UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1456

September Term, 2014

ARNOLD MILES

v.

STATE OF MARYLAND

Kehoe,
Arthur,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: September 15, 2015

Arnold Miles (hereafter "Miles") was indicted in the Circuit Court for Wicomico County, Maryland, and charged with possession of heroin with intent to distribute and possession of heroin. After his motion to suppress evidence was heard and denied, Miles entered a not guilty plea based on an agreed statement of facts and, as to both counts, was found guilty. Those counts were merged, and Miles was sentenced as a subsequent offender to twenty years, the first ten without possibility of parole. In this appeal, one question is presented:

Did the circuit court err in denying Miles's motion to suppress?

We shall answer that question in the negative. Although there are other grounds for that answer, principles of law set forth in *State v. Ofori*, 170 Md. App. 211 (2006) govern this case inasmuch as: 1) although a State Trooper held appellant and his vehicle for about 15 minutes after the purpose of the traffic stop had been fulfilled, the additional period of detention was nevertheless lawful given the fact that, at the time the purpose of the traffic stop had been fulfilled, the officers had a right to detain appellant while they waited for a drug-sniffing dog to arrive and scan appellant's vehicle for drugs because the police, during that additional period of detention, had a reasonable articulable suspicion that appellant possessed illegal drugs.

I.

Evidence Presented at the Suppression Hearing

Corporal Richard Hagel has been a Maryland State Police officer since 2001 and during that period had worked on over one thousand drug related cases. As a result of that

experience, he was familiar with the method and manner of street level packaging of heroin, cocaine, and marijuana in the Salisbury, Maryland area.

On March 7, 2014, Corporal Hagel and another police officer met with a confidential informant, who had provided reliable information to the police in the past. The informant provided the officers with appellant's name, address, a description of him (black male, 45-50 years old) and the name of his employer. The informant also told the officers that appellant drove a green Ford Expedition with chrome rims and that Miles keeps heroin inside a New York Yankees baseball cap that he (Miles) wore.

Twelve days later, on the afternoon of March 19, 2014, Corporal Hagel was on patrol with Officer Oliver[1] when they passed T's Market, located on Route 13 in Salisbury, Maryland. The area around T's Market was characterized by Corporal Hagel as a "well-known, high-drug, high-crime area," and Corporal Hagel knew that narcotics arrests had been made in and around T's Market in the past. At that point, the officers noticed a 1999 green Ford Expedition parked in between two empty islands that previously contained gas pumps. The vehicle was parked 20 to 25 feet away from the store and was occupied by two persons, but it did not appear that the individuals were preparing to exit the vehicle to go into the store.

[1]The agreed statement of fact show that Officer Oliver's first name is John and that on the date of appellant's arrest, he was a member of the Salisbury Police Department. Those details were not mentioned at the suppression hearing.

On the day in question, Corporal Hagel was driving an unmarked 2004 dark green Ford Expedition. He testified that for two years he had been using that unmarked vehicle exclusively while on patrol. He further testified, without objection, that his vehicle was "well-known" "in the hood," and that he did not know of any other vehicle like it in the area.

As the police officer maintained surveillance of the green 1999 Ford Expedition, Corporal Hagel saw Ashley Pruski, a known heroin addict who had been arrested for possession of heroin in 2014, approach the 1999 Ford Expedition vehicle. At around the same time, the 1999 green Ford Expedition began to pull out of the lot. Corporal Hagel testified, again without objection, that he assumed that "he had been made," i.e., the occupants of the 1999 Ford Expedition had seen his unmarked vehicle and recognized that it was a police car.

As the 1999 Ford Expedition pulled out of T's Market, Ashley Pruski started chasing it while holding her hand up and shaking that hand, which held a cell phone. It appeared to Hagel that Pruski was trying to get the attention of the people in the 1999 Ford Expedition while she jogged after it. The vehicle did not stop, however.

At that point in his testimony, Hagel said that a drug user, such as Pruski, would typically arrange a meeting to purchase narcotics using a cell phone or text message to ask

if a potential seller had heroin. Then, the drug buyer and seller normally would make arrangements to meet at some predetermined location in order to conduct a drug transaction.[2]

Corporal Hagel followed the 1999 Ford Expedition after it drove onto Route 50 westbound. Noticing that the vehicle was traveling about 10 miles per hour over the posted speed limit, Hagel conducted a traffic stop at approximately1:12 p.m. He approached the 1999 Ford Expedition and recognized Miles, the driver, as the person about whom the confidential informant had provided information. Corporal Hagel asked Miles, who was wearing a New York Yankees baseball cap, for his license. Miles produced a learner's permit. The front seat passenger also did not have a driver's license. This presented a problem for Miles because, as Corporal Hagel explained, in order for appellant to legally drive on a learner's permit, he needed to have a licensed driver with him.[3] Although Corporal Hagel could have arrested appellant at that time for the learner's permit violation, he elected not to do so.[4]

Corporal Hagel observed that appellant's hands were shaking when he handed over his learner's permit and that Miles also failed to make eye contact with him. Also, Miles

[2]Hagel did not testify, however, that Pruski's behavior was consistent with attempting to purchase narcotics.

[3]See Md. Code (1977, 2012 Repl. Vol.) § 16-105 of the Transportation Article ("TA").

[4]*See* TA § 16-105(g) ("An individual holding a learner's instructional permit issued under this section may not drive or attempt to drive a motor vehicle on any highway in this State in violation of any of the provisions of this section").

stuttered during their conversation. Based on the number of traffic stops he had made over his career, Corporal Hagel opined that appellant's nervousness during this stop was "more excessive" than normal.

At about 1:15 p.m., Corporal Hagel called for a narcotics dog and handler to report to the scene. At approximately 1:16 p.m., Corporal Hagel finished writing a warning ticket for the speeding violations; at 1:30 p.m., the K-9 handler, Officer John Dallam, an eight-year veteran of the Delmar Police Department, arrived with his dog.

When Officer Dallam first arrived, he spoke to Corporal Hagel and was advised of Hagel's observations, as well as the information from the informant that appellant was known to carry heroin on his person. Officer Dallam then approached the vehicle and noticed that appellant's knuckles were turning white because he was gripping the steering wheel very tightly. Dallam asked appellant to step out of the vehicle because he was going to have his dog perform a K-9 scan. As appellant exited the vehicle, Officer Dallam noticed that appellant was sweating, although the weather was "cool." At that point, Officer Dallam also noticed that appellant was breathing at a "rapid pace[.]"

Once appellant was outside of the vehicle, standing within arm's reach of Officer Dallam, the K-9 officer asked appellant if there were any drugs in the car. Appellant did not respond. Dallam then asked appellant if he had any weapons on his person. Again, appellant made no response. Appellant's silence heightened Officer Dallam's concern about

the situation.[5] Based on these non-responses, appellant's body language, as well as concern for his safety and the safety of his dog, Officer Dallam told appellant he was going to pat him down for weapons. What happened next, as related by Officer Dallam at the hearing, was as follows:

> As I patted him down for weapons, I move from his pant legs, I move up to the waist. I touch the back, and as I was touching his neck and head area, he smacked my hand away and pushed back in an aggressive way towards me, which, in turn, I took an aggressive action and [I] grabbed both of his arms and pinned him against the vehicle.

Appellant, according to Officer Dallam, next "pushed off the vehicle, hit my hand away," and then "was making a move like he was going to try to confront me[.]" At that point, Officer Dallam and Corporal Hagel placed appellant in handcuffs and Office Dallam removed appellant's New York Yankees baseball cap. Inside the inner band of the cap, Corporal Hagel observed a large ziplock baggie with 47 small baggies inside, each of which contained a brownish powder-like substance that Corporal Hagel believed to be heroin. Corporal Hagel then searched appellant's person and found one more small baggie of suspected heroin in appellant's front pants pocket.

Next, Officer Dallam had his dog, Aron, sniff the vehicle. Aron gave a positive alert at the driver's side door. The car was then searched but no additional drugs were found. Corporal Hagel, however, did find 43 $20 bills rolled up and secured by a rubber band

[5]When Dallam was asked to explain why Miles's actions were of concern, the court interrupted, stating, "Well, I think we can all figure out why."

inside a sunglass holder. Corporal Hagel testified that "a lot of narcotic dealers sell their quantities in 10's and 20's."

Both Corporal Hagel and Officer Dallam testified that even when no drugs are found during a search of a vehicle following a positive K-9 alert for drugs, police procedure dictates that the driver then be searched. More specifically, both officers testified that, had the sequence of events been different, and the dog had given a positive alert before appellant had been searched, the police would normally have searched appellant's vehicle, and if no illegal drugs were found, appellant would have been searched.

On cross-examination, Corporal Hagel admitted that he let appellant stay in his vehicle before the K-9 officer arrived. He also said that he was not aware of any facts that would have led him personally to believe that appellant was armed. On redirect, however, Corporal Hagel said that it was possible to hide a small .22 pistol or a knife inside a baseball cap.

At the suppression hearing, after the State rested, defense counsel stressed that the purpose of the traffic stop had been accomplished within four minutes of the initial stop and that appellant should have been allowed to leave the scene at that point. Defense counsel further contended that at the point when the purpose of the traffic stop had been completed, there was no evidence that the police had a reasonable articulable suspicion that criminal activity was afoot and therefore it was illegal, based on the decision in *Terry v. Ohio*, 392 U.S. 1 (1968), to prolong the stop until the K-9 unit arrived. Counsel also argued that the

facts proven were insufficient to establish that appellant assaulted Officer Dallam and therefore the police had no probable cause to arrest him for that offense, nor did the police actually arrest him for assault. Finally, defense counsel argued that, following the K-9 alert, police could only search the vehicle, but had no authority to search appellant's person.

The State responded that the search of appellant's person could be justified under a variety of theories, including that this was a valid traffic stop, and, at the same time, a valid *Terry* stop. According to the prosecutor, it was reasonable, under the circumstances, to frisk appellant, and that the ensuing assault justified appellant's arrest and a search incident to arrest. Finally, the State maintained that the narcotics recovered would have inevitably been discovered following the positive alert (by the drug sniffing dog) on the vehicle and the resulting recovery of no narcotics from that same vehicle.[6]

The court denied the motion to suppress, saying in pertinent part:

> My first concern was whether this was an improper second traffic stop by making the defendant wait for the K-9 people to come, but my notes are more in line with what [the prosecutor] said with respect to the time sequence.
>
> And let's back up to T's Market, nothing - there is nothing wrong with a police officer following somebody he thinks is a purveyor of controlled dangerous substances. He can do that if he wants, and there is nothing wrong with him charging somebody with speeding even though it might be a tenth

[6]During Officer Dallam's direct examination, the State proffered that one of its theories was that, even if Dallam had unlawfully searched appellant, the subsequent positive alert by the K-9 on the vehicle, considered with other factors, would have allowed the police to search appellant's person when no narcotics were found inside the vehicle.

of a mile over the speed limit. It's not very nice, but he can do it. And he can make that traffic stop, and that traffic stop is supported by reasonable articulable suspicion.

The question then is how quickly does the officer conduct his business, and then let everyone go on his or her way?

The traffic stop, I think it's undisputed. The traffic stop was at 1312. I'm using military or European time. The warning was written at 1316, and I did recall Trooper Hagel saying he called within two minutes, or after two minutes, he called, so that would have been 1314. And Officer Dallam said he got there at 1330.

Now, sure, we're going to be off. I'm off, I'm sure a minute or two one side of those numbers or the other, but that's within 16 minutes, 18 minutes, 19 minutes, and there is case law that allows it to go out as far as 25 minutes, maybe even higher. So I don't think this was a second stop. I don't think there is anything improper about the K-9 scan as far as the time of arrival.

The court continued:

One thing, let me back up and say this. I know it's standard procedure to ask every occupant of the vehicle to get out of the vehicle because the K-9 officer doesn't want the dog attacking the people in the car if they are sitting on top of contraband. So it's normal to ask them to get out. I inquiry [sic] just in the ordinary system or situation, let's say, it's the New Jersey turnpike and it's a family of four, a husband and wife and two little kids, and the officer calls for a K-9. Is there anything improper about the officer wanting to search the adult parents when they get out of the vehicle for just simply because officers' safety? I don't know the answer. But what was here - here's what is a little different. They knew Mr. Miles was a dealer of sorts, and then he didn't answer the question.

I think it's very imprudent on the part of a law enforcement officer to ask, if he asks and the person doesn't answer about firearms or weapons[,] not to search. So he did do the patdown.

> And, again, you may quibble or we may argue about whether the officer committed a second degree assault or whether the defendant committed a second degree assault. Swatting or pushing an officer's arm away is technically an assault, so that would give them probable cause to arrest the defendant on the spot.
>
> Obviously if he is arrested, they can search his immediate person, and that's how the contraband was found. Whether the hat fell off during the struggle and the bag fell out, or whether after he swatted Officer Dallam's arm, he reached for the hat and pulled it out, does it make a difference? I don't think so.

(Emphasis added).

And, finally, the court addressed the inevitable discovery argument as follows:

> So that would lead, I guess, necessarily to the question of inevitable discovery if this doesn't pass muster. And I'm not even sure, I think I understand what . . . [the Assistant State's Attorney] is saying that if there is a positive alert, he's saying if there's a positive alert on the vehicle even though contraband is not found [in] the vehicle, the case law allows the officer to search the occupants or someone closely identified with the vehicle, in this case, the driver, who was the defendant. So under that theory, there probably is inevitable discovery in any event.
>
> So having said all of that, the only conclusion I can reach is that the motion to suppress must be denied.

(Emphasis added).

DISCUSSION

Appellant maintains that the suppression court erred because the police prolonged his traffic stop to await the arrival of the drug dog, that there was no reasonable articulable suspicion to justify a second stop, that there was no reason to conduct a *Terry* frisk, and that, contrary to the court's ruling, the inevitable discovery rule does not apply. The State

responds that there was no unreasonable delay during the traffic stop, that, alternatively, this was a valid stop and detention under *Terry*, and that appellant's assault on Officer Dallam was an intervening act that provided probable cause to arrest and search appellant incident to the arrest. In reply, appellant contends that his assault on Officer Dallam was *de minimus* and did not provide probable cause to arrest.

The Court of Appeals has described the standard of review to be applied in motions to suppress:

> When we review a trial court's grant or denial of a motion to suppress evidence alleged to have been seized in contravention of the Fourth Amendment, we view the evidence adduced at the suppression hearing, and the inferences fairly deducible therefrom, in the light most favorable to the party that prevailed on the motion. We defer to the trial court's fact-finding at the suppression hearing, unless the trial court's findings were clearly erroneous. Nevertheless, we review the ultimate question of constitutionality *de novo* and must make our own independent constitutional appraisal by reviewing the law and applying it to the facts of the case.

Corbin v. State, 428 Md. 488, 497-98 (2012) (citation and internal quotation omitted).

The Court of Appeals has also explained what should be considered in evaluating a traffic stop under the Fourth Amendment of the United States Constitution:

> Where the police have probable cause to believe that a traffic violation has occurred, a traffic stop and the resultant temporary detention may be reasonable. *See Whren v. United States*, 517 U.S. 806, 810, 116 S.Ct. 1769, 1772, 135 L.Ed.2d 89, 95 (1996). A traffic stop may also be constitutionally permissible where the officer has a reasonable belief that "criminal activity is afoot." *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889, 911 (1968). Whether probable cause or a reasonable articulable suspicion exists

> to justify a stop depends on the totality of the circumstances. *See United States v. Cortez*, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981).

Rowe v. State, 363 Md. 424, 433 (2001).

As already mentioned, we are guided in our analysis by *State v. Ofori*, *supra*. In *Ofori*, we recognized the distinction between "[a] traffic stop standing alone," and a traffic stop that is simultaneously – and independently – supported by reasonable suspicion under *Terry*. *Ofori*, 170 Md. App. at 235. Judge Moylan, writing for this Court in *Ofori* said:

> One scenario, and one big chunk of caselaw, is that in which the traffic stop provides the only justification for any Fourth Amendment detention. How long may it last, while the dog is on the way? The basic rule is easy to articulate. Once the traffic-related purpose of the stop has been served, any detention based on the traffic stop should terminate and the stopee should be permitted to leave the scene immediately. Once the traffic stop is over, there is no waiting for the arrival, even the imminent arrival, of the K-9 unit.

Id. at 235.

Judge Moylan cited a number of cases, including *Snow v. State*, 84 Md. App. 243 (1990), *Munafo v. State*, 105 Md. App. 662 (1995), and *Pryor v. State*, 122 Md. App. 671 (1998), that stand for the proposition that a valid *Whren*[7] stop "does not justify a second unreasonable detention" in the absence of reasonable suspicion or probable cause that some other crime has been committed. *Pryor*, 122 Md. App. at 680. In *Snow*, *Munafo*, and *Pryor*, the police had nothing more than a hunch that drug activity was afoot, and attempted to use the traffic stop to embark on a separate investigation for a narcotics violation. Consequently,

[7] *Whren v. United States*, 517 U.S. 806 (1996).

those are cases in which the police "must execute their traffic-related functions with diligence and may not prolong the traffic stop unnecessarily in order to 'buy time' to carry out some extraneous investigative purpose for which they lack any particularized justification." *Ofori*, 170 Md. App. at 250 (citation omitted).[8]

The standard is different, however, in cases in which the traffic stop is also valid as a "*Terry*-stop for drugs." *Ofori*, 170 Md. App. at 251. Where the stop is based, *ab initio*, on reasonable suspicion that criminal activity is afoot, "[t]he traffic stop cases are beside the point." *Ofori*, 170 Md. App. at 251 (citation omitted). Judge Moylan contrasted the "non-function of the dog in a traffic stop with the core function of the dog in a *Terry*-stop for drugs," explaining:

> Once a reasonable time for the processing of a traffic charge has expired, even a minimal further delay to accommodate the arrival of a drug-sniffing canine is not permitted. That foreclosure is for the obvious reason

[8]There are, however, no rigid time frames governing the length of a detention in connection with a legitimate traffic stop involving a police investigation. *See Byndloss v. State*, 391 Md. 462, 484-85 (2006). As this Court said in *Charity v. State*, 132 Md. App. 598, 617 (2000):

> Even a very lengthy detention may be completely reasonable under certain circumstances. Conversely, even a very brief detention may be unreasonable under other circumstances. There is no set formula for measuring in the abstract what should be the reasonable duration of a traffic stop. We must assess the reasonableness of each detention on a case-by-case basis and not by the running of the clock.

> that the dog sniff, however valuable it might be for other investigative purposes, does not in any way serve the purpose of the justifying traffic stop. Once the purpose of the traffic stop has been fully and reasonably served, no further detention is permitted . . . .
>
> When, by contrast, the energizing articulable suspicion is that a violation of the drug laws may be afoot, the time constrictions on the *Terry*-stop are very different. *The bringing of a drug-sniffing canine to the scene is in the direct service of that investigative purpose and the measure of reasonableness is simply the diligence of the police in calling for and procuring the arrival of the canine at the scene*. This use of a trained dog . . . is an investigative practice that is looked upon with favor.

Ofori, 170 Md. App. at 251-52 (quoting *Carter v. State*, 143 Md. App. 670, 692-93 (2002) (emphasis added in *Ofori*)). Thus, this Court noted that:

> [o]nce the analysis shifts from an examination of the reasonable duration of a traffic stop to the very distinct examination of the reasonable duration of a *Terry*-stop for suspected drug activity, a different standard for measuring the reasonableness of the length of detention is brought to bear on the problem.

170 Md. App. at 250.

In *Ofori*, we found "nothing remotely unreasonable" about a 17-minute detention for a canine alert during a *Terry* stop for drugs. The Court explained the inherent reasonableness in waiting for arrival of the drug dog during a *Terry* stop for drugs:

> Nothing so well symbolizes the difference between a traffic stop and a *Terry*-stop for drugs as their respective attitudes toward the presence of drug-sniffing dogs. The dog has no role to play in a traffic stop. The dog may be the star performer in a *Terry*-stop for drugs. The traffic stop, once completed, will not await the arrival of the dog for so much as 30 seconds. The *Terry*-stop for drugs very deliberately and patiently does await the arrival of the dog. The dog's arrival is, indeed, the primary reason for waiting.

170 Md. App. at 251.

Here, Corporal Hagel arrived at the scene at about 1:12 p.m. and finished writing appellant a warning for a speeding violation at 1:16 p.m. We agree with appellant that, at that moment, the traffic stop was over. Nevertheless, we disagree with appellant that reversal is warranted. As in *Ofori*, what occurred here amounted to a "*Terry*-stop for drugs" and the detention for an additional fifteen minutes (approximately) for the arrival of the K-9 unit was not unreasonable.

It is well settled that police may stop and briefly detain a person for purposes of investigation if the officer has a reasonable suspicion supported by articulable facts that criminal activity may be afoot. *See Terry*, 392 U.S. at 30; *accord Crosby v. State*, 408 Md. 490, 505 (2009); *see also Stokes v. State*, 362 Md. 407, 415 (2001) (reasonable suspicion is a "common sense, nontechnical conception that considers factual and practical aspects of daily life and how reasonable and prudent people act") (citations omitted); *accord Bost v. State*, 406 Md. 341, 356 (2008). Further, the Supreme Court has explained that even seemingly innocent behavior, under the circumstances, may permit a brief stop and investigation. *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) (recognizing that even in *Terry*, the conduct justifying the stop was ambiguous and susceptible of an innocent explanation, but that, because another reasonable interpretation was that the individuals were casing the store for a planned robbery, "*Terry* recognized that the officers could detain the individuals to resolve the ambiguity"). Reviewing courts "must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and

objective basis' for suspecting legal wrongdoing." *United States v. Arvizu*, 534 U.S. 266, 273 (2002); *see also Bost*, 406 Md. at 356 ("The test is 'the totality of the circumstances,' viewed through the eyes of a reasonable, prudent, police officer.") (citation omitted). And, "the court must . . . not parse out each individual circumstance for separate consideration." *Crosby*, 408 Md. at 507 (quoting *Ransome v. State*, 373 Md. 99, 104 (2003)); *see also In re: David S.*, 367 Md. 523, 535 (2002) ("Under the totality of circumstances, no one factor is dispositive").

We acknowledge, preliminarily, that the motions court did not analyze the stop as independently justified under *Terry*, even though the State argued at the motions hearing that the detention of appellant was justified as a valid *Terry* stop for drugs. That presents the question as to how we should consider the record in this case as we undertake our *de novo* review.

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

"The basic rule of fact-finding review, therefore, is that the appellate court will defer to the fact-findings of trial judge or jury whenever there is some competent evidence which, if believed and given maximum weight, could support such findings of fact. That is the

prime directive." *Morris v. State*, 153 Md. App. 480, 489 (2003), *cert. denied*, 380 Md. 618 (2004). When the fact finding is ambiguous, however:

> [T]he appellate court will accept that version of the evidence most favorable to the prevailing party. It will fully credit the prevailing party's witnesses and discredit the losing party's witnesses. It will give maximum weight to the prevailing party's evidence and little or no weight to the losing party's evidence. It will resolve ambiguities and draw inferences in favor of the prevailing party and against the losing party. It will perform the familiar function of deciding whether, as a matter of law, a *prima facie* case was established that could have supported the ruling.

Id. at 490; *accord Turkes v. State*, 199 Md. App. 96, 113 (2011).

With these principles in mind, we turn to the facts that were objectively known to the police officers during their encounter with appellant. We begin with the tip from a known, reliable informant that appellant, whom he described, was known to carry heroin in his New York Yankees' cap and to drive a car that matched the one he was driving when stopped. Although an informant's tip ordinarily should contain self-verifying details or be corroborated by independent observation, *see Allen v. State*, 85 Md. App. 657, 666-67, *cert. denied*, 323 Md. 1 (1991), a tip from a reliable confidential informant that does not contain self-verifying details may be a factor in considering whether there was reasonable articulable suspicion. *See State v. Rucker*, 374 Md. 199, 213 (2003) ("What is also clear is that reasonable suspicion may arise from information provided by an informant").

Next, the area around T's Market was described by Corporal Hagel as a "well-known, high-drug, high-crime area," and Hagel knew that narcotics arrests had been made in and

around T's Market. The nature of the area is an important factor in any *Terry* analysis. *See, e.g.*, *Illinois v. Wardlow*, 528 U.S. at 124 (investigatory stop in area known for heavy narcotics trafficking; "that the stop occurred in a 'high crime area' among the relevant contextual considerations in a *Terry* analysis" (citing *Adams v. Williams*, 407 U.S. 143, 144 (1972))); *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975) (law enforcement officers may consider an area's characteristics in deciding whether to make an investigatory stop); *accord Holt v. State*, 435 Md. 443, 466 (2013).

We also are persuaded that both the presence of Ashley Pruski, a known heroin addict, as well as appellant's behavior immediately before he exited the lot with Pruski chasing after him are relevant considerations. Notably, appellant's vehicle was parked in an area away from the store, near some abandoned gas pumps. When Pruski started to approach appellant's vehicle, appellant started to drive away from the market. And yet, Pruski continued to chase after appellant's vehicle, waving her hands in the air.

As a possible explanation for appellant's rather odd conduct, Corporal Hagel testified that his vehicle was well-known in the area as a police vehicle. He also testified that he thought he had "been made." Unprovoked flight from the police is another pertinent factor in determining whether officers are justified in believing that an individual is engaging in criminal activity. *Illinois v. Wardlow*, 528 U.S. at 124 ("Headlong flight – wherever it occurs – is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such"); *Price v. State*, 227 Md. 28, 33 (1961)

("Flight, though not conclusive, is usually evidence of guilt."); *see also Cox v. State*, 161 Md. App. 654, 671 (2005) (noting that flight and presence in a high-crime area are relevant factors).

Next, although there was no testimony that Pruski and appellant affirmatively engaged in a drug transaction, Corporal Hagel did testify that it appeared that Pruski was trying to get appellant's attention. He also testified that users and sellers would typically prearrange to meet using cell phones in order to arrange a heroin transaction.

In considering this sequence of events, we observe that a police officer's experience and training are highly relevant in assessing either probable cause or reasonable suspicion. *See Arvizu*, 534 U.S. at 273 (a reviewing court must permit police officers "to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person'" (citation omitted)); *see also Holt*, 435 Md. at 461 ("We therefore 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'") (citations omitted); *Crosby*, 408 Md. at 508 ("In making its assessment, the court should give due deference to the training and experience of the law enforcement officer who engaged the stop at issue") (citing *Ransome*, 373 Md. at 104-05).

Corporal Hagel was a thirteen-year veteran of the Maryland State Police at the time he stopped appellant's vehicle and had worked on over one thousand drug related cases

during his career. He had been qualified as an expert on prior occasions and was familiar with the street level packaging of heroin, cocaine, and marijuana in the Salisbury area. Given that Corporal Hagel decided to pursue appellant's vehicle, it can be rationally inferred that, based on his training and experience, he believed there was a reasonable suspicion that criminal activity was afoot. That appellant's and Pruski's unusual behavior could have some innocent explanations, is of no material import in a *Terry* analysis. *See Navarette v. California*, 572 U.S. __, 134 S. Ct. 1683, 1691 (2014) ("[W]e have consistently recognized that reasonable suspicion "need not rule out the possibility of innocent conduct.") (quoting *United States v. Arvizu*, 534 U.S. 266, 277 (2002)).

The reasonableness of the next event in the sequence is not questioned by appellant. He concedes the lawfulness of the traffic stop for speeding. Therefore, we turn our attention to appellant's conduct during the course of the stop. First, appellant did not provide a valid driver's license, nor did his passenger. Although not a major offense, as evidenced by the fact that Corporal Hagel did not cite appellant for it, we simply note that, absent the presence of another properly licensed driver, appellant was in violation of TA § 16-105 (g).

Appellant was also exhibiting nervousness that was "more excessive" than Corporal Hagel normally observed from individuals during the course of a stop. Although the Court of Appeals downplayed the importance of nervousness in *Ferris v. State*, 355 Md. 356, 387-89 (1999), it has since observed that "conduct, including nervousness, that may be innocent if viewed separately can, when considered in conjunction with other conduct or

circumstances, warrant further investigation." *McDowell v. State*, 407 Md. 327, 337 (2009); *see Illinois v. Wardlow*, 528 U.S. at 124 (noting that nervous, evasive behavior was a pertinent factor in determining reasonable suspicion); *Nathan v. State*, 370 Md. 648, 665 n.5 (2002) (distinguishing *Ferris* and finding that "extreme" nervousness is a relevant factor to consider), *cert. denied*, 537 U.S. 1194 (2003); *see also Jackson v. State*, 190 Md. App. 497, 520 (2010) ("A nervous reaction by a detainee, we readily agree, means almost nothing by itself, but like the slow drip, drip, drip of water on a rock, it may nonetheless contribute to a larger totality. A single drop means little, but in the end a mountain has become a plain").

Corporal Hagel observed that when he questioned appellant, the latter stuttered, was sweating and breathing rapidly, and that his hands were shaking when he handed over his learner's permit. Officer Dallam made similar observations, noting that appellant was breathing rapidly and sweating, and that his knuckles were turning white because he was gripping the steering wheel very tight.

Under the totality of the circumstances, and under our standard of review, we are persuaded that there was a sufficient basis to conclude that this was a lawful *Terry* stop. And, given that the K-9 officer responded to the scene about 18 minutes after the initial stop, we also conclude that the stop was not unduly prolonged.

Moreover, we are also persuaded that a limited pat down for weapons was warranted under these circumstances. *See State v. Smith*, 345 Md. 460, 468 (1997) ("The reasonableness of a *Terry* stop and frisk thus must be assessed on a case-by-base basis").

Considered objectively, and, as indicated, in the light most favorable to the prevailing party on the motion, there was reasonable suspicion in this case that crime was afoot, specifically, a narcotics related crime. This Court has "often recognized the inherent dangers of drug enforcement, and an investigatory stop based upon a reasonable suspicion that a suspect is engaged in drug dealing, can justify a frisk for weapons." *Hicks v. State*, 189 Md. App. 112, 124 (2009); *see also Marks v. Criminal Compensation*, 196 Md. App. 37, 70 (2010) ("There can be no serious dispute that there is an intimate relationship between violence and drugs"); *Dashiell v. State*, 143 Md. App. 134, 153 (2002) ("Persons associated with the drug business are prone to carrying weapons"), *aff'd*, 374 Md. 85 (2003). We conclude that the police were authorized to frisk appellant.

Furthermore, even if the stop and/or frisk was unlawful, the appellant was not entitled to use force against the officers in resisting it. In *Hicks*, *supra*, we stated:

> Although appellant stepped out of the vehicle when ordered to do so, he was uncooperative and combative when directed to take a stance to allow the officer to frisk him. Officer Gottlieb testified that "at one point [appellant] threw his right elbow back at me, missed, ... and ran toward the back of the car ... and he was, basically, fighting us, elbowing us, trying to get away from us." Appellant's conduct changes the focus of our analysis. There is no privilege to resist either an unlawful *Terry* stop, *Barnhard v. State*, 86 Md. App. 518, 528, 587 A.2d 561 (1991), *aff'd*, 325 Md. 602, 602 A.2d 701 (1992), or an unlawful frisk. *State v. Blackman*, 94 Md. App. 284, 306, 617 A.2d 619 (1992) ("Even if the frisk would have been unlawful ..., there was no right or privilege on the part of the [defendant] to resist it by using force against the officer.") Appellant's thrust of his elbow at Officer Gottlieb was an assault and appellant continued to elbow and fight the officers. Officer Gottlieb arrested appellant for assault and, pursuant to that arrest, lawfully searched him and recovered the handgun from his right front pocket. The arrest and the

> resulting search were justified. *Blackman*, 94 Md. App. at 305, 617 A.2d 619 ("[T]he [defendant] was not privileged to resist [the frisk] by shoving the officer. That shove, albeit arguably minimal, was a battery. That was all that was required to justify the arrest of the [defendant] and the search incident thereto.")

Hicks, 189 Md. App. at 125.

When appellant unlawfully assaulted Officer Dallam, the stop that initially was justified under *Terry* ripened into one supported by probable cause to arrest. *See Crosby v. State*, 408 Md. 490, 506 (2009) ("[A] *Terry* stop may yield probable cause, allowing the investigating officer to elevate the encounter to an arrest or to conduct a more extensive search of the detained individual"); *see also Stokeling v. State*, 189 Md. App. 653, 670 (2009) (recognizing that a *Terry* stop may be elevated to one supported by probable cause), *cert. denied*, 414 Md. 332 (2010); *Rosenberg v. State*, 129 Md. App. 221, 243 (1999) (concluding that, under the circumstances, reasonable, articulable suspicion may ripen to probable cause), *cert. denied*, 358 Md. 382 (2000)).

Aside from what we have already said, it is quite likely that the assault that occurred as Officer Dallam was patting down appellant near his neck and head area was an attempt by appellant to conceal evidence. In this regard, it is important to note that at the time the search was made, Officer Dallam knew that Corporal Hagel had been told by an informant that appellant kept heroin in his New York Yankees cap. Due to the prior information from the informant that appellant kept heroin in his baseball cap, appellant's actions in trying to prevent a search underneath his cap, supported an inference that appellant was displaying

consciousness of guilt. *See Wagner v. State*, 213 Md. App. 419, 465 (2013) (recognizing that an attempt to conceal evidence is consistent with consciousness of guilt).

Once there was probable cause to arrest, appellant's person, including his New York Yankees' cap and his front pants pocket, could be searched incident to arrest. *See Arizona v. Gant*, 556 U.S. 332, 338 (2009) ("Among the exceptions to the warrant requirement is a search incident to a lawful arrest"); *see also Belote v. State*, 411 Md. 104, 113 (2009) ("[T]he fact of a custodial arrest alone is sufficient to permit the police to search the arrestee"); *Scribner v. State*, 219 Md. App. 91, 99 ("Among the exceptions to the warrant requirement is a search incident to a lawful arrest. The exception derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations") (citation omitted), *cert. denied*, 441 Md. 63 (2014). Accordingly, we hold that the stop of appellant was lawful, as was the search that resulted in the recovery of heroin from his person. The motions court properly denied the motion to suppress.

Alternatively, we are persuaded that the search was justified under the inevitable discovery doctrine. As mentioned earlier, this theory was discussed by counsel during argument at the suppression hearing, and by the court in its ruling.[9]

[9]Despite the fact that the State does not raise this argument in its brief, the issue was clearly presented and argued to the motions court below and appellant addresses this issue in his brief. Accordingly, we shall exercise our discretion and consider the issue. *See Moats v. City of Hagerstown*, 324 Md. 519, 524-25 (1991). We decline to consider the State's intervening act argument, however, as that ground was not clearly argued in the motions hearing, and was not the basis of the court's alternative ruling.

There are three methods by which evidence obtained after initial unlawful conduct can be purged of any taint:

> First, evidence obtained after initial unlawful governmental activity will be purged of its taint if it was inevitable that the police would have discovered the evidence. *See Nix v. Williams*, 467 U.S. 431, 444, 104 S.Ct. 2501, 2509, 81 L.Ed.2d 377, 387 (1984). Second, the taint will be purged upon a showing that the evidence was derived from an independent source. *See United States v. Wade*, 388 U.S. 218, 239-242, 87 S.Ct. 1926, 1938-1940, 18 L.Ed.2d 1149, 1164-1166 (1967). The third exception . . . will allow the use of evidence where it can be shown that the so-called poison of the unlawful governmental conduct is so attenuated from the evidence as to purge any taint resulting from said conduct. *See Wong Sun*, 371 U.S. at 488, 83 S.Ct. at 417, 9 L.Ed.2d at 455.

Miles v. State, 365 Md. 488, 520-21 (2001), *cert. denied*, 534 U.S. 1163 (2002).

The inevitable discovery doctrine is an "exception [that] permits the government to cleanse the fruit of poison by demonstrating that the evidence acquired through improper exploitation would have been discovered by law enforcement officials by utilization of legal means independent of the improper method employed." *Stokes v. State*, 289 Md.155, 162-63 (1980) (citing 3 W. LaFave, *Search and Seizure* § 11.4 at 620-628; La Count and Girese, *The "Inevitable Discovery" Rule, an Evolving Exception to the Constitutional Exclusionary Rule*, 40 Alb. L.Rev. 483 (1976); Maguire, *How to Unpoison the Fruit – the Fourth Amendment and the Exclusionary Rule*, 55 J.Crim. L.C. & P.S. 307, 313-321 (1964)). In *Williams v. State*, 372 Md. 386, 417-18 (2002), the Court of Appeals summarized the inevitable discovery rule:

> In sum, the State has the burden of proving, by a preponderance of the evidence, that the evidence in question inevitably would have been found through lawful means. *See*, *e.g.*, [*Nix v. Williams*, 467 U.S. 431, 444 (1984); *Oken v. State*, 327 Md. 628, 654 1992)]. This standard embodies two ideas – that there was a lawful method for acquiring the evidence and that the evidence inevitably *would* have been discovered. When challenged evidence inevitably would have been discovered lawfully regardless of police misconduct, the deterrence effect of exclusion is minimal, and exclusion of the evidence would put police in a worse position than they would have been without any illegal conduct. *Nix*, 467 U.S. at 444, 104 S. Ct. at 2509, 81 L. Ed. 2d 377. The inevitable discovery doctrine necessarily involves an analysis of *what would have happened* if a lawful investigation had proceeded, not what actually happened. The analysis of what would have happened had a lawful search proceeded should focus on historical facts capable of easy verification, not on speculation. *Id*. at 444 n.5, 104 S. Ct. at 2509 n.5, 81 L. Ed. 2d 377; *United States v. Vasquez De Reyes*, 149 F.3d 192, 195 (3d Cir. 1998); *United States v. Kennedy*, 61 F.3d 494, 497-98 (6th Cir. 1995).

Assuming *arguendo* that the frisk of appellant, and the ensuing search of appellant's person incident to an arrest for an assault were unlawful, the alternative rationale concerns whether the police would have inevitably discovered the evidence on appellant's person in any event. Both this Court and the Court of Appeals have held that an alert by a drug sniffing dog to the presence of drugs provides probable cause to perform a warrantless search and/or arrest. *See State v. Wallace*, 372 Md. 137, 146 (2002) ("Further, the law is settled that when a properly trained canine alerts to a vehicle indicating the likelihood of contraband, sufficient probable cause exists to conduct a warrantless "*Carroll*" search of the vehicle"), *cert. denied*, 540 U.S. 1140 (2004); *Wilkes v. State*, 364 Md. 554, 586 (2001) ("We have noted that once a drug dog has alerted a trooper 'to the presence of illegal drugs in a vehicle, sufficient probable cause exist[s] to support a warrantless search of [a

vehicle]'") (citation omitted); *Stokeling*, *supra*, 189 Md. App. at 664 (stating that dog "alert to the Chrysler gave the police probable cause to search it for illegal drugs"); *State v. Ofori*, 170 Md. App. at 221 ("[O]nce the K-9 'alerted' to the probable presence of contraband drugs in the Cadillac, all Fourth Amendment uncertainty came to an end").

In *Fitzgerald v. State*, 153 Md. App. 601 (2003), *aff'd*, 384 Md. 484 (2004), we said that an alert by a drug dog will support the warrantless arrest of a suspect:

> The same degree of certainty that will support the warrantless *Carroll* Doctrine search of an automobile will, *ipso facto*, support the warrantless arrest of a suspect. In passing, *Wilkes v. State*, 364 Md. at 587 n.24, 774 A.2d 420, alluded to this arrest-search equivalency:
>
> > Moreover, some jurisdictions have held that *once a drug dog has alerted the trooper to the presence of illegal drugs in a vehicle, sufficient probable cause existed to support a warrantless arrest*. *See United States v. Klinginsmith*, 25 F.3d 1507, 1510 (10th Cir.) ("[W]hen the dog 'alerted,' there was probable cause to arrest [defendants]. . ."), *cert. denied*, 513 U.S. 1059, 115 S.Ct. 669, 130 L.Ed.2d 602 (1994); *United States v. Williams*, 726 F.2d 661, 663 (10th Cir. 1984) ("[A] drug sniffing dog's detection of contraband in luggage 'itself establish[es] probable cause, enough for the arrest, more than enough for the stop.'" (alteration in original) quoting *United States v. Waltzer*, 682 F.2d 370, 372 (2d. Cir. 1982), *cert. denied*, 463 U.S. 1210, 103 S.Ct. 3543, 77 L.Ed.2d 1392 (1983)).

Fitzgerald, 153 Md. App. at 620; and *Ofori*, 170 Md. App. at 229 ("[I]n circumstances such as those involving a K-9 sniff, probable cause to search the vehicle is, *ipso facto*, probable cause to arrest, at the very least, the driver"); *State v. Funkhouser*, 140 Md. App. 696, 721 (2001) ("The probable cause developed by the initial canine 'alert' was at one and the same

time probable cause to believe both 1) that drugs were probably then in the car and 2) that its driver and sole occupant probably was then or recently had been in unlawful possession of those drugs").

The record developed at the suppression hearing shows that Corporal Hagel called Officer Dallam to the scene specifically to conduct a K-9 scan of appellant's vehicle. Officer Dallam was in the process of advising appellant of how that scan would be conducted when he asked him to exit the vehicle. Thus, is it clear that the scan was going to be conducted, even had Dallam not handcuffed appellant following the assault and searched him. And, the positive alert by the narcotics dog authorized a search of the vehicle and the arrest of the driver of that vehicle. In other words, even if the heroin had not been discovered during the initial frisk, it would have inevitably been discovered during a lawful search following the positive alert and subsequent arrest. We hold that the motions court properly denied the motion to suppress on this alternative ground.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.