Circuit Court for Howard County
Case No. C-13-CR-18-000392

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3251

September Term, 2018

DIVEREL WRIGHT

v.

STATE OF MARYLAND

Meredith,
Friedman,
Thieme, Raymond G.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: December 26, 2019

Diverel Wright, appellant, was charged, in the Circuit Court for Howard County, with, *inter alia*, unlawful possession of a firearm by a convicted felon, after police officers discovered a handgun in his backpack. Prior to trial, appellant moved to suppress the handgun, arguing that the search of his backpack exceeded the scope of a *Terry* frisk.[1] The court denied appellant's motion. Appellant pled not guilty and proceeded on an agreed upon statement of facts. Following a bench trial, the court convicted appellant of unlawful possession of a firearm, and sentenced him to fifteen years' incarceration, all but five suspended, and five years' post-release probation. Appellant appealed, and presents a single question for our review: "Did the circuit court err in denying the motion to suppress the evidence?" We answer appellant's question in the negative and shall therefore affirm the judgment of the circuit court.

FACTS[2]

On the morning of August 30, 2018, Howard County Police Officer Brad Skove was on routine patrol in Columbia, Maryland. At 9:10 a.m. he was dispatched to 10350 Swift Stream Place, Apartment 203. Dispatch advised Officer Skove that a domestic disturbance had occurred at that address, during which the caller's ex-boyfriend had yelled at the caller from outside of her apartment door. Officer Oliver Burgos was the first officer on scene,

[1] *Terry v. Ohio*, 392 U.S. 1 (1968).

[2] Given that appellant's sole contention is that the court erroneously denied his motion to suppress, we confine our recitation of the facts to those adduced at the suppression hearing. *See Sizer v. State*, 456 Md. 350, 362 (2017) ("When reviewing a hearing judge's ruling on a motion to suppress evidence under the Fourth Amendment, we consider only the facts generated by the record of the suppression hearing.").

followed by Officers Skove and George.[3] When Officer Skove arrived, Officer Burgos was speaking with the caller in her apartment.

The caller ("ex-girlfriend") apprised the officers that appellant, her ex-boyfriend, had called her earlier that day and had subsequently appeared unannounced outside of her apartment. Upon arriving at her apartment, appellant knocked on the door and threatened both to harm ex-girlfriend and to damage her vehicle. When ex-girlfriend demanded that he leave and informed him that she was calling 911, appellant departed.

When she had finished describing the events to the officers, ex-girlfriend requested that they escort her to her vehicle so that she could determine whether appellant had damaged it. Upon their doing so, Officer Skove noticed that ex-girlfriend's silver Jaguar appeared to be missing a hood ornament. Ex-girlfriend informed the officers that the hood ornament had been affixed to her car when she had parked it. Finding no other damage to the vehicle, Officer Burgos escorted ex-girlfriend back to her apartment, while Officer Skove canvassed the garage in search of the missing hood ornament. The officers then returned to their vehicles.

As they prepared to "clear the call" and vacate the premises, the officers "heard the high rev of [an] engine," and saw ex-girlfriend's Jaguar accelerating out of the garage. As she drove, ex-girlfriend shouted "help." A male, later identified as appellant, chased after the vehicle on foot. After waving ex-girlfriend into a parking space, the officers approached appellant, who was standing in the middle of the roadway. In his hand, appellant gripped a

[3] Officer George's full name does not appear in the record.

green and black backpack. Though Officer Burgos repeatedly instructed appellant to "step back and sit on the curb," appellant disregarded his demands. The officers observed appellant "pull a shiny object out of his pocket." Officer Burgos removed the object from appellant's hand and "tossed it in the grass." Appellant finally complied with the officers' instructions. As he sat on the curb, appellant placed the backpack between his feet.

The officers asked appellant to produce identification ("ID"). Appellant responded that his ID was in the backpack. The officers authorized appellant to retrieve it from his backpack, which Officer Skove described as having appeared to be "full." With Officer Skove standing directly next to him, appellant searched the backpack's small pockets. He quickly unzipped and rezipped the pockets, without taking the time to rummage through them. Not having found his ID in the smaller pockets, he proceeded to unzip the backpack's large compartment and search for his ID therein. As he searched, appellant "leaned back away from the officers, so [Officer Skove] and Officer Burgos could not see inside the backpack." Still unable to locate his ID, appellant rezipped the compartment. The officers repeated their request that appellant produce his ID. Appellant re-opened the main compartment, "folded it in on itself …[,] and pull[ed] the backpack away" so as to conceal its contents. As he searched for the ID, appellant became agitated and his voice grew loud. He explained to the officers that he had gone to the apartment in order "to get clothes from [ex-girlfriend]." Still unable to locate his ID, appellant closed the large compartment.

Officer Skove then seized the backpack and opened it. Inside, he observed a revolver protruding from a "leather man purse."[4] After "toss[ing] [the backpack] to the side," Officer Skove informed Officer Burgos that he had found a firearm. Officer Skove then instructed appellant to remain seated and to place his hands behind his back. Rather than heed the officer's instructions, appellant stood up and extended his arms in front of his body. Officer Skove proceeded to subdue appellant, "tackl[ing] him to the ground."[5]

At the hearing on appellant's motion to suppress, Officer Skove testified that he seized and opened the backpack in order to make certain that it did not contain any weapons. When asked on direct examination "what made you concerned that there would be a weapon inside?" Officer Skove answered, "Because of his demeanor on the scene. And then it[s] stemming [from] a domestic which are just inherently dangerous." The court denied the motion to suppress.

Additional facts will be provided as required.

DISCUSSION

I.

Appellant contends that the court erred in denying his motion to suppress because Officer Skove "failed to articulate an objectively reasonable basis for believing [a]ppellant was armed and dangerous." He asserts that Officer Skove's suspicion that he was armed

[4] Officer Skove testified that he neither reached into the backpack nor manipulated its contents.

[5] Officer Skove ultimately located appellant's identification card in the pocket of appellant's pants.

and dangerous was entirely predicated on the erroneous assumption that domestic disputes are inherently dangerous. The State counters that by failing to raise this argument at the motions hearing, appellant failed to preserve the issue for appellate review. In his Reply Brief, appellant rejoins that this contention is preserved under Maryland Rule 8–131(a) because the State raised and the court decided the issue.

Maryland Rule 8–131(a) governs the scope of appellate review, and provides, in pertinent part: "Ordinarily, the appellate court will not decide any … issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" The purpose of this rule is to "'prevent the unfairness that could arise when a party raises an issue for the first time on appeal, thus depriving the opposing party from admitting evidence relating to that issue[.]'" *Carroll v. State*, 202 Md. App. 487, 507 (2011) (citation omitted), *aff'd*, 428 Md. 679 (2012).

In determining whether a matter is preserved pursuant to Rule 8–131, it is helpful to define the terms contained therein. As contemplated by Rule 8–131(a), an "issue" is "'a point in dispute between two or more parties.'" *Ray v. State*, 435 Md. 1, 20 (2013) (quoting Black's Law Dictionary 907 (9th ed. 2009)). In order to "raise" an issue, a party must "'bring up [that disputed point] for consideration or debate[.]'" *Id*. at 14 (quoting Merriam–Webster's Collegiate Dictionary 1028 (10th ed. 1999)). In the context of Rule 8–131(a), "'decide' means 'to make a final choice or judgment about'; 'to select as a course of action;' or 'to infer on the basis of evidence.'" *Id*. at 22–23 (quoting Webster's,

supra, at 322). "[T]he term 'implies previous consideration of a matter causing doubt, wavering, debate, or controversy.'" *Id*. at 22 (quoting Webster's, *supra*, at 322).

An issue can neither be raised nor ruled upon unless and until that issue is generated, to wit, until a "point in dispute" arises. In this case, it does not "plainly appear from the record" that the instant issue ever arose at the suppression hearing. At no point during the suppression hearing did defense counsel challenge the proposition that the police reasonably suspected that appellant was armed and dangerous. *See Ray*, 435 Md. at 20–21 (holding that no probable cause issue had been "put into play" because defense counsel never contested the State's assertion that the police had probable cause to arrest petitioner). In fact, it appears from the transcript of the hearing that defense counsel and the State *agreed* that such reasonable suspicion existed. In the course of arguing that the search of appellant's backpack exceeded the scope of a frisk, defense counsel expressly conceded that a *Terry* frisk was warranted. During its closing, defense counsel argued:

> The objective standard here as [the] State indicated is what's reasonable. What would a reasonable person do. And in *Terry*, which I believe is the closest thing that this might be. Is a *Terry* type case. You have to look at what's reasonable. *Of course Terry would pat down. These officers are permitted to again pat down and not manipulate. Pat down persons. I believe they could have patted down the bag*[.] [I]f something is hard and seems like [a] weapon then you go through, but what we have is what's reasonable. What is reasonable enough to protect Officer Skove's safety, but also yet protect the Fourth Amendment Rights of a person being subjected to this *Terry* stop.

(Emphasis added).

By endorsing a pat-down of appellant's backpack, defense counsel implicitly acknowledged that the officers had a reasonable articulable suspicion that appellant was

armed and dangerous. Given that the reasonableness of that suspicion was not disputed, it was not an issue within the meaning of Rule 8–131(a). *See Ray*, 435 Md. at 21 ("Because the lawfulness of Petitioner's arrest was not disputed, it did not become an issue as the term is contemplated by Rule 8–131(a)."). Accordingly, this contention is not preserved for appellate review pursuant to Rule 8–131(a).

II.

Appellant next contends that "[e]ven if police were justified in believing [a]ppellant was armed and presently dangerous, the search of the backpack was still unreasonable because it exceeded the scope of a frisk."

Standard of Review

When reviewing a circuit court's denial of a motion to suppress evidence pursuant to the Fourth Amendment, we limit our analysis to the evidence presented at the suppression hearing and reasonable inferences drawn therefrom. *Sizer v. State*, 456 Md. 350, 362 (2017). We consider such evidence in the light most favorable to the prevailing party, here, the State, and will not disturb the factual findings of the suppression court unless they are clearly erroneous. *Id*. However, we review legal questions *de novo*. *Id*. In other words, in determining whether a search or seizure violated the Fourth Amendment, "'we make our own independent constitutional appraisal by reviewing the law and applying it to the facts of the case.'" *Sellman v. State*, 449 Md. 526, 538 (2016) (quoting *Bailey v. State*, 412 Md. 349, 362 (2010)).

"[W]arrantless searches and seizures are presumptively unreasonable and, thus, violative of the Fourth Amendment[.]" *Thornton v. State*, 465 Md. 122, 141 (2019) (citations omitted). The State, therefore, bears the burden of establishing that a warrantless search falls within one of "'a few specifically established and well-delineated exceptions' to the warrant requirement." *Id*. (quoting *Grant v. State*, 449 Md. 1, 17 (2016)).

The exception at issue in this case is the *Terry* "stop and frisk." In order to pass Fourth Amendment muster, the State must establish that the *Terry* stop and subsequent *Terry* frisk of a suspect—or, as here, of a container belonging to a suspect—each complied with certain threshold requirements and scope limitations. In order to justify the initial *Terry* stop, the State must establish that the stop was supported by reasonable, articulable suspicion that the stoppee has committed, is committing, or is about to commit a crime.[6] *Ames v. State*, 231 Md. App. 662, 672 (2017). Once commenced, a *Terry* stop's duration is limited to the time necessary for the officer to confirm or dispel his or her suspicions. *Swift v. State*, 393 Md. 139, 150 (2006). The threshold requirements for an officer's conducting a *Terry* frisk are twofold. First, the officer must conduct a valid antecedent *Terry* stop. *Ames*, 231 Md. App. at 676. Second, the frisking officer must have reasonable, articulable suspicion that the suspect is presently armed and dangerous. *Id*. at 672. The scope of a *Terry* frisk "is whatever is necessary to serve the purpose of that particular search—but not one little bit more." *Id*. at 679. Generally, the scope of such a frisk is limited to an open-handed pat-down of a suspect's outer garments. *Id*. at 667.

[6] Appellant does not challenge the legality of the initial *Terry* stop.

In determining whether there exists reasonable suspicion to justify either a *Terry* stop or a *Terry* frisk, we consider the totality of the circumstances and reasonable inferences drawn therefrom through the eyes of a reasonable, prudent, police officer, "'in light of the officer's experience.'" *Sellman*, 449 Md. at 542 (quoting *Bailey*, 412 Md. at 367). In making that determination, we do not limit our consideration to "the subjective or articulated reasons of the officer[.]" *Id*. (quoting *Ransome v. State*, 373 Md. 99, 115 (2003) (Raker, J., concurring)). "'[R]ather, the validity of the stop or frisk is determined by whether the record discloses articulable objective facts to support the stop or frisk.'" *Id*. (quoting *Ransome*, 373 Md. at 115).

Scope of the Frisk

In support of his contention that Officer Skove's search of his backpack exceeded the scope of a *Terry* frisk, appellant relies on the Court of Appeals's holding in *McDowell v. State*, 407 Md. 327 (2009). In *McDowell*, a lone police officer conducted a traffic stop of a vehicle in which the defendant was a passenger. The officer observed that the driver and defendant were nervous, and that the latter "appeared to be out of it." *Id*. at 331. While the officer checked the status of the driver's license and registration, he observed the defendant "bending down and twisting his body several times." *Id*. Upon approaching the passenger side door, the officer observed the defendant "reaching underneath his seat and then behind the seat into a gym bag." *Id*. When the officer asked the defendant what he was reaching for, he replied that he was searching for cigarettes. The officer then inquired whether there were cigarettes in the gym bag. The defendant answered "no." The officer

instructed the defendant to exit the car and to bring the gym bag with him. The officer proceeded to open the bag in which he found clothes, drug paraphernalia, and plastic bags containing heroin. The defendant unsuccessfully moved to suppress the incriminating evidence, and was convicted of "importing a controlled dangerous substance into the State." *Id.* at 332.

The Court of Appeals held that although the circumstances justified the officer's examination of the bag to determine whether it contained a weapon, the State did not satisfy its burden of proving that the officer's search of the bag was reasonable. The Court reasoned:

> When the search is sought to be justified under *Terry* … the State has the burden of demonstrating that the officer did, indeed, use the least intrusive means likely to be effective in determining whether the suspect is armed and dangerous. Obviously, if a pat-down is attempted and proves inconclusive, the police may take the next step. *If, by reason of a container's construction or other circumstance, a pat-down of it is impracticable or is not likely to reveal the desired information, the officer need not resort to it; futile gestures are not required.* If, on the other hand, … there is no articulated reason why a pat-down might not suffice, there is no need to open the container as a self-protective measure, and doing so in that circumstance would exceed what is permitted under *Terry.*
>
> *When the container is subjected to a more intrusive search in lieu of a pat-down, the State can sustain its burden of proof that the search was reasonable* either *by having the officer explain why it was necessary to conduct that search* or by demonstrating from the container itself that a pat-down would not have revealed the presence or absence of a weapon. *It is not a difficult burden, only a necessary one.* It derives from the requirement laid out in *Terry* itself that the officer "be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion."

Id. at 341 (emphasis added).

As the State correctly notes, in determining whether a search offends the Fourth Amendment, we do not assess "whether the officers accomplished their goal in the 'least intrusive' manner[.]" *Barnes v. State*, 437 Md. 375, 393 (2014) (citing *City of Ontario v. Quon*, 560 U.S. 746, 763 (2010)). Rather, we assess "whether the conduct itself was reasonable within the meaning of the Fourth Amendment." *Id*. We must, therefore, simply determine whether Officer Skove's concern for his safety and the safety of his fellow officers outweighed appellant's expectation of privacy in the contents of his backpack. In making that determination, we distinguish the facts in the instant case from those in *McDowell*. Whereas in *McDowell* the arresting officer did not provide any testimony indicating that a pat-down of the defendant's gym bag would have been impracticable or futile, in this case Officer Skove testified that appellant's backpack was opaque, looked as though it contained multiple items, and "appeared full." This testimony was sufficient to satisfy the State's burden of demonstrating that a mere pat-down of appellant's backpack would have been unlikely to reveal the presence or absence of a weapon. We therefore hold that Officer Skove was justified in foregoing a pat-down of appellant's backpack and proceeding directly to open it.

JUDGMENTS OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. COSTS ASSESSED TO APPELLANT.