." *Id.* at 97, 115, 152 A.3d 661 (citations omitted).

Since the time the General Assembly decriminalized possession of less than ten grams of marijuana, the Maryland Court of Appeals has decided several cases that provide guidance with respect to the legal significance of a police officer's detection of the odor of marijuana during a traffic stop. Particularly instructive are *Lewis v. State*, 470 Md. 1 (2020); *Pacheco v. State*, 465 Md. 311 (2019); and *Norman v. State*, 452 Md. 373 (2017). Because of the developing caselaw since 2014 in this area of the law, some of the arguments that have been made by prosecutors in opposing motions to suppress evidence discovered as a result of a search conducted in reliance upon the odor of marijuana have been held ineffective by our State's highest court. *See, e.g.*, *Lewis* and *Pacheco*.

At the suppression hearing in Jones's case, the State's principal argument was:

> What the State is saying is you had a lawful traffic stop followed by **the odor of raw marijuana** emanating from the vehicle. **The State believes that gives the police the right to search *both* the vehicle *and* that sole *driver of the car***. And when they did that, they discovered the CDS [on his person], they placed him into custody and thereafter [additional] CDS was found at the police station.

(Emphasis added.)

This rationale is inconsistent with the holding in *Lewis*, 470 Md. at 10, where the Court of Appeals held "that the odor of marijuana, without more, does not provide law enforcement officers with the requisite probable cause to arrest and perform a warrantless search of that person incident to the arrest." The *Lewis* Court reiterated, *id*. at 27: "Consistent with our decision in *Pacheco*, we hold here that the mere odor of marijuana emanating from a person, without more, does not provide the police with probable cause to support an arrest and a full-scale search of the arrestee incident thereto."

In Jones's case, the suppression judge adopted a somewhat different rationale for denying the motion to suppress, stating:

> He's pulled over. The officer smells the odor of raw marijuana from the car. The officer conducts the pat-down, and of course that led to the other things. But it seems to me there was --- there is a reasonably articulable suspicion that some sort of wrongdoing was afoot. The officer acted reasonably under the circumstances[;] therefore, the motion to suppress is denied.

But the suppression court's reliance upon "a reasonably articulable suspicion that some sort of wrongdoing was afoot" is inconsistent with the statement in *Norman*, 452 Md. at 411, "reaffirm[ing] the basic principle that, **for a law enforcement officer to**

frisk, *i.e.*, pat down, an individual, **there must be reasonable articulable suspicion that the individual is armed and dangerous**, even where a law enforcement officer detects the odor of marijuana emanating from a vehicle." (Emphasis added.) The suppression judge did not find a reasonable articulable suspicion that Jones was "armed and dangerous," and the police officer's testimony did not identify anything peculiar about Jones other than a strong odor of marijuana. The officer explained that the pat down of this driver who smelled of marijuana was based upon the officer's normal routine and his "training, knowledge and experience I am familiar with people that carry a large amount of CDS to typically carry weapons."

Nevertheless, there was an argument that the State did not articulate at the suppression hearing that clearly supported the search of Jones's person after he was stopped for driving without a license. The State did raise this argument in its brief in this Court, and further asserted:

> [G]enerally, "an appellee is entitled to assert any ground adequately shown by the record for upholding the trial court's decision, even if the ground was not raised in the trial court, and that, if legally correct, the trial court's decision will be affirmed on such alternative ground." *Unger v. State*, 427 Md. 383, 406 (2012).

Holdings similar to this quote from *Unger* are found in *Elliott v. State*, 417 Md. 413, 435 (2010) ("'[W]here the record in a case adequately demonstrates that the decision of the trial court was correct, although on a ground not relied upon by the trial court and perhaps not even raised by the parties, an appellate court will affirm.'") (quoting *Robeson v. State*, 285 Md. 498, 502 (1979)); and *Barrett v. State*, 234 Md. App. 653, 665 (2017)

("Although appellant is correct that the search incident to arrest argument was not raised below, that does not preclude this Court from considering the issue.").

It is apparent from the record that, at the time the police stopped Jones's vehicle, he was driving on a suspended or revoked license. And he readily admitted that he did not have a license. As a consequence of that, the officers had probable cause to arrest Jones for committing a misdemeanor in the presence of the officers.

Maryland Code (1977, 2012 Repl. Vol.), Transportation Article ("Trans.") § 26-202(a)(3)(iv) provides:

> **A police officer may arrest without a warrant a person for a violation of the Maryland Vehicle Law, including** any rule or regulations adopted under it, or for a violation of any traffic law or ordinance of any local authority of this State, if . . . [t]he officer has probable cause to believe that the person has committed the violation, and the violation is any of the following offenses: . . . **[d]riving or attempting to drive a motor vehicle while the driver's license or privilege to drive is suspended or revoked**[.]

(Emphasis added.)

Having probable cause to arrest Jones for committing a misdemeanor in their presence gave the officers the right to conduct a warrantless search of Jones's person. *See Lewis*, 470 Md. at 20 ("The prerequisite to a lawful search of a person incident to arrest is that the police have probable cause to believe the person subject to arrest has committed a felony or is committing a felony or misdemeanor in the presence of the police. *Pacheco*, 465 Md. at 323, 214 A.3d 505 (citing *Maryland v. Pringle*, 540 U.S. 366, 369–70, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003)).").

On that basis, we will uphold the denial of the motion to suppress the CDS discovered on Jones's person, and we shall affirm the conviction.

FACTS AND PROCEDURAL BACKGROUND

Jones argues that the suppression court "should have granted [the] motion to suppress because all of the evidence in this case was the fruit of an unlawful *Terry* frisk" (citing *Terry v. Ohio*, 392 U.S. 1 (1968)) and "also the fruit of an unlawful search." The following facts, viewed in the light most favorable to the State as the prevailing party, were adduced at the hearing on Jones's motion to suppress.

The sole witness at the hearing was Detective Stephen Hackett, a narcotics detective for the Cambridge Police Department and a member of the Dorchester County Narcotics Task Force. Det. Hackett testified that, on the afternoon of May 2, 2018, he and Deputy McDaniel, of the Dorchester County Sheriff's Office, were conducting a routine patrol in the 600 block of Greenwood Street in Cambridge when they observed Jones operating a motor vehicle. Det. Hackett testified that this observation was "significant" because "Deputy McDaniel and myself [were] familiar with [Jones] previously not possessing a valid license." When Jones then parked his vehicle at an apartment complex in the 500 block of Greenwood Avenue, Det. Hackett and Dep. McDaniel performed a "license check" of Jones through the Dorchester County Sheriff's Office dispatch, and confirmed that Jones's license to drive was "deemed to be suspended and revoked currently."

Det. Hackett and Dep. McDaniel then observed Jones get back into the car and drive on public streets. They effected a traffic stop of Jones in the 400 block of Oakley Street. Det. Hackett asked Jones if he had a valid driver's license, and Jones responded that he did not. Det. Hackett also testified that, "[u]pon immediate contact with [Jones], I smelled a strong odor of raw marijuana coming from inside the vehicle." The following colloquy provides further details regarding the traffic stop:

> [BY THE STATE]: And what's your basis for believing that you knew that to be raw marijuana, or the odor of raw marijuana?
>
> [BY DETECTIVE HACKETT]: Based off of trainings, knowledge that I received through different trainings that I've been to. The difference between raw and burnt marijuana is pretty apparent. It's two distinctive smells.
>
> Q. Okay. Was there anyone else in the vehicle?
>
> A. No, there was not.
>
> Q. Okay. Based on your observation for [sic] detection of what you believed to be the odor of raw marijuana, what did you do then?
>
> A. I asked Mr. Jones to step out of the vehicle.
>
> Q. And did you ask him about the smell of the marijuana?
>
> A. I did, yes.
>
> Q. And did he give you a response?
>
> A. He did. He told me that -- actually I believe him showing me his ashtray. He picked up his ashtray and showed it to me and said that he had just smoked.
>
> Q. Okay. So what did you do then?

A. I requested Mr. Jones to get out of the vehicle, and then started to pat him down for weapons immediately at which time I felt a bulge in his pocket, then conducted a probable cause search of him.

Q. Did you fish the bulge out?

A. Yes.

Q. And what did you determine that to be?

A. Marijuana.

Q. Okay. And describe its appearance if you would.

A. The marijuana was in I believe it was a plastic bag in his right pocket. A fairly large ball kind of object I guess.

Q. Okay. Did you have any belief as to what its volume was at that time based on your seizure of that item?

A. I did. Based off of just experience, my observation was that it was going to be over 10 grams at that point.

Q. Okay. So what did you do then?

A. To confirm that[,] I did request a scale to come out, and it was weighed.

Q. Okay. And do you recall what it weighed on the roadside?

A. Approximately 20 grams.

Q. And what did you do then?

A. Mr. Jones was placed under arrest.

Jones's vehicle was searched, but no contraband was found. Jones himself was more thoroughly searched after being transported to the Cambridge Police Department, and the record reflects that "other CDS"—namely, cocaine—"was found." Jones was

charged with possession of cocaine with intent to distribute it, possession of cocaine, and possession of more than ten grams of marijuana.

Jones made the following argument at the suppression hearing as to why the motion to suppress should be granted:

> [BY DEFENSE COUNSEL]: This is a warrantless search of my client, and therefore the State has the burden of proving that it fit into -- either had a warrant or fit into a warrant exception. There obviously wasn't a warrant in this case[;] therefore, the State has the burden of proving that it was a warrant exception.
>
> This case is remarkably similar to *Belote v. State*, 411 Md. 104 [(2009)], ...
>
> In that case the officers found an arrestable amount of marijuana. This was prior to the civil citations version, and -- but never arrested him. In that case the Court of Appeals ordered that the motion to suppress should have been granted because where there is no arrest, there can't be a search incident to arrest. And that was the warrant expectation [sic] that I believe the State is going to be relying on.
>
> The Court also emphasized that the determination of whether someone is under arrest at the time of the search is based off of an objective test, but it's also -- relevant is the officer's subjective intent.
>
> [BY THE COURT]: Well, he was arrested at the time of the search, wasn't he? Do you recall?
>
> [DEFENSE COUNSEL]: No, Your Honor. He was not arrested -- at the time he was searched for marijuana he was not arrested at that point. The officer testified he did not place him under arrest until some five to 15 minutes afterwards.
>
> [THE COURT]: But the scales came, and the scales showed 20 grams, and then he was arrested.
>
> [DEFENSE COUNSEL]: Yes, Your Honor. But he was not arrested at the time he was searched and found marijuana. And that marijuana was used as the justification for the later arrest.

* * *

Judge Moylan made the principle the most clear in [*State v.*] *Funkhouser*, 140 Md. App. 696 [(2001)], which stated, and I quote, "An arrest that is made on the basis of what the search recovers will never be constitutional no matter how instantaneously it may follow the search." In this case he was searched, stuff was found, and that was used as a basis to arrest him five to 15 minutes after the fact. It wasn't even instantaneous. It wasn't a search incident to arrest, it was a search to look for more things that may be arresting [sic]. And if nothing had turned up, he would have been released on citation.

He was not actually searched -- the search incident to arrest came after he was arrested five to 15 minutes later when they searched him again. They didn't find anything at that point, but they took him back to the station and later found something. So that -- because he was searched without an arrest, he was not in cus -- there was no objective manifestation of arrest. That is what caused the marijuana to be found which was used as the basis -- the arrest to take him down to the station where other contraband was found which would be fruit of the poisonous tree at this point.

I think the statements in the Court of Appeals in *Belote* and the Court of Special Appeals in *Funkhouser* are explicit and on point for this case because there was no arrest. There is no search thing. And [Judge] Moylan made that point in *Funkhouser* as well that there is no such thing as a simple probable cause person -- search of a person. It has to fit into a warrant exception.

[THE COURT]: Didn't the officer say he smelled the odor of raw marijuana?

[DEFENSE COUNSEL]: Yes, Your Honor, which --

[THE COURT]: Before that. Before any of that happened.

[DEFENSE COUNSEL]: -- which is -- which can be -- I should say which can be probable cause, but there actually has to be arrest. The search -- the smell of the marijuana gave the police the right to search the car, but it did not give him the right to search Mr. Jones unless he was arrested.

[THE COURT]: Why wouldn't the police have the right to do a pat-down search of the driver of a car who does not have a license where there's a smell of raw marijuana?

[DEFENSE COUNSEL]: Well, Your Honor, the pat-down, and there's even more clear precedent on that, there's required to be a reasonable articulable suspicion of the defendant being armed and dangerous. In this case there was no testimony about a particularized concern that Mr. Jones had a weapon, therefore, the pat-down by itself was illegal.

[THE COURT]: Well, how could there ever be? Couldn't a little 90-pound old lady carry a gun?

[DEFENSE COUNSEL]: Anyone can carry a gun, Your Honor.

[THE COURT]: So why does there have to be particularized indicia that one is armed?

[DEFENSE COUNSEL]: Because that's what the Supreme Court held in *Terry v. Ohio*.

[THE COURT]: I'm not so sure you're right about that.

[DEFENSE COUNSEL]: And, Your Honor, I have copies of *Belote* and *Funkhouser* which I believe are on point to this case that -- that make this point I think the most clear.

[THE COURT]: All right. You'll get the last word. [The State] will have a chance now.

[BY THE STATE]: Thank you, Your Honor. Your Honor, in *Belote* the State's argument was that there was an arrest. That's not what we're saying here. We're not saying that the defendant was under arrest on the roadside and prior to the discovery of the bulge in his pocket. What the State is saying is you had a lawful traffic stop followed by the odor of raw marijuana emanating from the vehicle. The State believes that that gives the police the right to search both the vehicle and that sole driver of the car. And then they did that, they discovered the CDS, they placed him into custody and thereafter CDS was found at the police station. So I don't think that *Belote* is on point with what the State's argument today is; for that reason I think it's distinguishable.

> And for that reason *Funkhouser* doesn't matter because *Funkhouser* deals with timing issues that are not related to how the State is supporting its search today.
>
> [THE COURT]: All right, you get the last word, [Jones's counsel].
>
> [DEFENSE COUNSEL]: Thank you, Your Honor. The Court of Appeals -- the Supreme Court and the Court of Appeals have made very clear that at the first level the --- a *Terry* stop frisk has to require reasonable articulable suspicion of the defendant being armed and dangerous.
>
> Additionally the -- it's made --
>
> [THE COURT]: Or engaged in wrongdoing.
>
> [DEFENSE COUNSEL]: Well, no. That's -- there's two prongs to it. The Court is right about one, the reasonable articulable suspicion of criminal activity. And the second prong is reasonable articulable suspicion of the defendant being armed and dangerous. Those are two separate factors that have to be considered.
>
> The Court of Appeals has -- and the Supreme Court has also made explicitly clear that search of a person has to either have a warrant or fit into a warrant requirement [sic]. A car has kind of a built-in more of a requirement. If there's probable cause you can search a car without a warrant. There's no search [sic] thing as a probable cause search of a person. The State has argued that before even in this court, and that -- and items have been suppressed on that basis.
>
> In this case there obviously was no warrant for Mr. Jones. And the State isn't even arguing that this was an arrest prior to a search, therefore, it doesn't fit into any warrant requirement [sic], and therefore everything has to be suppressed.

The suppression court then explained that it was denying the motion to suppress for the following reasons:

> [THE COURT]: All right. You have a man driving a vehicle in the city limits of Cambridge without a driver's license. He's suspended. He's pulled over. The officer smells the odor of raw marijuana from the car. The officer conducts the pat-down, and of course that led to the other

> things. But it seems to me there was -- there is a reasonably articulable suspicion that some sort of wrongdoing was afoot. The officer acted reasonably under the circumstances, therefore, the motion to suppress is denied.

On October 1, 2018, Jones pled not guilty pursuant to an agreed statement of facts and was found guilty of possession of cocaine with intent to distribute. The charges of simple possession of cocaine and possession of marijuana in an amount over ten grams were nol prossed. Jones was sentenced to ten years in the Department of Corrections, with all but 153 days he had already served suspended, to be followed by two years' probation.

Jones timely filed an appeal to this Court. He argued: that his roadside pat-down was, contrary to *Terry*, "not supported by reasonable articulable suspicion that [he] was armed and dangerous"; that the search of Jones's person did not fit into the search incident to arrest exception to the warrant requirement "because Detective Hackett did not intend to effect an arrest at the time he conducted the search"; and further that Jones's arrest—*after* the search—for possession of marijuana (found on his person) was not supported by probable cause, which invalidates all the "fruits" of the search. Jones noted in his opening brief that "[t]his very issue is presently pending before the Court of Appeals" in *Pacheco v. State*, which had been argued on October 9, 2018.

The Court of Appeals's opinion in *Pacheco* was filed on August 12, 2019. In *Pacheco,* the Court of Appeals held that the odor of burnt marijuana alone does not supply the police with probable cause to believe that an individual is in possession of a criminal amount of marijuana and, in reliance thereon, to conduct a search incident to

arrest of the individual. The Court noted the distinction between a search of Pacheco's automobile pursuant to the automobile exception to the Fourth Amendment's warrant requirement and a search of the person of an occupant of the automobile. The search of the automobile—based on the odor of burnt marijuana and the presence of a joint in plain view in the center console—was upheld, but the search of Pacheco's person was not:

> As we made clear in *Robinson* [*v. State*, 451 Md. 94 (2017)], marijuana in any amount remains contraband and its presence in a vehicle justifies the search of the vehicle. Therefore, the eventual search of Mr. Pacheco's vehicle was permissible by application of the automobile doctrine.
>
> **It does not follow, however, that because the police lawfully searched Mr. Pacheco's car for contraband or evidence [of criminal possession of marijuana], they likewise had the right to search his person.** It is not in dispute that the only rationale offered by the State in support of the search of Mr. Pacheco was that it was a proper search "incident to his arrest." **For such a search to have been reasonable under the Fourth Amendment, the officers must have possessed, *before* the search, probable cause to believe that Mr. Pacheco was committing a felony or a misdemeanor in their presence.**

465 Md. at 330 (bold emphasis added); *accord Lewis*, 470 Md. at 22-23.

After *Pacheco* was decided by the Court of Appeals, this Court directed the parties in Jones's appeal to file supplemental memoranda addressing the "applicability and effect" of that opinion on this appeal. In Jones's supplemental memorandum, he analogized his case to the scenario in *Pacheco*, arguing (in part):

> Just as it was not reasonable for the officers to infer, based on the odor of marijuana coming from Pacheco's vehicle and the presence of a marijuana joint in the center console, that Pacheco was in possession of more than 10 grams of marijuana, it was not reasonable for Detective Hackett to infer, based on the odor of marijuana coming from [Jones's] vehicle and Appellant's admission that "he had smoked marijuana earlier," that Appellant was in possession of more than 10 grams of marijuana. It

> was reasonable for Detective Hackett to infer, based on the odor coming from the vehicle and Appellant's statement that he had smoked marijuana earlier, that Appellant had recently been in temporary possession of at least a small amount of marijuana, but those facts did not give Detective Hackett probable cause to believe that Appellant currently possessed any amount of marijuana, much less a criminal amount of the substance. Thus, the search of Appellant's person was invalid, as any arrest of Appellant that was actually consummated was not supported by probable cause.

In the State's supplemental memorandum, the State attempted to distinguish *Pacheco* on two grounds: first, in *Pacheco*, the police "recognized clearly" that the joint they observed "contained less than ten grams of marijuana," and it was for that reason that the odor of burnt marijuana plus a joint containing what the police knew to be a non-criminal amount of marijuana did not supply probable cause to believe that Pacheco "possessed a criminal amount of marijuana on his person."[1] *Pacheco*, 465 Md. at 333. Second, in contrast to *Pacheco*, the police in Jones's case already had probable cause to arrest Jones for driving without a license, as well as "driving under the influence," based on Jones's own statements about his lack of a valid driver's license and his admission that he had "just smoked."

STANDARD OF REVIEW

In *State v. Wallace*, 372 Md. 137, 144 (2002), the Court of Appeals described the standard of appellate review of the denial of a motion to suppress as follows:

[1] In *Pacheco*, the alleged smell of marijuana was described as being "fresh burnt," whereas, in this case, Detective Hackett testified that he could recognize the "pretty apparent" difference between the smell of "burnt" and raw marijuana due to his training and experience, and that the odor he smelled as soon as he approached appellant's vehicle was "a strong odor of raw marijuana."

> Our review of a circuit court's denial of a motion to suppress evidence under the Fourth Amendment, ordinarily, is limited to the information contained in the record of the suppression hearing and not the record of the trial. When there is a denial of a motion to suppress, we are further limited to considering facts in the light most favorable to the State as the prevailing party on the motion. Even so, we review legal questions *de novo*, and where, as here, a party has raised a constitutional challenge to a search or seizure, we must make an independent constitutional evaluation by reviewing the relevant law and applying it to the unique facts and circumstances of the case. We will not disturb the trial court's factual findings unless they are clearly erroneous.

(Citations omitted.)

DISCUSSION

Jones's primary argument is that the motion to suppress should have been granted because "all of the evidence in this case was the fruit of an unlawful *Terry* frisk." And indeed, our discussion of *Terry* frisks in *Williams v. State*, 246 Md. App. 308, 329–31 (2020), provides some support for Jones's contention that the search of his person in this case is not sustainable on the basis that the officer had a reasonable articulable suspicion that some sort of wrongdoing was afoot:

> The Fourth Amendment protects individuals against unreasonable searches and seizures. U.S. Const. amend. IV. A "seizure" of a person means any nonconsensual detention. *Norman v. State*, 452 Md. 373, 386–87, 156 A.3d 940 (2017). Warrantless searches are presumed to be unreasonable, so "[w]hen a police officer conducts a warrantless search or seizure, the State bears the burden of overcoming the presumption of unreasonableness." *Thornton v. State*, 465 Md. 122, 141, 214 A.3d 34 (2019). There are, however, limited exceptions to the warrant requirement, including the stop and frisk procedure outlined in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). *Thornton*, 465 Md. at 141, 214 A.3d 34. Ultimately, though, "[t]here 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." *Norman*, 452 Md. at 387, 156 A.3d 940.

* * *

> Under *Terry*, a "frisk" is limited "to a pat-down of [an individual's] outer clothing," and is meant to protect the officer and others, not to discover evidence. *Thornton*, 465 Md. at 142, 214 A.3d 34 (*quoting Bailey v. State*, 412 Md. 349, 368, 987 A.2d 72 (2010)). For that reason, *Terry* allows a police officer to frisk someone they believe to be "armed and dangerous" for the safety of themselves and others. *Norman*, 452 Md. at 387, 156 A.3d 940. The frisk must be supported by "particularized suspicion *at its inception*." *Thornton*, 465 Md. at 142, 214 A.3d 34 (emphasis added). The officer doesn't need to be certain that the individual in question is armed and dangerous, but must "have 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion.'" *Id.* (*quoting Sellman v. State*, 449 Md. 526, 541, 144 A.3d 771 (2016) (brackets omitted)).
>
> When a court considers whether an officer had reasonable articulable suspicion to frisk an individual, it "must take an objective view of the totality of the circumstances." *Id.* at 143, 214 A.3d 34. Then it must decide whether a reasonably prudent police officer "would have felt that he [or she] was in danger, based on reasonable inferences from particularized facts in light of the officer's experience." *Id.* (*quoting Bailey*, 412 Md. at 365, 987 A.2d 72). Our inquiry is fact-specific. *Id.*

But, regardless of the validity of the pat-down/frisk of Jones (which discovered a suspicious bulge rather than a weapon), the officers in this case had probable cause to arrest Jones without a warrant, before the search, for driving on a suspended or revoked license. Trans. § 26-202(a)(3)(iv).

In *Spell v. State*, 239 Md. App. 495 (2018), *cert. denied*, 462 Md. 581 (2019), this Court held that Spell's arrest for driving on a suspended license was supported by probable cause, and that the search incident thereto (which uncovered CDS on his person) was constitutionally valid. In that case, two Baltimore City police officers on narcotics patrol in the middle of the afternoon observed Spell sitting in the driver's seat of an idling

vehicle. The officers had previously arrested Spell four months earlier, and knew at that time that Spell did not have a valid driver's license. The officers made contact with Spell, who confirmed that he did not have a license. Believing that they had probable cause to arrest him based on that violation, the officers requested Spell's consent to search him, and discovered ten vials of suspected cocaine. (Consent to search, however, was not relied upon by the motions court in its ruling denying the motion to suppress, and it was not a consideration on appeal. 239 Md. App. at 503 n.5.)

Spell filed a motion to suppress. His attorney argued that, although it was true that the police *could have* arrested Spell for driving without a license, they *did not* arrest him for that offense; instead, they "engage[d] in activities not related to the enforcement of the traffic code in order to determine whether there [was] sufficient indicia of some [other] illegal activity." *Id*. at 503 (footnote omitted). The suppression court rejected that argument, finding that the traffic violation gave police probable cause to arrest Spell, which in turn supported a search incident to arrest. The court denied the motion to suppress.

This Court affirmed, explaining:

> The record here supports the circuit court's conclusion that the police had probable cause to believe that appellant was driving without a license. The police had reason to believe from a prior encounter in February 2017 that appellant may not have had a license on June 15, 2017, which appellant confirmed to be a fact. When Officer Jones asked: "[W]hat are you doing driving that car. You know you don't have a license," appellant stated: "I know, but I ain't doing nothing but chilling man." And there is no question that appellant's actions, sitting in the vehicle with the engine running, constituted driving. *Motor Vehicle Admin. v. Atterbeary*, 368 Md. 480, 503, 796 A.2d 75 (2002) (motorist was "driving" when he was "sitting

> in the driver's seat, awake, with the vehicle's engine running"). Under these circumstances, the circuit court properly found that the officers had probable cause to arrest appellant.
>
> Appellant contends that, even if the officers had probable cause to arrest him, the search of his person was not a valid search incident to arrest because it occurred prior to the time the police put him in handcuffs. This contention similarly is without merit.
>
> Once a person is lawfully arrested, the "police may search 'the person of the arrestee' as well as 'the area within the control of the arrestee' to remove any weapons or evidence that could be concealed or destroyed.'" *Conboy v. State*, 155 Md. App. 353, 364, 843 A.2d 216 (2004) (quoting *United States v. Robinson*, 414 U.S. 218, 224, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973)). That the search occurs immediately before the formal arrest does not invalidate it because "it is not 'particularly important that the search precede the arrest rather than vice versa.'" *Id.* (quoting *Rawlings v. Kentucky*, 448 U.S. 98, 111, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980)). *Accord Barrett*, 234 Md. App. at 672, 174 A.3d 441 ("The United States Supreme Court has made clear that a search may qualify as a search incident to arrest even if, sequentially, the search occurs prior to the arrest."). A search incident to arrest is valid as long as the search is "essentially contemporaneous" with the arrest, regardless of whether the search or arrest occurs first. *Wilson v. State*, 150 Md. App. 658, 673, 822 A.2d 1247 (2003).

Id. at 508-09 (footnote omitted).

As in *Spell*, it is clear in this case that the police officers had probable cause to believe that Jones was driving without a license when they pulled him over, and Jones immediately confirmed their suspicions in that regard. As in *Spell*, the police had probable cause to arrest Jones at that point, *before* searching him. Then, "[u]pon immediate contact with" Jones, Det. Hackett "smelled a strong odor of raw marijuana coming from inside the vehicle." Although it is true that "the odor of marijuana, **without more**, does not provide law enforcement officers with the requisite probable cause to

arrest and perform a warrantless search of that person incident to the arrest," *Lewis v. State*, 470 Md. at 10 (emphasis added), here, there *was* more, namely, conduct that supported a warrantless arrest pursuant to Trans. § 26-202(a)(3)(iv).[2]

For the foregoing reasons, we affirm the denial of Jones's motion to suppress.

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

[2] We note that, in a concurring opinion in *Pacheco*, 465 Md. at 335, Judge Robert McDonald observed that, although the odor of marijuana, without more, did not justify a search of Pacheco's person in that case, it is easy to envision situations in which the officer would have probable cause to arrest the driver for driving while under the influence of marijuana, which is another traffic offense that could support an arrest without a warrant, under Trans. § 26-202(a)(3)(ii), and a search incident to that arrest. In the present case, however, the officers described no behavior that suggested Jones's ability to drive was impaired by any drug.