Circuit Court for Baltimore City
Case No. 118249020

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3241

September Term, 2018

RASHAD WHITEHURST

v.

STATE OF MARYLAND

Graeff,
Arthur,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: February 5, 2020

*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.

Following a jury trial in the Circuit Court for Baltimore City, Rashad Whitehurst, appellant, was convicted of unlawful possession of a regulated firearm; wearing, carrying, or transporting a handgun; illegal possession of ammunition; possession of oxycodone; and possession of more than 10 grams of marijuana. On appeal, he raises two issues: (1) whether the court erred in denying his motion to suppress contraband that was recovered from his person, and (2) whether the commitment record must be amended to accurately reflect the sentence imposed by the circuit court. For the reasons that follow, we shall affirm.

I.

Mr. Whitehurst first contends that the court erred in denying his motion to suppress the loaded firearm and oxycodone that were recovered during a search of his person.[1] Specifically, he claims that the police lacked probable cause to arrest him and therefore, that the search could not be justified as a search incident to arrest.

At the suppression hearing, Detective Luke Shelley was admitted as an expert in the sale, identification, packaging, use, and distribution of controlled substances in Baltimore City. Detective Shelley testified that he was conducting surveillance at an intersection that was a "known open air drug market that [had] high volume calls for CDS activity" and observed Mr. Whitehurst engage in hand-to-hand transactions with three different individuals. In the first transaction, a man approached Mr. Whitehurst, who was sitting in the passenger seat of his parked vehicle. Mr. Whitehurst gave the man several very small

[1] The police also recovered marijuana during a search of Mr. Whitehurst's vehicle. He does not contend that the search of his vehicle was unlawful.

objects and thereafter, the man walked away. Mr. Whitehurst then exited the car, sat on the steps of a vacant building, and proceeded to smoke what Detective Shelley believed to be a marijuana cigarette. Several minutes later, another man parked his car on the side of the street, approached Mr. Whitehurst, and gave him money. Mr. Whitehurst then reached "towards his waist dip area" and gave the man several small objects. The man immediately got back into his car and drove away. Shortly thereafter, a woman approached Mr. Whitehurst and gave him money. Mr. Whitehurst reached into his pocket and gave the female several small objects, which she put in her shirt pocket. After this exchange, there was no further interaction between the parties and the female walked away. Detective Shelley testified that, based on his training and experience, he believed that Mr. Whitehurst had engaged in three drug transactions.

Based on these observations, Detective Shelley and several other officers approached Mr. Whitehurst, who was now sitting in the passenger seat of his vehicle. Upon approaching the vehicle, Detective Shelley smelled a strong odor of marijuana coming from both Mr. Whitehurst and the vehicle. Detective Shelley asked Mr. Whitehurst to get out of the vehicle, at which point his body "went ridgid and stiff." When Mr. Whitehurst refused to exit the vehicle after being asked a second time, Detective Shelley pulled him out of the vehicle and handcuffed him. During a search of his person, the police recovered a firearm in Mr. Whitehurst's pocket and a fanny pack that contained 14 oxycodone pills. The police also recovered marijuana inside his vehicle. After hearing arguments from counsel, the trial court denied the motion to suppress, finding that the police had probable

cause to arrest Mr. Whitehurst and that the search of his person was a lawful search incident to arrest.[2]

As an initial matter we note that, when the State moved at trial to introduce the fruits of the traffic stop, specifically the footage from the arresting officer's body camera, which showed the officer removing the loaded firearm from Mr. Whitehurst's pants pocket; a photograph of the recovered contraband; the actual drugs recovered from Mr. Whitehurst's person; and a videotaped interview wherein Mr. Whitehurst admitted to possessing the firearm, defense counsel told the court that she had "no objection" to the admission of that evidence. Consequently, Mr. Whitehurst has waived his right to contest the admissibility of that evidence on appeal. *See Jackson v. State*, 52 Md. App. 327, 331-32 (1982) (noting that the right of appellate review "can be waived in many ways" including when, after a motion to suppress is denied "appellant says he has no objection to the admission of the contested evidence" at trial).[3]

[2] The court alternatively found that the initial search, which resulted in the police finding the gun, was also justified as a lawful *Terry* frisk. Because we conclude that the police had probable cause to arrest appellant we do not address his finding on appeal.

[3] We note that when the State moved to introduce the firearm, defense counsel lodged an objection based on an alleged lack of foundation and thus, did not state that she had "no objection" to it being admitted. Nevertheless, even though Mr. Whitehurst did not waive his claim that the actual gun should have been suppressed, its admission was harmless beyond a reasonable doubt based on the other evidence that was admitted without objection, specifically the officer's body camera footage and Mr. Whitehurst's interview wherein he admitted to possessing the gun. *See Yates v. State*, 429 Md. 112, 120 (2012) ("Where competent evidence of a matter is received, no prejudice is sustained where other objected to evidence of the same matter is also received.").

Moreover, even if Mr. Whitehurst's suppression claim was not waived, it lacks merit. The police had probable cause to arrest Mr. Whitehurst based on Detective Shelley's expert testimony that, while conducting surveillance in a known open-air drug market, he observed Mr. Whitehurst engage in what appeared to be three separate hand-to-hand drug transactions. *See Donaldson v. State*, 416 Md. 467 (2010) (holding that there "can be probable cause to arrest an individual who has exchanged an unidentified item for money, if the totality of the circumstances supports the conclusion that the exchange involved an unlawful substance"); *Williams v. State*, 188 Md. App. 78, 83-85, 96 (2009) (holding that probable cause existed where the police conducted surveillance on an area described as an "open-air drug market" and observed the defendant take an unknown object from somewhere "between [his] waist and the rest of his upper torso" and exchange it for money, which the observing officer believed was a drug transaction based on his specialized training and experience). Mr. Whitehurst contends that *Williamson* is distinguishable because there was no evidence that he made any effort to conceal the transactions. However, the Court of Appeals has recognized that a lack of concealment is not necessarily "dispositive" where the totality of the circumstances suggest that the parties were involved in the exchange of narcotics. *Donaldson*, 416 Md. App. at 484. And here there were several factors that, when viewed collectively, supported Detective Shelley's conclusion that Mr. Whitehurst was engaging in drug transactions including: (1) the number of transactions over a short period of time; (2) the location of the transactions in an "open-air drug market"; and (3) the fact that the other parties involved in the transactions left immediately after the transactions were over and did not engage in any conversation with

Mr. Whitehurst. Consequently, the court did not err in denying Mr. Whitehurst's motion to suppress.

II.

Mr. Whitehurst also asserts that the court sentenced him to eleven years of executed time, but that the commitment record reflects that he is to serve twelve years of executed time. He thus contends that the commitment record must be amended. However, this claim lacks merit as a review of the transcript indicates that the court sentenced appellant to serve twelve years of executed time. At the sentencing hearing, the court sentenced appellant as follows:

> [THE COURT]: The sentence of the Court for possession a firearm after a prior disqualifying conviction is 15 years suspend all but ten, the first five without parole. The sentence of the Court for wearing, carrying or transporting a handgun is three years concurrent with the first sentence. The sentence for illegally possessing ammunition is one year consecutive to the possession of a firearm charge. The sentence of the Court for possessing a controlled dangerous substance, Oxycodone, is one year consecutive to the handgun charge. The sentence of the Court for possessing marijuana in excess of ten grams is six months concurrent. And I will sentence you for three years' probation on the sentences that had the suspended portion. That's what, 12 years?
>
> [THE CLERK]: Was that five years' probation, Your Honor?
>
> [THE PROSECUTOR]: Three years of probation.
>
> [THE COURT]: Three years of probation.
>
> [DEFENSE COUNSEL]: Yes. It is 12 years.
>
> [THE COURT]: Any questions? Anything not clear?
>
> [DEFENSE COUNSEL]: No, Your Honor.

> [THE PROSECUTOR]: So, Your Honor, essentially, the ultimate sentences then of jail time would be 15 suspend all but 12?
>
> [THE COURT]: Yes.
>
> [THE PROSECUTOR]: First five without [parole]
>
> [THE COURT]: Because of the two of consecutive, right?
>
> [THE PROSECUTOR]: Correct.
>
> [DEFENSE COUNSEL]: Right.
>
> [THE COURT]: Because the two 1-year sentences.

In claiming that the court announced an eleven-year executed sentence, Mr. Whitehurst notes that the court stated his one-year sentence for possession of oxycodone was to run consecutive to "the handgun charge" but did not indicate whether it was to run consecutive or concurrent to his one-year sentence for possession of illegal ammunition. Because there is a "presumption that, unless the Court explicitly notes that one sentence is consecutive to another, the sentences will be deemed concurrent," *see Gatewood v. State*, 158 Md. App. 458, 479-81 (2004), he thus contends that it was intended to be concurrent to his sentence for possession of ammunition, resulting in a total executed sentence of eleven years. We disagree.

Despite the presumption regarding concurrent sentences, an interpretation of the sentencing court's intentions regarding concurrent or consecutive sentences must ultimately be based on a review of the sentencing transcripts. *Collins v. State*, 69, Md. App. 173, 197 (1986). And this Court has recognized that use of the term "consecutive" is

not "a talisman[.]" *Id*. Thus, when "the duration of a sentence is otherwise discernible from the record, it will be upheld without resort to the presumption of leniency." *Id*.

Although the sentencing court did not initially state whether Mr. Whitehurst's sentence for possession of oxycodone was to run consecutive or concurrent to his sentence for possession of illegal ammunition, it subsequently indicated that there were two consecutive one year sentences, and that the total sentence to be served was 12 years. The court also asked the parties if there were any questions about the sentence and both the prosecutor and defense counsel indicated that they understood Mr. Whitehurst's total executed sentence to be twelve years. Evidencing these facts, there was no ambiguity in Mr. Whitehurst's sentence and the commitment record clearly reflects his sentence as announced and intended by the sentencing court.[4]

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

[4] Perhaps anticipating an argument that the State did not make, Mr. Whitehurst asserts in his brief that the court's "comments regarding imposition of a twelve-year executed sentence did not serve as a 'correction' of its previously announced sentence of eleven years of executed time [pursuant to Maryland Rule 4-345(c)]" because the trial court never acknowledged that it was correcting a mistake. We agree that the court was not attempting to correct a mistake. However, that is because the court did not announce a sentence of eleven years of executed time and subsequently try to replace it with a different sentence. Rather, the unambiguous sentence announced by the court, and understood by the parties, was twelve years of executed time.