UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1700

September Term, 2015

CLARENCE R. JONES

v.

STATE OF MARYLAND

Krauser, C.J.,
Nazarian,
Moylan, Charles, E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: October 11, 2016

Convicted by a jury, in the Circuit Court for Montgomery County, of robbery and second-degree assault, Clarence Jones, appellant, presents two issues for our review. Rephrased to facilitate that review, they are:

I. Did the trial court err in denying Jones' motion to suppress the victim's out-of-court identification of him, as well as physical evidence that was recovered near the location where the police stopped him, because, he claims, they were the fruits of a seizure that was not supported by reasonable suspicion?

II. Did the trial court impose an illegal sentence when it ordered that the first ten years of Jones' sentence be served without parole?

For the reasons that follow, we affirm Jones's convictions but vacate the portion of his sentence that required him to serve the first ten years of his sentence without parole.

Suppression Hearing

Jones filed a pre-trial motion to suppress claiming that the police stopped and detained him, without reasonable articulable suspicion of criminal activity and, therefore, that the victim's out-of-court identification of him, as well as the physical evidence that was recovered near the location of the stop, should be suppressed. At the hearing on that motion, Justin Tonczyczyn of the Montgomery County Police Department testified that on Sunday, May 6, 2014, he was on patrol in Silver Spring, Maryland when he heard a police broadcast, regarding a robbery and assault that had occurred at about 10:55 p.m. in front of the McDonald's on Colesville Road. The broadcast, which did not indicate whether the suspect had fled on foot or in a vehicle, described the perpetrator as a dark-skinned black

male with short-cropped hair, approximately 5'5" tall, 180 pounds, and wearing a blue and white "varsity jacket."[1]

At 11:30 p.m. that night, Officer Tonczyczyn observed Jones walking on Sligo Avenue, approximately one mile from the McDonald's. Other than his height, which was somewhere between 6'2" and 6'4," Jones matched the description of the robbery suspect because, in addition to being a "very dark-skinned," black male with short hair, Jones was wearing "a blue center coat with [ ] white sleeves" that was similar to a high school football varsity jacket. Officer Tonczyczyn then stopped his vehicle and detained Jones for approximately ten minutes as they waited for the victim to arrive and, when he did, he identified Jones as the perpetrator of the robbery. Thereafter, property belonging to the victim was recovered near the area where Jones was stopped.[2]

At the conclusion of the hearing, the suppression court denied Jones' motion to suppress. Although the court noted that the "witness [ ] gave a description that was certainly inconsistent with respect to height," it ultimately found that the stop was "reasonable" because both Jones and the alleged perpetrator were wearing a "distinctive style of coat" and Jones was stopped in close proximity to crime scene shortly after the robbery occurred.

[1] The original police broadcast indicated that the suspect possibly had dreadlocks; however, before Officer Tonczyczyn stopped appellant he called the dispatcher, who clarified that the suspect actually had short, close-cropped hair.

[2] The specific items recovered, and the precise location where they were found, were not identified at the suppression hearing. But, at trial, Officer Kevin McGlamary testified that he recovered the victim's cell phone and identification card behind a retaining wall where Jones had been standing.

I.

In challenging the denial of his motion to suppress, Jones contends that Officer Tonczyczyn lacked a reasonable suspicion to stop him because "he was approximately one foot taller than the suspect" described in the police broadcast; there was no information that the suspect had fled in the direction where he was stopped; and given the presence of mass transit in Silver Spring, the area in which the suspect might have fled was large. We find appellant's argument unpersuasive.

"In reviewing the ruling of the suppression court, we must rely solely upon the record developed at the suppression hearing." *Briscoe v. State,* 422 Md. 384, 396 (2011). In doing so, we view "the evidence and inferences that may be reasonably draw therefrom in a light most favorable to the prevailing party on the motion, here the State." *Lindsey v. State*, 226 Md. App. 253, 262 (2015) (citation omitted). "Furthermore, we extend great deference to the findings of the motions court as to first-level findings of fact and as to the credibility of witnesses, unless those findings are clearly erroneous." *Id*. (internal quotation marks and citation omitted). "The ultimate determination of whether there was a constitutional violation, however, is an independent determination that is made by the appellate court alone, applying the law to the facts found in each particular case." *Sinclair v. State,* 444 Md. 16, 27 (2015) (citation omitted).

It is well settled that police may, under the Fourth Amendment, 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 v. Ohio,* 392 U.S. 1, 30 (1968); *accord Crosby v. State,* 408 Md. 490, 505 (2009). Although the

"reasonable suspicion" required to justify an investigatory stop is conceptually similar to probable cause, "the level of suspicion required for a *Terry* stop is obviously less demanding than that for probable cause." *State v. Dick*, 181 Md. App. 693, 705 (2008) (citation omitted).

"There is no standardized test governing what constitutes reasonable suspicion," and the concept is "not readily, or even usefully, reduced to a neat set of legal rules." *Holt v. State*, 445 Md. 443, 459 (2013) (quotation marks and citations omitted). Instead, it is "a common sense, nontechnical conception that considers factual and practical aspects of daily life and how reasonable and prudent people act." *Cartnail v. State,* 359 Md. 272, 286 (2000) (citation omitted). Nevertheless a stop based on reasonable suspicion must rely on more than an "inchoate and unparticularized suspicion or hunch." *Pyon v. State*, 222 Md. App. 412, 430 (2015) (internal quotation marks and citation omitted.) The Supreme Court has therefore required that an officer conducting such a stop to be able to articulate "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Illinois v. Wardlow,* 528 U.S. 119, 128 (2000) (citation omitted).

In the absence of a bright-line test, the Court of Appeals has highlighted certain factors that courts generally consider, when judging "whether a reasonable and prudent police officer would have been warranted in believing that [the individual stopped] had been involved in criminal activity." *Cartnail,* 359 Md. at 289. These factors include:

> "'(1) the particularity of the description of the offender or the vehicle in which he fled; (2) the size of the area in which the offender might be found, as indicated by such facts as the elapsed time since the crime occurred; (3) the number of persons about in that area; (4) the known or probable direction of the offender's flight; (5) observed activity by

> the particular person stopped; and (6) knowledge or suspicion that the person or vehicle stopped has been involved in other criminality of the type presently under investigation.'"

Id. (quoting 4 Wayne R. LaFave, Search and Seizure § 9.4(g), at 195 (3d ed. 1996 & 2000 Supp.))

Applying these factors, we examine at the totality of the circumstances and do not "parse out" every circumstance for individualized consideration. *Crosby*, 408 Md. at 507. To satisfy the reasonable suspicion standard, these factors, considered together, "must serve to eliminate a substantial portion of innocent travelers." *Id*. at 291 (citations and quotations omitted).

In applying the above factors to this case, we believe that several cases that have found a seizure not to be supported by reasonable suspicion are instructive. First, in *Cartnail*, the Court of Appeals held that the police lacked reasonable suspicion to stop a gold Nissan, occupied by a black man, one hour and fifteen minutes after the robbery, in a different section of the city, where the report indicated that a gold or tan Mazda occupied by three black men fled in "no known direction." *Id*. at 277-78. Noting the "range of possible flight" that the perpetrators could have taken in a vehicle over one hour after the robbery, the Court rejected the State's claim that the supposed corroboration of Mazda and Nissan vehicles, on the basis that they were "both Japanese," was sufficient to "narrow the group of innocent travelers." *Id*. at 294-95. The Court then reasoned that "[u]nder this premise, the police, with solely a gold or tan Mazda manufacturer description, would have unfettered discretion to pull over seemingly infinite combinations of drivers." *Id*. at 295.

Similarly, in *Stokes v. State,* 362 Md. 407 (2001) a police broadcast described an armed robbery suspect as "a black male wearing a black tee shirt." *Id*. at 410 Stokes, a black male wearing dark clothing, drove into a parking lot near the crime scene roughly thirty minutes after the broadcast. *Id.* The Court of Appeals held that a reasonable, articulable suspicion to stop the defendant did not exist because the description was "far too generic" and "sparse at best." *Id.* at 425. In addition, the Court stressed that the State did not put forth any evidence to support a conclusion that the presence of a black male in the neighborhood where the stop occurred was atypical. *Id.* at 418.

Finally, in *Madison–Sheppard v. State,* 177 Md. App. 165 (2007), the police broadcast an alert for a suspect in a murder committed earlier that week. *Id.* at 168. The alert described the suspect in the nearby crime as "a black male, approximately six feet tall, 180 pounds, with cornrow-style hair." *Id.* An officer observed Madison–Sheppard, who generally fit the description, on the front porch of a house and searched him, finding cocaine. *Id.* at 169. We looked to the *Cartnail* factors and held the search invalid, observing that the physical description "could apply to a large segment of African American male population" and that the crime had been committed several days before the search; at which time, the area of flight "could be enormous." *Id.* at 179–80.

The common thread in each of these cases is that the description of the suspect was not specific and, given the time that had elapsed since the crime, could have applied to a large number of people. Here, however, the police broadcast not only described the perpetrator's general physical characteristics, but also, indicated that he was wearing a very distinctive type of jacket. This last detail was sufficient to eliminate a substantial portion

of innocent persons who might have been in the area, especially considering that the robbery and assault occurred late on a Sunday night and there was no indication that the assailant had fled in a vehicle.

After hearing the police broadcast, Officer Tonczyczyn observed Jones, wearing the same color and style of jacket, in both temporal and spatial proximity to the crime. Moreover, Jones also matched the physical description of the suspect, with the exception of height, a discrepancy that we do not find to be dispositive in light of the appellant's other similarities to the person described in the police broadcast. We therefore hold that, under the totality of the circumstances, it was reasonable for Officer Tonczyczyn to believe that Jones was the robbery suspect and to detain him for a brief period of time so that he could either confirm or dispel his suspicions via a show-up identification with the victim. Accordingly, the circuit court properly denied appellant's motion to suppress.

II.

Jones was ultimately convicted by a jury of robbery and second-degree assault. At Jones' sentencing hearing, the State presented evidence demonstrating that, in 2010, Jones had been convicted of robbery, in the Circuit Court for Prince George's County. On the basis of that conviction, the trial court found that Jones' robbery conviction, in this case, was his second conviction for a crime of violence and, therefore, that he was subject to a mandatory enhanced sentence pursuant to Md. Code Ann., Crim. Law § 14-101(d)(1) (2015 Supp.). It then imposed a sentence of twelve years' incarceration, stating that "[t]he first 10 years of that sentence is to be without chance of parole pursuant to Article 14-101[.]" Appellant did not object to that sentence.

On appeal, appellant now asserts that the trial court erred in ordering the first ten years of incarceration to be served without parole because § 14-101(d)(1), while providing for a ten year mandatory sentence, does not grant the trial court the authority to order that the mandatory sentence be served without parole. He further contends that this Court can review this issue, despite his failure to object at trial, because the "no parole" condition constitutes an illegal sentence. The State concedes that the "no parole" condition of Jones' sentence is illegal and should be vacated. We agree with the parties and vacate the portion of Jones' sentence requiring him to serve his ten year mandatory sentence without parole.

Maryland Rule 4-345(a) provides that: "[t]he court may correct an illegal sentence at any time." Accordingly, "when the trial court has allegedly imposed a sentence not permitted by law, the issue should ordinarily be reviewed on direct appeal even if no objection was made in the trial court." *Carlini v. State*, 215 Md. App. 415, 425 (2013).

The Court of Appeals has recognized that "[u]nless a statute provides to the contrary, courts are not empowered to determine whether or when a prisoner should be released on parole." *State v. Parker,* 334 Md. 576, 596 n. 9 (1994). Accordingly, the imposition of a no-parole condition, "[e]xcept in those limited circumstances when the Legislature has expressly empowered the court to impose no-parole provisions," constitutes an illegal sentence. *DeLeon v. State,* 102 Md. App. 58, 86 (1994) (holding that the sentencing court's imposition of a five-year no parole condition, when not authorized by statute, constituted an illegal sentence).

Section 14-101of the Criminal Law Article requires the trial court to impose specific mandatory enhanced sentences when an offender has previously been convicted of a crime

of violence. The relevant sentencing provisions for persons who have been convicted of their third and fourth crime of violence require that those mandatory sentences be served "without parole." *See* Crim. Law §§ 14-101(b)(1), (c)(3). Appellant, however, was sentenced, as a second time violent offender, under subsection (d)(1) of that statute, which provides that:

> (d)(1) On conviction for a second time of a crime of violence committed on or after October 1, 1994, a person shall be sentenced to imprisonment for the term allowed by law, but not less than 10 years, if the person:
>
> (i) has been convicted on a prior occasion of a crime of violence, including a conviction for a crime committed before October 1, 1994; and
>
> (ii) served a term of confinement in a correctional facility for that conviction.
>
> (2) The court may not suspend all or part of the mandatory 10-year sentence required under this subsection.

Because, unlike its counterparts, subsection (d)(1) does not contain a "no parole" provision, the trial court's imposition of such a condition was not authorized by statute and therefore his sentence was illegal. Accordingly, that portion of Jones' sentence must be vacated.

PROVISION IN THE SENTENCE THAT APPELLANT NOT BE ELIGIBLE FOR PAROLE IS VACATED; JUDGMENTS ARE OTHERWISE AFFIRMED; COSTS TO BE PAID ONE-HALF BY APPELLANT AND ONE-HALF BY MONTGOMERY COUNTY.