Circuit Court for Baltimore City
Case No.: 118115008

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2385

September Term, 2018

TURRELL DAVIS

v.

STATE OF MARYLAND

Nazarian,
Beachley,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: October 8, 2019

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

In this appeal, we review the constitutionality of a protective frisk conducted during a traffic stop, resulting in the discovery of a handgun on the person of appellant Turrell Davis. After the Circuit Court for Baltimore City denied his motion to suppress evidence of the gun, appellant entered a conditional guilty plea to possession of a regulated firearm after a disqualifying conviction. He was sentenced to fifteen years' incarceration, with all but five years suspended, to be served without the possibility of parole.

Appellant contends that the gun evidence should have been suppressed because it was recovered during an illegal pat-down, arguing that he "was just a passenger in a car that was pulled over for running a red light." Applying *Thornton v. State*, 465 Md. 122 (2019), we hold that the court erred in denying appellant's motion to suppress the gun evidence because the State did not establish reasonable articulable suspicion for the Fourth Amendment frisk.

FACTUAL AND PROCEDURAL BACKGROUND

Before trial, appellant moved to suppress evidence of the gun on the ground that it was obtained pursuant to an unconstitutional stop and frisk. At the suppression hearing, defense counsel abandoned his challenge to the legality of the stop, focusing on the reasons for removing appellant from the passenger seat in order to conduct a pat-down.[1] The State presented testimony from two of the three officers who conducted the traffic stop, video from the body cameras worn by the two testifying officers, and an aerial map showing the

[1] Although appellant also challenged the scope of the frisk, citing its one-minute length, appellant does not renew his scope challenge.

location of the stop.

Baltimore City Police Detective Jamal Brunson testified that around 3:00 p.m. on March 26, 2018, he was on "proactive enforcement" in the "tri-district area[,]" which encompasses the Southwest, Western, and Southern Districts. He characterized this as a "high-crime, high-drug . . . area" that experiences "a high level of violence" where "four to five different drug organizations" operate. In March 2018 alone, this area was the scene of approximately fourteen handgun-related arrests, nine non-fatal shootings, and three homicides.

The detective described his duties that day as "essentially, just conduct[ing] protective enforcement, meaning car stops[.]" While patrolling with two partners, Officer Mark Gurbelski and Officer Shank,[2] Detective Brunson observed a gray Honda Accord with "heavily tinted" windows traveling "at a high rate of speed." After stopping for a red light at an intersection, the vehicle turned left while the light was still red.

Detective Brunson activated his emergency lights and siren. The Honda slowed and stopped on a side street. While pulling his vehicle behind the Honda, Detective Brunson activated his body camera, which has a thirty-second audio delay.

On direct examination, Detective Brunson testified that as the Honda pulled over, he saw the "left and right shoulders of both of the driver and the passenger . . . moving up and down[,]" and "there was a lot of movement going on inside the vehicle[.]" Detective

[2] Officer Shank's first name does not appear in the suppression hearing transcript or elsewhere in the record transmitted to this Court.

Brunson's body camera recorded his observation that there was "lots of movement" inside the Honda. He testified that he was unsure what the occupants were "reaching for," but in his experience the amount of movement inside the Honda was "unusual," and it heightened his concern for "officer safety for himself and his partners."

After Officer Shank made the initial approach to the driver, Detective Brunson approached the Honda. The detective recognized appellant, who was the only passenger. Detective Brunson previously encountered appellant at least "ten times" "in reference to CDS investigations in that same area." These interactions included "several arrests . . . , chases, other things[.]"

After license, tag, and registration information was called in to dispatch, Detective Brunson was advised that there were no pending matters involving the driver and that the Honda was not reported stolen.

Based on the movements he observed while the Honda was responding to his signal to pull over, Detective Brunson decided that he was going to frisk the occupants. When the prosecutor asked whether anything else factored into this decision, Brunson answered:

> Just for officer safety purposes, like I said. Not knowing what those movements led to -- were leading to, it's just for officer safety, just to pull them out just to conduct a weapons pat down for both individuals.

After inquiring about Brunson's knowledge of the area, the prosecutor asked again whether anything else "factored into" his decision to frisk the occupants, prompting this answer:

> Just the [sic] where the vehicle was coming from and th[e] area in which we conducted the stop, and just the nature of the, I'd say, the high drug and high, you know, violent crimes in that area.

The prosecutor then played a portion of Brunson's body camera video recording, which showed the officers standing between the bumpers of the Honda and their patrol vehicle at the time the dispatcher "cleared" the license and vehicle. When asked why the officers gathered behind the Honda, the detective explained that they were discussing "how [they] were going to handle the situation," and that they agreed to get the occupants out of the car to "[j]ust conduct weapons pat-downs." When Officer Gurbelski patted down appellant, he discovered a handgun.

On cross-examination, Detective Brunson testified that the tint on the Honda's windows was so dark that he "couldn't see a silhouette" "at all." "All [he] just saw was a black window[.]" While appellant and the driver were being searched by the other officers, Detective Brunson searched the area around where the driver had been sitting, "where his hands would be[,]" "[b]ecause of the furtive movements [he] observed."

On direct examination, Officer Gurbelski testified that he was in the front passenger seat of the marked patrol vehicle on "proactive enforcement" with Detective Brunson and Officer Shank. After Detective Brunson observed a traffic violation and initiated a stop, Officer Gurbelski saw the passenger's and driver's heads moving back and forth and their shoulders dipping down. According to Officer Gurbelski, "the vehicle was shaking due to the amount of movement inside of the vehicle." Characterizing these as "furtive movements," the officer explained that they were "indicative of someone who is attempting

to hide an item" from view. The officer's "greatest concern" in terms of what might be concealed was "any kind of weapon, a knife, a handgun, anything that can be used to harm [him] or one of [his] partners."

Officers Gurbelski and Shank went to the Honda while Detective Brunson called dispatch for the license and registration information. Officer Gurbelski testified that he recognized appellant because he sees him "frequently" in patrolling that area. On a previous occasion, the officer had arrested appellant after "a lengthy foot chase."

When asked why he frisked appellant, Officer Gurbelski responded that, "prior to approaching the vehicle, we observed a substantial amount of movement in the vehicle between both of the occupants, so much so that the vehicle itself was moving." When asked whether there were "any other reasons" to justify the pat-down, Gurbelski answered: "No, sir. It's an officer safety issue to, you know, possibly have, like I said, a gun, a knife anything that could possibly harm one of us."

In conducting the pat-down, Officer Gurbelski "began with a quick sweep around the waistband to see that nothing was visibly exposed[,]" then proceeded to search appellant's "jacket on the right side[.]" Appellant "moved" repeatedly, so that Officer Gurbelski "had to basically start over . . . . to make sure that [he] didn't miss anything due to the movements." When the officer felt "the handle of the firearm in his waistband[,]" he handcuffed appellant and removed a loaded handgun.

On cross-examination, defense counsel asked why the Honda was stopped. Officer Gurbelski answered that Detective Brunson "just said, []we're stopping this car. He didn't

go into detail as to why." After Officer Gurbelski retrieved the driver's license and registration, he joined the other two officers in a discussion behind the Honda. When the dispatcher reported that "the car [was] registered to the driver, that the driver's license [was] good and that there[] [was] nothing wrong with the car [,]" the three officers discussed the "furtive movements" as the car came to a stop. "[B]ased off of the observations that [they] had made . . . , [they] decided yes, this is reasonable articulable suspicion to pull these gentlemen out of the vehicle and then conduct a weapons pat-down for safety." When he frisked appellant, "[t]he gun was in his right side waistband."

Defense counsel argued that the State failed to establish reasonable suspicion that appellant was armed and dangerous because the officers embellished the movements. Pointing to discrepancies in the officers' testimony, counsel compared Detective Brunson's testimony that the tinting was "so dark" that he could not see the occupants' silhouettes to his claim that he saw the occupants moving through the car windows. Similarly, defense counsel argued that the body camera videos contradicted Officer Gurbelski's assertion that there was so much movement in the car that it was "shaking violently."

With respect to appellant's background, defense counsel argued there was nothing in evidence that could lead the officers to believe that appellant was armed and dangerous. Although Officer Gurbelski and Detective Brunson knew appellant from prior encounters involving drugs, neither testified that he was charged with a felony. Defense counsel further asserted that the officers' claims that they frisked the car's occupants for "officer safety" was undermined by evidence showing that the officers huddled together for "20 to

40 seconds" to discuss what to do and "turn[ing] their backs" on appellant and the driver, rather than immediately removing the potentially armed occupants from the vehicle. In defense counsel's view, the officers' conduct during the approximately 90 seconds between the initiation of the traffic stop and the frisk for weapons "contradicted" their stated concerns for "officer safety."

The prosecutor countered that the officers reasonably believed that appellant may have been armed based on the movements of the vehicle's occupants in a high crime area and appellant's history of arrests and chases. The State further argued that appellant's body "dropping" more on the left side was "consistent with placing a firearm in [appellant's] right side." Countering the argument that the officers' safety concerns were not "genuine," the prosecutor argued that "the law requires reasonable articulable suspicion, not reasonable articulable certainty combined with visceral demonstration of fear[.]"

The hearing court, stating that it had considered the testimony of both police officers and the State's exhibits, denied the motion to suppress, explaining:

> The testimony of both officers as to . . . what they've characterized as a furtive movement, but the car moving back and forth, the [c]ourt did observe and probably clear in State's Exhibit Number 2, the body cam footage of Officer Brunson, that shoulders did go back and forth and the [c]ourt did observe that the defendant's movement to the left with his shoulder, certainly would indicate, as the officers testified, I guess in -- as to a reasonable, articulatable [sic] suspicion that he could have been trying to hide something.
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> And I think as the State has argued that that might be indicative of placing contraband in the left side. . . .
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> [L]ooking at the totality of the circumstances, the testimony of a high-crime area and both officers' interaction with the defendant, not that he's ever been

> armed, but certainly involved in CDS arrests and clearly, based upon their experience, the connection between CDS and guns, the [c]ourt does believe that they did have a reasonable articulatable [sic] suspicion. And so the [c]ourt finds that the frisk itself was, in fact, proper.

PRINCIPLES GOVERNING REVIEW OF SUPPRESSION RULING ON *TERRY* FRISK

The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" U.S. CONST. amend. IV. This guarantee applies to the States through the Fourteenth Amendment. *See Thornton*, 465 Md. at 140.

"When evidence is obtained in violation of the Fourth Amendment, it will ordinarily be inadmissible in a state criminal prosecution pursuant to the exclusionary rule." *Id*. On appeal, this Court reviews "a hearing judge's ruling on a motion to suppress evidence under the Fourth Amendment" by considering "only the facts generated by the record of the suppression hearing." *Sizer v. State*, 456 Md. 350, 362 (2017). We consider that evidence in the light most favorable to the party that prevailed on the issue raised as grounds for suppression. *Id*.

"Suppression rulings present a mixed question of law and fact. We recognize that the '[hearing] court is in the best position to resolve questions of fact and to evaluate the credibility of witnesses.'" *Thornton*, 465 Md. at 139 (citation omitted) (quoting *Swift v. State*, 393 Md. 139, 154 (2006)). "Accordingly, we defer to the hearing court's findings of fact unless they are clearly erroneous[,]" but "[w]e do not defer to the hearing court's conclusions of law." *Id*. Instead, we "review the hearing judge's legal conclusions *de*

novo, making our own independent constitutional evaluation as to whether the officer's encounter with the defendant was lawful." *Id.* at 139-40 (citation omitted) (quoting *Sizer*, 456 Md. at 362).

"Fourth Amendment jurisprudence has made it clear that warrantless searches and seizures are presumptively unreasonable and, thus, violative of the Fourth Amendment." *Id.* at 141. For that reason, "[w]hen a police officer conducts a warrantless search or seizure, the State bears the burden of overcoming the presumption of unreasonableness." *Id*.

A protective pat-down following an investigatory traffic stop is a search on the Fourth Amendment spectrum. *See Pyon v. State*, 222 Md. App. 412, 420 (2015). Also known as a "*Terry* stop and frisk," named after the landmark Supreme Court decision establishing the constitutional limits on such seizures and searches, a pat-down is a limited search that must be supported by "reasonable articulable suspicion that the person with whom the officer is dealing is armed and dangerous." *See Thornton*, 465 Md. at 142; *see also Terry v. Ohio*, 392 U.S. 1 (1968). Whereas the purpose of a *Terry* stop is to investigate possible criminal activity, the purpose of a *Terry* frisk is to protect the searching officer and others in the vicinity. *See Thornton*, 465 Md. at 142; *Ames v. State*, 231 Md. App. 662, 673-74 (2017). Consequently, circumstances establishing reasonable suspicion for an investigatory stop do not automatically establish justification for a pat-down. *See Thornton*, 465 Md. at 142 n.13.

It is the State's burden to overcome the presumption that a warrantless frisk is unreasonable by articulating a "particularized suspicion at its inception." *See id.* "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." *Norman v. State*, 452 Md. 373, 387, *cert. denied*, 138 S. Ct. 174 (2017).

Although such a feeling "must be based on more than an inchoate and unparticularized suspicion or hunch," *Chase v. State*, 449 Md. 283, 296 (2016) (internal quotation marks omitted) (quoting *Terry*, 392 U.S. at 27), the reasonable suspicion standard "does not require an officer to be absolutely certain that an individual is armed and dangerous." *Thornton*, 465 Md. at 142. The Court of Appeals has "described the standard as a 'common sense, nontechnical conception that considers factual and practical aspects of daily life and how reasonable and prudent people act.'" *Holt v. State*, 435 Md. 443, 460 (2013) (quoting *Crosby v. State*, 408 Md. 490, 507 (2009)).

"[C]onduct that would seem innocent to an average layperson may properly be regarded as suspicious by a trained or experienced officer, but if the officer seeks to justify a Fourth Amendment intrusion based on that conduct, the officer ordinarily must offer some explanation of why he or she regarded the conduct as suspicious; otherwise, there is no ability to review the officer's action." *Ransome v. State*, 373 Md. 99, 111 (2003). Because it is the State's burden to produce evidence from which a determination of

reasonable suspicion may be made, "appellate courts cannot fill in blanks in the evidentiary record." *In re Jeremy P.,* 197 Md. App. 1, 22 (2011).

When evaluating whether an officer had reasonable suspicion for a *Terry* frisk, courts consider the totality of the circumstances. *See Holt*, 435 Md. at 460. Although we must "assess the evidence through the prism of an experienced law enforcement officer, and 'give due deference to the training and experience of the . . . officer who engaged the stop at issue,'" *id*. at 461 (quoting *Crosby*, 408 Md. at 508), we are mindful that ultimately, "[t]he test is objective: 'the validity of the stop or frisk is not determined by the subjective or articulated reasons of the officer; rather, the validity of the stop or frisk is determined by whether the record discloses articulable objective facts to support the stop or frisk.'" *Sellman v. State*, 449 Md. 526, 542 (2016) (quoting *Ransome*, 373 Md. at 115); *see Thornton*, 465 Md. at 142-43.

DISCUSSION

Appellant contends that "at the time of the frisk, there were insufficient circumstances giving rise to reasonable articulable suspicion that [he] was armed and dangerous to justify the frisk." In his view,

> there was no suggestion that either [appellant] or the driver were engaged in illegal activity and no prior history with the police that would suggest that [appellant] was armed. Other than [appellant's] mere presence in a high crime neighborhood and nondescript shoulder and head movements when the vehicle came to a stop, the police offered no further factual basis for their decision to pat-down [appellant] and the driver. [Appellant] was just a passenger in a car that was pulled over for running a red light.

The State responds that "the suppression court correctly concluded, based on the totality of the circumstances known at the time of the frisk[,]" that appellant "may have been armed and dangerous." In particular, the State cites the following three factors as grounds for the search:

> (1) the high levels of violent and drug-related crime in the specific area where the traffic stop occurred; (2) the furtive movements on the part of both occupants inside the Honda as it was pulling to the side of the road; and (3) the officers' familiarity with [appellant] from multiple prior arrests and chases in connection with drug-related investigations in that same area[.]

In appellant's view, however, the two officers who testified at the suppression hearing only "articulated two reasons to justify the frisk": "(1) the movement of the occupants when the car came to a stop, and (2) the occupants' presence in a high crime neighborhood." Appellant argues that "[n]either factor alone nor the combination of the two" supports a reasonable suspicion that he was armed and dangerous.

After the parties briefed this appeal, the Court of Appeals considered the role of furtive movements as justification for a *Terry* frisk of a vehicle's occupant following a routine traffic stop, in *Thornton*. There, the Court addressed an issue not decided by either the suppression court or this Court, "[t]o provide guidance to suppression courts[,]" *Thornton*, 465 Md. at 141, holding that a gun recovered from the occupant of an illegally parked vehicle "should have been excluded as evidence . . . because the State failed to establish that the frisk . . . was reasonable under the circumstances." *Id*. at 130. Close examination of the *Thornton* opinion and its rationale informs our analysis and resolution of the instant case.

Thornton v. State

At the suppression hearing in *Thornton*, two Baltimore City police officers testified that on New Year's Day 2016, around 2:00 p.m., they were on patrol with a third officer in "'a high drug area' . . . looking for drugs, weapons, and other contraband." *Id*. at 131. Thornton was alone, sitting in the driver's seat of his car. *Id.* The vehicle was parked with lights and engine off, "along the curb across the street from [Thornton's] home, but it was facing the wrong direction" because "there was construction work being done on the street that interfered with ordinary parking." *Id.* Officer Zimmerman pulled his patrol car behind Thornton's vehicle and activated emergency lights. *Id*. Although "[t]he officers intended to inform the vehicle's driver that the car was illegally parked[,]" when they approached on opposite sides, "they questioned Mr. Thornton for approximately 30-40 seconds" without informing him "that his vehicle was illegally parked." *Id*. at 131-32. "By all accounts, Mr. Thornton's demeanor while he was being questioned was 'laid back.'" *Id*. "Neither officer could affirm that they investigated the license plate on Mr. Thornton's vehicle or asked Mr. Thornton for his license and registration, although both officers testified that running a vehicle's tags and asking for a driver's license and registration is standard procedure for issuing a parking citation to the operator of an illegally parked vehicle." *Id.*

"Nonetheless, both officers testified that Mr. Thornton showed characteristics of an armed individual." *Id*. "According to the trial court's factual findings, to support their notion that Mr. Thornton was armed, '[a]ll [the officers] ha[d] [wa]s . . . conduct with [Mr.

Thornton's] hands [that the officers observed] while [Mr. Thornton was] being approached by the police officers.'" *Id*. (alterations in original). The Court of Appeals summarized that evidence as follows:

> At the suppression hearing, the officers described the conduct they observed that led them to believe that Mr. Thornton was armed. Even though Mr. Thornton was observed seated in a vehicle, Officer Scott testified that when a person is armed, "they walk . . . with their arm[s] straight, sometimes they don't like swing their arms a lot or they check[] . . . their . . . front waistband area." Officer Scott explained that, as he was approaching Mr. Thornton's car, he saw Mr. Thornton looking out of his mirror. He also saw Mr. Thornton "numerous times like start making movements to his front area[.]" He did not describe the specific movements that he saw. Officer Scott explained that, while Mr. Thornton was being questioned, Mr. Thornton had his hands down by his side near his waist. According to Officer Scott, "[Mr. Thornton] just kept like doing like a check, like just trying to, I don't know, like push it down or . . . I don't know . . . just to make sure it's secured." Mr. Thornton made such movements "[n]umerous, numerous times." Officer Scott inferred that Mr. Thornton was doing "a weapons check . . . like he had something he was trying to hide."
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> Officer Zimmerman testified that an armed individual may have "a bladed stance away from you, [do] security checks, maybe favor[ ] one side of [his or her] body but a big one is . . . hold[ ] the area where the weapon is concealed." Officer Zimmerman indicated that, when seated in a vehicle, the individual may move his or her shoulders "up or down drastically and that would show that [the individual is] maybe trying to reach under [his or her] seat or to, you know, further conceal something in [his or her] front waistband." In addition, Officer Zimmerman noted that the suspect may make "quick movements that are kind of uncharacteristic with just being seated in a vehicle."
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> Officer Zimmerman testified further that, as he was approaching Mr. Thornton's vehicle, he saw Mr. Thornton "raise his right shoulder and kind of bring his elbows together[.]" Officer Zimmerman said that Mr. Thornton appeared "uncomfortable with whatever was in his lap . . . he kept trying . . . [to] mak[e] adjustments, kept his hands in front of his lap." When speaking with the officers, "Mr. Thornton would lean over to the right to address . . . Officer Scott and then again would sit back down and attempt to adjust something in his waistband." Mr. Thornton appeared to be "manipulating

> something, that he was obviously uncomfortable with, didn't like the position or . . . the size, the shape, but there was something that he was manipulating." At first, Officer Zimmerman said that Mr. Thornton made such movements two or three times. Later, Officer Zimmerman testified that Mr. Thornton touched his waistband four to five times. Officer Zimmerman conceded that Mr. Thornton may have been moving to address the officers, who were stationed on either side of his vehicle. He also acknowledged that, in his experience, individuals tend to be more nervous around police and may move around as a result. He maintained, however, that Mr. Thornton was not making nervous movements; his movements were characteristic of an armed person.
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> Because the officers thought that Mr. Thornton exhibited signs of an armed individual, Officer Scott said that the stop was no longer an ordinary traffic stop. Officer Scott asked Mr. Thornton whether he could search Mr. Thornton's car. Mr. Thornton declined. In response, Officer Scott told Mr. Thornton that they would have to wait for a K-9 unit to arrive. Officer Zimmerman explained that "[s]ometimes we will say that we're calling for a K-9 unit to" scare or "gauge the reaction of the person that [we're] speaking to." There is no indication that Officer Scott's threat to call a K-9 unit invoked any particular reaction from Mr. Thornton. At the suppression hearing, Officer Scott testified that he did not intend to call a K-9 unit to the scene. Officer Scott explained that his true intention was to search Mr. Thornton because he believed Mr. Thornton was armed. On cross-examination, Officer Scott was unable to explain why he would ask to search Mr. Thornton's vehicle and threaten to call a K-9 unit if, all along, he believed that Mr. Thornton had a weapon.

Id. at 132-134 (alteration in original).

When asked to step out of his car to allow Officer Zimmerman to conduct a pat-down, "Mr. Thornton complied." *Id*. at 134. Although the officer did not feel a weapon in Thornton's waistband, Thornton pushed the officer "aside a little bit and then ran." *Id*. When Thornton "slipped and fell[,]" he was apprehended. *Id*. Police recovered "a handgun that was lying on the ground beneath Mr. Thornton." *Id*.

The suppression court "found that the traffic stop may have been pretextual, *i.e.,* 'just an excuse to inquire further into the driver[.]'" *Id*. Nevertheless, the parking violation

made the initial stop lawful. *Id*. at 135.

Turning to the frisk, the suppression court addressed "whether the officers were justified in searching Mr. Thornton's person, based on the movements or 'furtive gestures' that they saw Mr. Thornton make." *Id*. (footnote omitted). Finding Officer Scott's testimony "unconvincing" the suppression court concluded that it failed to "establish sufficient cause for a search[,]" given his requests to search the car and threats to call a K-9 unit. *Id*. at 136. In contrast, Officer Zimmerman's more detailed account persuaded the court "that if Mr. Thornton moved as described, such movements 'could be consistent with adjusting the position of a gun in the waistband or in some other actions toward the [waist]band.'" *Id*.

Yet the suppression court, citing *In re Jeremy P*., 197 Md. App. at 1, "explained that 'a security check by itself . . . is not enough to establish . . . reasonable [suspicion] . . . because it could represent any variety of behaviors other than checking on a gun.'" *Thornton*, 465 Md. at 136. Because "[t]he record lacked any indication of verbal aggression, disobedience, or false identification on Mr. Thornton's part, or evidence of a tip or crime to which Mr. Thornton could be connected[,]" the suppression court determined that "the officers' sole basis for justifying the search was the movements that they observed Mr. Thornton making as he was sitting in his vehicle." *Id*.

Although the suppression court pointed out that, in accordance with *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), "police officers may lawfully order an operator out of the vehicle during the course of a traffic stop[,]" at that point, "the officers had 'very

questionable reasonabl[e] articulable suspicion' to subsequently frisk Mr. Thornton." *Thornton*, 465 Md. at 136 (alteration in original). Nevertheless, the court denied the motion to suppress, ruling that, "assuming *arguendo* that an unlawful search had occurred, . . . Mr. Thornton's flight constituted an intervening circumstance that 'attenuate[d] the initial illegality.'" *Id*. at 137 (alteration in original).

In affirming that ruling based on the attenuation doctrine, this Court assumed without deciding that the police had reasonable articulable suspicion to support the frisk. *See Thornton v. State*, 238 Md. App. 87, 123 (2018), *rev'd*, 465 Md. 122 (2019). In doing so, we reviewed "several Maryland cases . . . conclud[ing] that furtive hand movements, in combination with other factors, can contribute to reasonable suspicion that the occupant of a vehicle is armed and dangerous." *Id*. at 121. For example, in *Matoumba v. State*, 162 Md. App. 39, 43, *aff'd*, 390 Md. 544 (2006), a passenger "repeatedly looked back at the police cruiser while the officers were [e]ffecting the stop" and "appeared to dip his right shoulder down to the floor as [the officer] approached[.]" The "passenger also 'placed his right hand behind his back'" and "demonstrated visibly shaking hands when commanded to show them." *Thornton*, 238 Md. App. at 121 (quoting *Matoumba*, 162 Md. App. at 43, 50). Ultimately, the ruling that there was reasonable suspicion to believe the passenger was armed and dangerous resulted from the "'due weight' [given] to this 'nervous conduct' in combination with what [the suppression court] described as the 'evasive action.'" *Id*. (quoting *Matoumba*, 162 Md. App. at 48).

In addition to *Matoumba*, we cited the following cases in which furtive movements

and other circumstances combined to create reasonable suspicion that the occupant of a stopped vehicle was armed and dangerous:

> *See Chase v. State*, 449 Md. 283, 307-08 (2016) (upon stopping vehicle for suspected illegal drug activity, officers observed driver and passenger reach under seat as officers were approaching); *Goodwin v. State*, 235 Md. App. 263, 281-83 (2017) (officers observed passenger engage in suspected illegal drug activity, driver did not stop immediately when officers signaled for him to stop, and driver bent toward floor area of car out [of] officers' view), *cert. denied*, 457 Md. 671 (2018); *Underwood v. State*, 219 Md. App. 565, 569-75 (2014) (driver had bulging pockets, driver showed extraordinarily stiff demeanor during traffic stop, officer knew that driver was on probation for prior handgun offense, and driver moved hand towards his pocket as officer reached for hand); *Russell v. State*, 138 Md. App. 638, 653-54 (2001) (during traffic stop in area in which guns are frequently recovered, passenger appeared extremely nervous when asked for his license and then attempted to conceal something in a pocket large enough to hold a handgun).
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> As these cases illustrate, a "factor that, by itself, may be entirely neutral and innocent, can, when viewed in combination with other circumstances, raise a legitimate suspicion in the mind of an experienced officer." *Ransome v. State*, 373 Md. at 105. **Still the State cites no case, in Maryland or elsewhere, holding that testimony about a movement by the occupant of a vehicle while an officer is approaching is enough to generate reasonable suspicion that the occupant is armed and dangerous.** This Court would need to venture beyond our existing precedent to conclude that Officer Zimmerman's testimony established justification for the frisk, where essentially all other objective circumstances indicated that Thornton was peaceful, compliant, and law-abiding, save for a minor parking infraction.

Id. at 121-22 (emphasis added).

Despite this thorough review of *Terry* frisk cases, we declined to resolve "the same impasse reached by the circuit court," *id.* at 122, and "assume[d], as the circuit court apparently did, that the officers lacked objectively reasonable suspicion to conduct the pat-down." *Id.* at 123. Instead, as noted previously, we affirmed the suppression court's denial

of the motion based on the attenuation doctrine. *Id.* at 123, 138.

On certiorari, the Court of Appeals exercised its discretion to address "this prefatory Fourth Amendment issue," *Thornton*, 465 Md. at 141, finding "an ample hearing record and sufficient findings of fact by the suppression court to reach the legal conclusion of whether there existed reasonable suspicion to frisk" Thornton. *See id.* at 140 n.11. "To provide guidance to suppression courts," the Court explained why the frisk violated Thornton's Fourth Amendment rights. *Id.* at 140.

Pointing out that "[t]he purpose of a protective *Terry* frisk is not to discover evidence, but rather to protect the police officer and bystanders from harm[,]" *id.* at 142 (quoting *Bailey v. State*, 412 Md. 349, 366-67 (2010)), the *Thornton* Court recognized

> that furtive movements, coupled with additional circumstances, can provide law enforcement with reasonable suspicion to believe that an individual is armed and dangerous. *Chase v. State*, 449 Md. 283, 307-08 (2016). In *Chase*, two officers were patrolling a hotel parking lot, located in an area known for illicit narcotic activity. The officers observed the passenger of a Lexus exit his vehicle and get into the passenger's seat of a Jeep Grand Cherokee. The officers observed the occupants make furtive movements. Specifically, the occupants of the Jeep were moving around, and they put their hands in their pockets. The occupants also provided the officers with conflicting explanations for their presence in the parking lot, and the passenger was described as "irate." Based on the circumstances, the officers suspected that the occupants were involved in illegal activity and may possess weapons.
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> The officers approached the vehicle and conducted a frisk of the passenger but discovered nothing. The officers detained the occupants in handcuffs and dispatched a K-9 unit to the scene. Ultimately, the officers searched the Jeep and discovered a motel key. After obtaining a search warrant, the officers found narcotics paraphernalia in the room associated with the motel key, which, before this Court, was alleged to have been discovered in violation of the driver's Fourth Amendment rights. We explained that the officers observed conduct that was "consistent with the

> hiding of illegal drugs [and] . . . suggested [that] weapons could have been secreted in the vehicle." Thus, we concluded that the occupants' "actions, mannerisms and 'furtive' movements" gave the officers reasonable suspicion to believe that weapons may have been present.

Id. at 143-44 (alterations in original).

The Court of Appeals also pointed to our decision in *In re Jeremy P.*, 197 Md. App. 1, where we followed *Ransome*, 373 Md. 99, in holding that furtive movements were not made more suspicious by the fact that they occurred in a high crime area. The *Thornton* Court observed:

> The Court of Special Appeals has concluded that a suspect's furtive movements in a high crime area, alone, were not sufficient to generate reasonable suspicion, where there was no particularized explanation for why the movements were inconsistent with innocent conduct. In *In re Jeremy P.*, a detective conducted a stop and frisk of a juvenile who made furtive movements in a high crime area, leading the officer to suspect that he was concealing a handgun. Specifically, the juvenile "kept playing around with his waistband area . . . . And he kept making firm movements in his waistband area." The officer observed the furtive movements two or three times. He deemed the juvenile's movements as "indicative of somebody constantly carrying a weapon on them." The detective asked the juvenile to sit on the ground. Ultimately, the detective decided to conduct a pat-down. When the officer asked the juvenile to stand up, the detective saw that the juvenile was sitting on top of a gun. The detective proceeded with the pat-down and recovered bullets from the juvenile's pants pocket.
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> The Court of Special Appeals explained that "there is no Maryland precedent involving a stop premised solely on the type of waistband adjustments at issue in the case." Aside from the waistband adjustments, the juvenile was not claimed to have been behaving in a suspicious manner. The detective did not "observe[] a bulge consistent with the presence of a weapon[,]" or "explain why he interpreted [the juvenile's] conduct to indicate the presence of a weapon, rather than merely a cell phone or another innocent object." In addition, the detective "did not testify about his own experience in recovering a gun based on observations of similar waistband adjustments." The Court of Special Appeals refused to "'rubber stamp' conduct simply because the officer believed he had the right to engage in it."

> [quoting *Ransome*, 373 Md. at 111]. Therefore, the court held that the detective lacked reasonable articulable suspicion to stop the juvenile.

Thornton, 465 Md. at 144-45 (alterations in original) (citations omitted).

Applying these principles and lessons to the suppression record before it, the *Thornton* Court held that "the State failed to present sufficient evidence to rebut the presumption that the warrantless frisk of [Thornton] was unreasonable." *Id.* at 145 (footnote omitted). The Court pointed to the testimony of Officer Zimmerman that Thornton made "'furtive' movements while he was seated in his vehicle[,]" *id.* at 145, when he "raise[d] his right shoulder and kind of br[ought] his elbows together[,]" and that "while being questioned, [he] kept his hands in front of his lap, adjusted his waistband, and 'would lean over to the right to address . . . Officer Scott and then again would sit back down and attempt to adjust something in his waistband.'" *Id.* at 146 (alterations in original). That testimony, the Court concluded,

> failed to set forth particularized facts that would warrant an objective officer to believe that he or she was in danger. . . . During their encounter with [Thornton], the officers outnumbered him three to one. Both Officer Scott and Officer Zimmerman described [Thornton's] demeanor as "laid back." We point out that when the police officers approached the vehicle and Petitioner was in the driver's seat, the officers knew or should have known that the misdemeanor prompting them to confront [Thornton] was merely a non-arrestable traffic offense. In addition, the suppression court took note of the many circumstances that were not presented on the record. The suppression court explained:
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> > I would note that there's no indication [that [Thornton] engaged in] verbal aggressiveness, disobedience, [or] false identification. In fact there's no evidence that any identification was asked for or received. No evidence [that the officers received] a tip, that something bad had happened. Although it was indicated it was a high crime area, there was

> no evidence of a rash of recent crimes that [Thornton] could be assigned to. No indication that [Thornton] fit some description of some third party.
>
> Not unlike in *In re Jeremy P*., in this case, the suppression court found that the "conduct with [Thornton's] hands while [Thornton's vehicle] was being approached by the police officers" was the sole basis for the officers' suspicion that [Thornton] was armed and dangerous.
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> We recognize that Officer Scott had worked for the Baltimore City Police Department for 10 years, and Officer Zimmerman had worked there for three and a half years. In addition, both officers had training and experience in identifying armed individuals, which their testimony indicated that they drew upon in suspecting that [Thornton's] movements were indicative of an armed individual. We give due weight to "the specific reasonable inferences which [an officer] is entitled to draw from the facts in light of his [or her] experience." Nevertheless, we do not give weight to an officer's "inchoate and unparticularized suspicion or 'hunch.'" To articulate reasonable suspicion, an "officer must explain how the observed conduct, when viewed in the context of all the other circumstances known to the officer, was indicative of criminal activity." "[I]t is impossible for a combination of wholly innocent factors to combine into a suspicious conglomeration unless there are concrete reasons for such an interpretation." Law enforcement officers cannot "simply assert that innocent conduct was suspicious to him or her." We repeat what has been said before, this Court will not "rubber stamp conduct simply because the officer believed he had the right to engage in it."

Id. at 146-47 (alterations in original) (citations omitted).

Examining the suppression hearing record, including testimony regarding the officers' training and experience in recognizing armed individuals, the *Thornton* Court concluded that the State failed to articulate an objectively reasonable basis for suspecting that Thornton was armed:

> Officer Zimmerman explained common characteristics of armed individuals in general. He said that, while seated in a vehicle, armed individuals may drastically move their shoulders, which would indicate that the individual[s] [are] "trying to reach under [their] seat or . . . conceal something in [their] front waistband." He testified that armed individuals

> make "quick movements that are . . . uncharacteristic with just being seated in a vehicle." The officers did not testify to having observed [Thornton] reach under his seat or make any of the quick movements described above. Officer Zimmerman saw [Thornton] "raise his right shoulder and kind of bring his elbows together[.]" Nonetheless, the fact that Officer Zimmerman was trained to believe that armed individuals may move "a shoulder . . . up or down drastically," and that he saw [Thornton] move his right shoulder is not, by itself, dispositive to our reasonable suspicion analysis. Rather, it is but one factor to be considered among the totality of the circumstances. To hold otherwise would effectively allow law enforcement's narrowly drawn authority to conduct a limited frisk for weapons to swallow the general rule that warrantless searches are presumptively unreasonable.
>
> Moreover, the officers failed to articulate an objective basis or provide a justification for suspecting that [Thornton] was manipulating or adjusting a *weapon* in his waist area rather than some innocent object. In fact, Officer Zimmerman conceded that [Thornton's] movements may have been consistent with innocent conduct. For instance, Officer Zimmerman acknowledged that [Thornton's] shifting around during the traffic stop could have been attributable to the fact that there were officers on either side of his vehicle, and he was shifting to answer the officers' questions, rather than adjusting a weapon in his waistband or performing a weapons check. Consequently, the officers failed to explain "why [they] interpreted [Thornton's] conduct to indicate the presence of a weapon, rather than merely [possession of] a cell phone or another innocent object." The officers' testimony was "not particularized and could fit a very large category of presumably innocent travelers, who would be subject to virtually random [searches and] seizures were th[is] Court to conclude that as little foundation as there was in this case could justify a" frisk. As such, we cannot say that the frisk was based on anything more than an inchoate and unparticularized hunch that [Thornton] possessed a weapon.

Id. at 147-49 (alterations in original) (citations omitted).

Based on this suppression record, the Court

> conclude[d] that the officers did not have reasonable suspicion to lawfully frisk [Thornton]. [Thornton] was investigated concerning a minor traffic violation, and the officers outnumbered him three to one. Although [Thornton] made allegedly "furtive movements" as the officers approached his vehicle, during the encounter, [Thornton] was described as "laid back," and he complied with the officers' requests. Under these circumstances, the

> officers failed to particularize an objectively reasonable basis for believing that [Thornton] was armed and dangerous. Indeed, the suppression court found that, during the exchange, the officers acted in a manner that was largely inconsistent with a genuine belief that Mr. Thornton was armed and dangerous. Accordingly, the frisk . . . was based on an inchoate and unparticularized hunch that [Thornton] possessed a weapon. The frisk was, therefore, not supported by the requisite quantum of suspicion to overcome the State's burden of proving that the warrantless search was reasonable. We hold that the frisk violated [Thornton's] Fourth Amendment rights.

Id. at 149.

Appellant's Challenge

When asked why they decided to pat-down appellant and the driver, both Detective Brunson and Officer Gurbelski testified that their decision was premised primarily on the movements they observed inside the Honda as it was pulling over to the side of the road. According to Detective Brunson, "the shoulders of both the driver and the passenger [were] moving up and down[,]" like they were "reaching for" something, which caused the detective to be concerned for "officer safety." Similarly, Officer Gurbelski recounted that the vehicle "was shaking due to the amount of movement inside" and that the shoulders of both the driver and appellant were "dipping down." Officer Gurbelski described these as "furtive movements" that were "indicative of someone who is attempting to hide an item[.]" His "greatest concern" was that the occupants were concealing "any kind of weapon, a knife, a handgun, anything that can be used to harm" one of the officers. The hearing court credited this evidence, finding that appellant's "movement to the left with his shoulder, certainly would indicate as the officers testified . . . that he could have been trying to hide something."

Appellant contends that the suppression hearing court erred in finding that the movements described by the officers "constituted reasonable suspicion that he was 'trying to hide something.'" In appellant's view, the testimony of Officer Gurbelski and Detective Brunson, and the body camera footage, "at best" show only "lateral shoulder and head movement as if the occupants have turned to face each other in conversation." Because neither appellant nor the driver was engaged in illegal activity and there was no indication that appellant's prior police encounters involved weapons, appellant contends that his "mere presence in a high crime neighborhood and nondescript shoulder and head movements when the vehicle came to a stop" did not establish reasonable suspicion that he was armed and dangerous.

We begin our review of the suppression court's ruling by noting that the Fourth Amendment issue is not, as the hearing court suggested, whether the officers had a reasonable suspicion that appellant and the driver "could have been trying to hide *something*." (Emphasis added.) Nor is the issue whether the officers *actually* suspected that they were armed and dangerous. Instead, the dispositive constitutional question is whether, based on the totality of circumstances, there was an *objectively* reasonable suspicion that either appellant or the driver was hiding a *weapon*. This reflects that the purpose of a *Terry* frisk "is not to discover evidence, but rather to protect the police officer and bystanders from harm." *Thornton*, 465 Md. at 142 (citation omitted); *see Ames*, 231 Md. App. at 673. It also reflects that the Fourth Amendment requires the State to establish that, at the inception of the pat-down, the police officer is able to articulate objectively

reasonable grounds to believe that the suspect was armed and dangerous. *See id.*

As the *Thornton* Court recognized, "furtive movements, coupled with additional circumstances, can provide law enforcement with reasonable suspicion to believe that an individual is armed and dangerous." *Id.* at 143. Such movements must be viewed in the totality of the circumstances, which encompass where the stop occurred and the behavior of the occupants in the vehicle. *See id.* We reiterate that it is the State's burden to establish reasonable suspicion that the observed movements indicated that an occupant was armed or concealing a weapon. *Cf. id.*, 148 ("the officers failed to articulate an objective basis . . . for suspecting that [Thornton] was manipulating or adjusting a *weapon* in his waist area rather than some innocent object").

Here the State failed to meet that burden. The observed movements in the Honda, even when viewed in light of the high crime area and the officers' prior encounters with appellant, did not establish a reasonable suspicion that appellant or the driver was manipulating or concealing a weapon. Indeed, this suppression record contains significantly less supporting evidence of reasonable suspicion than that deemed insufficient by the *Thornton* Court:

- In *Thornton*, as in this case, police were on patrol in a high crime neighborhood when they observed a non-arrestable traffic violation. *See id.*, at 146.

- As in *Thornton*, police had no tips concerning a weapon in this vehicle or carried by its occupants. *Id.* at 147. Nor did police observe a CDS transaction or other criminal activity from which an inference might be drawn that the occupants were armed. *Cf. Chase*, 449 Md. at 307-08 (reasonable suspicion for frisk of vehicle occupant stopped for suspected drug activity, after furtive movements); *Goodwin*, 235 Md. App. at 281-83

(reasonable suspicion for frisk of vehicle occupant after suspected drug transaction and movements consistent with concealment of contraband).

- Just as the three officers who conducted the *Thornton* stop outnumbered the sole occupant of that stopped vehicle, the three officers in this case outnumbered the two occupants in the Honda. *See Thornton*, 465 Md. at 149.

- Whereas the officers in *Thornton* detailed their training and experience in recognizing movements characteristic of armed persons, the officers in this case did not testify about any such training or experience. *Id.* at 147. Nor did they testify that the shoulder movement they observed was characteristic of a person concealing a weapon, rather than another object that did not pose a threat to officer or public safety.

- The movements cited as grounds for the frisk in *Thornton* encompassed more than the movements cited as grounds for the frisk in this case. In *Thornton*, the frisk was premised not only on shoulder movements like those described in this case, but also on repeated hand movements, as Thornton manipulated something underneath his clothing in the high-risk waistband area. *Id.* at 148. Moreover, Thornton's hand movements occurred after the officers approached his vehicle, while they were interviewing Thornton. *Id.* In contrast, the shoulder movements observed by police in this case were not followed by any suspicious hand movements.

- In both *Thornton* and this case, while police were interviewing the occupants of the stopped vehicle, there was no nervousness, agitation, inconsistent statements, or lack of cooperation indicating possible criminal activity or possession of weapons. *Id.* at 149. Like Thornton, appellant and the driver were compliant, and there was nothing about their demeanor that caused the officers to suspect they were armed. *Id.*; *cf. Matoumba*, 162 Md. App. at 48, 50 (during stop, frisked subject was nervous and his hands were shaking); *Russell*, 138 Md. App. at 653-54 (frisked subject was extremely nervous and tried to conceal something in pocket large enough to hold a handgun).

- As in *Thornton*, the officers here arguably "acted in a manner largely inconsistent with a genuine belief," that appellant was armed and dangerous, *Thornton*, 465 Md. at 149, because the officers huddled for a short period of time to discuss what action they should pursue.

Viewing the totality of the circumstances, we conclude that the officers did not have reasonable suspicion to lawfully frisk appellant. Although both officers testified that the

movement they saw while approaching the Honda indicated that its occupants might be concealing something, which they worried might be a weapon, neither officer explained *why* those particular movements raised that concern. In contrast to the testimony in *Thornton,* detailing the officer's training and experience in identifying shoulder movements that are characteristic of an armed person, in this case, neither officer testified to possessing such training or experience. Nor did they testify that the movements they observed were distinctively characteristic of armed persons. Moreover, the shoulder movements described by the officers here were not accompanied by any of the manipulative hand movements in high-risk areas of the body that existed in *Thornton* and *In re Jeremy P*.

Instead, when asked why they decided to pat-down appellant and the driver, both officers answered that it was a combination of the occupants' furtive movements before they were questioned and the high crime area where the stop occurred. To be sure, evidence of the gun-related offenses committed in that enforcement district during the same month as this stop and frisk supports the characterization of the area as one presenting an increased risk to officer safety.

Yet the combined evidence of appellant's movements as the police approached and the high crime nature of the area where the stop occurred did not rebut the constitutional presumption that the frisk was unreasonable. As *Thornton* teaches, the fact that an individual makes a movement consistent with concealing an unknown "something," as he or she is stopped in a high crime area for a minor traffic violation does not support a

reasonable suspicion that the individual is armed and dangerous. *See Thornton*, 465 Md. at 149; *In re Jeremy P.*, 197 Md. App. at 20-22. A contrary conclusion would effectively authorize police to frisk every individual pulled over for a non-arrestable traffic violation, whenever, in the course of responding to the lights and siren, that individual or a companion moves his or her shoulders in a manner that, among a myriad of innocent possibilities, could be consistent with concealing some unknown item that is not a weapon. Because the State failed to sufficiently particularize why the shoulder movements made by appellant and the driver indicated that they were armed and dangerous, they "could fit a very large category of presumably innocent travelers, who would be subject to virtually random [searches] . . . were th[is] Court to conclude that as little foundation as there was in this case could justify a frisk." *Thornton*, 465 Md. at 149 (quoting *Sellman v. State*, 449 Md. 526, 544 (2016)).

Nor are we persuaded that appellant's prior police encounters boosted the level of reasonable suspicion over the Fourth Amendment threshold. "It is not enough that objective circumstances be present that might have permitted some other officer in some other case to conclude that the suspect was armed and dangerous. It is required that the frisking officer himself expressly articulate the specific reasons he had for believing that the frisk was necessary." *Ames*, 231 Md. App. at 674. Because neither Detective Brunson nor Officer Gurbelski invoked their past dealings with appellant as grounds for suspecting that he was armed, that factor was not part of their articulated grounds for the frisk. Nevertheless, the prosecutor cited appellant's prior encounters with the officers as a factor

contributing to reasonable suspicion, and the hearing court relied in part on that evidence in ruling on the motion.

We do not agree that evidence of appellant's prior encounters with Detective Brunson and Officer Gurbelski tipped the Fourth Amendment balance in this instance. Although both officers testified that they recognized appellant from "frequent" interactions involving drugs, including multiple arrests and a foot chase, the hearing court expressly recognized that there was no evidence that appellant was armed during those previous incidents. *Cf. Underwood*, 219 Md. App. at 570-71 (frisking officer knew that driver of vehicle was on probation for a handgun offense). Nor was there any evidence that appellant "was in possession of illegal narcotics," which arguably might have "raised reasonable, articulable suspicion that he was in possession of a firearm." *See Stokeling v. State*, 189 Md. App. 653, 667 (2009).

Like the Court of Appeals,

> [w]e are fully cognizant of dangers constantly lurking on our streets and of the plight of conscientious police officers who have to make split-second decisions in balancing their duties, on the one hand, to detect and prevent crime, respecting the dignity and Constitutional rights of persons they confront.

Ransome, 373 Md. at 111. As in *Thornton* and *In re Jeremy P.*, however, "[t]he conduct here, on the record before us, crossed the line." *Id*.

Following *Thornton*, we hold that this frisk violated appellant's Fourth Amendment rights because the State failed to establish an objectively reasonable suspicion that appellant was armed and dangerous. Consequently, the hearing court erred in denying

appellant's motion to suppress evidence of the gun recovered in that search. Because appellant's guilty plea was conditioned on the outcome of that motion, we must reverse his conviction.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY VACATED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY MAYOR AND CITY COUNCIL OF BALTIMORE.