Circuit Court for Howard County
Case Nos.: C-13-CR-18-000097
C-13-CR-18-000620

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 19 & 1053

September Term, 2019

WILLIAM ALFRED BURGESS, IV

v.

STATE OF MARYLAND

Nazarian,
Gould,
Wright, Alexander
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: February 19, 2021

Appellant William Alfred Burgess IV was indicted in the Howard County Circuit Court (Case Number C-13-CR-18-0000970) and charged with attempted armed robbery and several other related counts. Prior to trial, the court heard and denied appellant's motion to suppress evidence seized following an investigative stop. Appellant then entered a not guilty plea on an agreed statement of facts and was found guilty of attempted robbery. Appellant was sentenced to 15 years, with all but seven years suspended, with credit for time served, to be followed by three years supervised probation. The remaining counts were placed on the stet docket.

Appellant also was indicted in Case Number C-13-CR-18-000620 and charged with illegal possession of a regulated firearm after being previously convicted of a crime of violence, in relation to the same incident previously described. Appellant renewed and incorporated the previously argued motion to suppress, and that motion was again denied. Appellant entered a not guilty plea on an agreed statement of facts and was found guilty as charged. He was sentenced to five years without possibility of parole and consecutive to the sentence to be served in Case Number 000097, as set forth above. Timely appeals from both of these two cases were consolidated by this Court in an order dated November 25, 2019.

Appellant presents the following question for our review:

Did the suppression court err in denying the motion to suppress in both cases?

For the following reasons, we shall affirm.

BACKGROUND

November 13, 2018 hearing - Case Number C-13-CR-18-000097

On May 6, 2018, at approximately 11:45 p.m., Howard County 911 received a call from a then unidentified male and female reporting that an African American man, wearing an Orioles sweatshirt with black and orange colors, pointed a gun at them as they sat in a car parked at the Lake Elkhorn parking lot near Columbia, Maryland. The callers indicated that the man was walking towards them, then ran at them with the gun, and that their car hit a sign or a curb when they escaped the parking lot in a car traveling at a high rate of speed.[1]

About five minutes after the 911 call was received, Howard County Police Sergeant Lisa Franks was on uniformed patrol in her marked Dodge Charger when she overheard dispatch report an incident in the Lake Elkhorn area. The dispatch "described a black male wearing an Oriole shirt or jacket." She testified that "[a]t the time the only information that the dispatcher had relayed to us was that something had occurred in the parking lot as far as a subject in an Orioles jacket running at or coming towards a couple in the parking lot." She agreed that she had no other identifying information concerning the subject, such as height, weight, age, or other items of clothing.[2]

After hearing the dispatch report, Sergeant Franks parked at a park-and-ride parking lot, located near the intersection of Route 32 and Broken Land Parkway, and began

[1] Audio clips from State's Exhibit A, a CD containing the 911 call and pertinent transmissions from the officers, were admitted without objection and played during the hearing. The CD includes a Microsoft Excel file which shows that the first 911 call came in on May 6, 2018 at 23:44:52 p.m., or 11:44:52 p.m.

[2] At this point in the evening's chronology, Sergeant Franks had only heard the dispatch and not the 911 call. She would later hear that call, but only after the fact of the stop and arrest ultimately at issue in this case.

surveillance of the area. This included another nearby parking lot for Lake Elkhorn, located about a quarter mile to the north of her location**.** A 23-year police veteran assigned to this part of Columbia for the past three years, the sergeant was aware that there had been a number of vehicle break-ins in that particular parking lot.

Almost as soon as she set up surveillance, again, within five minutes of the original 911 call, Sergeant Franks saw a "black male subject walking but most importantly he had an Orioles jacket on." Further testifying that there were no other people around, and that it was late on a Sunday night, Sergeant Franks explained that this individual was approaching her location, on foot, and was walking east on the westbound shoulder.

After informing dispatch that she saw a subject matching the description, the individual then walked past her marked vehicle, talking on a cell phone. Testifying that she did not know if a crime had occurred at that time, Sergeant Franks pulled her car near him and asked to speak to him. She explained she was using a casual tone and spoke to him while driving her car parallel to where he was walking.

Early on in the exchange, Sergeant Franks turned on her "left alley light," which she described as a square, stationary light situated at the end of the light bar on top of her patrol car, in order to get his attention. She agreed, on cross-examination, that when she turned on this light, it illuminated the appellant. She identified appellant, in court, as that same individual.

Asked several times what she said to him specifically as she was driving, Sergeant Franks testified that she stated: "[H]ey, can I talk to you for a minute about what happened down at the lake. Something to that effect." During cross-examination, she referred to her

police report and testified that she stated that she "needed to speak to him" about "what happened up by the lake." She testified that the individual initially replied, "okay," but kept on walking, against traffic in his original direction along Broken Land Parkway towards, and eventually across, the Route 32 overpass. He continued in this path, all the while still talking on his cell phone.

As appellant continued to walk unimpeded across the Route 32 overpass, Sergeant Franks continued to try speaking to him, while still in her patrol car. She confirmed that she "shouted" at some points but explained that any shouting was due to the traffic travelling underneath them on Route 32.

As she was not able to pull over on the overpass, and as there was at least one other vehicle in the area, Sergeant Franks drove ahead and pulled her vehicle over on the other side of the bridge in the gore area near the on ramp.[3] She estimated that the distance between when she first saw appellant walking along Broken Land Parkway near the park and ride lot, to the point across the Route 32 overpass when she stopped her vehicle, was approximately one-quarter mile.

Once appellant was across the Route 32 overpass, he slowed his pace momentarily, and "his left shoulder kind of dipped down in a weird way," according to Sergeant Franks. He then eventually crossed over Broken Land Parkway to Sergeant Franks' side of the

[3] A "gore area" is "a triangular plot of land (as created when a road forks when intersecting a second road, or merges on and off from a larger one)." https://en.wikipedia.org/wiki/Gore_(road) (last accessed on January 25, 2021). Both the area where Sergeant Franks first encountered appellant and where she stopped her vehicle are designated on the exhibit.

road. Sergeant Franks maintained that, at this point, she had not given appellant any commands or orders "[b]ecause I still didn't know if any crime had occurred." She also testified she did not order him to cross the street, and that she "said I wanted to talk to him. He approached me."

At around this time, PFC Christopher Martin arrived in another patrol car and parked behind Sergeant Franks' vehicle. Officer Martin activated his rear flashers to warn traffic but did not activate his emergency lights.

The two police officers then got out of their respective patrol cars and Officer Martin asked appellant for his identification. Officer Martin also testified at the hearing and indicated that they spoke to appellant in front of their vehicles and that he asked appellant where he was coming from. Appellant replied that he was coming from his residence and was walking to his girlfriend's house. Officer Martin further testified that he asked appellant if he had seen anything in the Lake Elkhorn parking lot and, according to the officer, appellant replied as follows:

> He told me he was, again, walking from his house to his girlfriend's house. He saw a car in the parking lot, was thinking that they were smoking marijuana and was going to ask them if they had any that he could have. As he got closer to the vehicle the vehicle backed up, took off, and he kept walking on his way.

After this conversation, neither Sergeant Franks nor Officer Martin believed that appellant had committed any crime. Sergeant Franks testified that appellant was "cooperative" and "very relaxed," and "[g]ave no indication of being deceitful." Instead, Sergeant Franks testified that they had "just a casual conversation about, hey, what's your version of what happened at the lake because some kids called 911 and we're kind of

confused here. That's it." Officer Martin added that appellant's "story made sense" because that parking lot was known for marijuana use. Appellant seemed "cool, calm, collected," and that it was a "normal conversation" and that appellant "never gave us any indication that he had done anything wrong or was nervous about what had gone on."

Appellant was not frisked or restrained in any way, nor was he accused of committing a crime**.** Officer Martin did, however, check appellant for outstanding warrants, and after about 10 minutes, when that came back negative, appellant left the scene**.** Sergeant Franks confirmed that she offered appellant a ride. Asked by defense counsel whether she offered appellant a ride because that would allow her to pat him down before he got into her car, she agreed "[t]hat's partly the reason."

Approximately five minutes later, after appellant walked away and was no longer in their view, Sergeant Franks and Officer Martin received additional information from Officer Brian Bochinski. Officer Bochinski spoke to the individuals who called 911. He then spoke to Officer Martin and told him, according to Officer Martin, "[t]hat the suspect from Lake Elkhorn possibly had a firearm on him that he had pointed at the victims over there." Sergeant Franks further testified that she learned "that the subject in the Orioles jacket had pointed a handgun" at the couple who called 911.

Realizing that they would need to locate appellant again, Sergeant Franks then recalled the moment, prior to their conversation, when she saw appellant "dip down next to the guardrail" after he crossed the bridge over Route 32. Informing Officer Martin of this observation, the two of them went towards the aforementioned location. Along their path, Officer Martin found a black mask on the ground in the middle of Broken Land

Parkway. Once at the guardrail, they found a black duffel bag on the other side, as shown on a photograph of the area. The officers opened the duffel bag and found a loaded AK-47 rifle as well as several rounds of ammunition. Sergeant Franks agreed that she could not recall if she saw appellant carrying a black duffel bag as he was walking along Broken Land Parkway when she was driving alongside him. She also agreed on cross-examination that when appellant initially walked directly past her, she was able to see the left and back side of his body.

Sergeant Franks then identified several photographs of the black duffel bag and its contents. The duffel bag was closed and resting on the ground on the other side of the guardrail, in an area that the officer described as "pretty dark[.]" Inside the bag, there was a "fully functional AK-47 rifle" covered in orange and black tape.[4] The rifle did not have a magazine, but there was one round in the chamber and several rounds of ammunition in a baggie. Also located inside the bag were several items of men's clothing, including what appears to be an Orioles knit cap.

After finding the bag and examining its contents, Officer Martin went back to the lake to take statements from the victims, while Sergeant Franks drove in the direction appellant was last seen on foot. About 15 minutes after they found the duffel bag, she saw appellant approaching from that same direction, but now on a bicycle. Appellant was still wearing the same Orioles jacket that he had on earlier that evening.

[4] The colors for the Baltimore Orioles are primarily orange and black. *See, e.g.*, https://www.mlb.com/orioles (last visited January 30, 2021).

Sergeant Franks testified that she approached appellant, with the intention to perform an investigative detention. Fearing that he might escape on the bicycle, and testifying that "I didn't think I'd be able to find him if he rode off on his bike," she used a ruse involving a purported reward in exchange for information about an unrelated homicide, and appellant responded by indicating "he wanted to talk about it" and "seemed interested." She asked appellant to get off his bike and to meet her by a streetlight. As he did so, two other officers arrived on the scene. and appellant was placed in handcuffs and "detained at that time and patted down by the two male officers." Sergeant Franks explained that "at that point we had information that he had pointed a gun at the two kids that called 911" and that it was a "safety hazard, so he was handcuffed at that time, yes." A replica handgun[5] was found in appellant's waistband.

Officer Brian Bochinski also testified at the motions hearing. He responded to a call regarding an incident at the Lake Elkhorn parking lot and eventually spoke to the 911 callers, identified as Jacob Lampf and his girlfriend, Ashley Martin. The two victims told the officer that, while they were parked in the lot, they observed "a black male approaching them from the foot path of Lake Elkhorn." The man was wearing "something orange over his face and he had his right hand in his pocket" as he approached. Concerned that someone was coming towards them from the park at that time of night, Lampf put the vehicle in reverse and started to leave the lot. As they did so, the unidentified man ran at them and "produced a black handgun out of his right pocket and pointed it at them as they began

[5] There is no dispute that the replicate handgun was a BB gun.

driving away." Lampf also indicated that his car hit a curb as he was driving at a high rate of speed to get away from the man. Officer Bochinski confirmed that he relayed this information to Officer Martin.

Officer Bochinski also testified that, after Officer Martin and Sergeant Franks found the black duffel bag, he spoke to the victims again and asked them if they saw the suspect carrying such a bag. They told him that they did not, indicating that the area was poorly lit and that it was "kind of hard to see."

Officer Bochinski also testified that he was the officer who advised appellant of his *Miranda* rights after he was taken into custody and transported to the police station.[6] Appellant waived these rights and informed Officer Bochinski that he was walking to his girlfriend's house and that, when he walked past the parking lot, he saw "three to four subjects in the car smoking marijuana." As he approached the vehicle, the car "sped out of the parking lot in an erratic manner," and he called his girlfriend to discuss the incident. Appellant denied contacting the occupants of the vehicle and denied pointing anything at them.

Officer Bochinski also asked appellant about the replica handgun recovered from his person and appellant replied that he retrieved the gun from his girlfriend's house after he spoke to Sergeant Franks and Officer Martin. Appellant denied knowing about the black duffel bag or the AK-47 rifle. Asked why he returned to the scene of the stop on a bicycle, appellant claimed he lost some keys somewhere along Broken Land Parkway.

[6] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Appellant then testified on his own behalf at the motions hearing. He was walking along Broken Land Parkway, talking with his girlfriend on his cellphone when Sergeant Franks shone a light from her car on him and asked to speak to him. Appellant testified that he ignored her first request. After her second request, he said, "okay." Sergeant Franks stopped her vehicle on the other side of the roadway, and then told him "come here, come over here, I need to talk to you, sir, stuff like that." A second patrol car arrived and activated some strobe lights on the top of the vehicle. Appellant testified:

> Q. And did anyone say anything to you at this point before you crossed the street?
>
> A. Did anyone say anything to me at this point?
>
> Q. Before you crossed the street did anyone say anything to you?
>
> A. Not at the exact moment. It was just more so like a few minutes before that she had asked to talk to me. I kept walking then he pulled up, put the lights on. I decided that they wasn't going to leave me alone so I walked over.
>
> Q. And did you feel free to leave at this point?
>
> A. No. I thought they was going to run my name, maybe ask me about an incident. I wasn't sure what was going on.
>
> Q. When you - before you crossed the street did you think that you had any other options other than crossing the street to the officers?
>
> A. No.

Appellant then testified about his interview with Officer Bochinski and confirmed that he told him he saw some people in the Lake Elkhorn parking lot earlier that evening. He also testified, "I didn't think I was under arrest," and maintained that he did not know

anything about the black duffel bag. He denied that he was read his *Miranda* rights, but agreed that he signed the waiver form.

On cross-examination, appellant was asked about the point when he crossed Broken Land Parkway to speak to Sergeant Franks and Officer Martin, as follows:

> Q. And it's true that at no point that evening that the officers blocked your pathway directly while you were walking down Broken Land Parkway, isn't it?
>
> A. I wouldn't say that. Because while I was walking the cars was coming my way and they're on the other side. But when they pulled into the middle of the street these cars stopped. And then these cars was stopped and they was blocking traffic. That's why she had to put the lights on so he could temporarily stall. So I looked and that's when she called out to me.
>
> Q. But was your path blocked?
>
> A. My path walking?
>
> Q. That's right.
>
> A. No. I thought you meant like the whole street.

Following this testimony, appellant argued that there were two stops in this case and that neither was supported by reasonable articulable suspicion. The first stop, or investigative detention as the motions court then deemed it, occurred when Sergeant Franks first made contact with the appellant, shone the alley light upon his person, and stated that she wanted to talk to him. Recognizing that appellant ignored the officer's initial entreaties, defense counsel contended that the repeated requests, along with the presence of the second officer, Officer Martin, led appellant to believe he was not free to ignore the officer's request and that the officers needed reasonable articulable suspicion of a crime in order to speak with him.

The second stop, according to defense counsel, occurred after the officers received additional information about the incident at the Lake Elkhorn parking lot, which led them to go over to the guardrail where they found the duffel bag and the AK-47 rifle**.** Counsel argued that there was insufficient evidence that appellant placed the bag in that location simply because Sergeant Franks saw him dip his shoulder in that area**.** Indeed, defense counsel later asserted, "this is a big duffel bag. It has, presumably, an AK-47 rifle in it along with clothing. If Mr. Burgess had this on his person when he passed by Sergeant Franks she would have noticed." Therefore, because the bag could not be connected to appellant, defense counsel continued, when appellant returned on the bicycle, appellant was unlawfully arrested because the only additional information available at that point was that "two individuals at the lake had seen a gun." Defense counsel also argued that his statements to Officer Bochinski were unlawfully obtained in violation of *Miranda* and, thus, were inadmissible. [7]

In response, the State argued that the first encounter between appellant and Sergeant Franks "does not rise to the level of an investigative detention or a *Terry* stop."[8] And, the second encounter was supported by, at minimum, reasonable articulable suspicion based on the additional information from the victims that a person matching appellant's description pointed a handgun at them**.** Reasonable articulable suspicion also was

[7] On appeal, the appellant only challenges his statement at the police station on the grounds that it was fruit of the poisonous tree under the Fourth Amendment. There is no claim under the Fifth Amendment.

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

supported by the discovery of the duffel bag and its contents. The State also argued, albeit during its discussion of the lawfulness of the police interview at the stationhouse, that "the description of the gun by the victims was more than enough to arrest." The State added that appellant's statement was sufficiently attenuated from any arguable illegality in the stop.

Following this, the court found that appellant "was walking, was called to by the officer multiple times, kept on walking and didn't pay attention the officer [sic] prompting the officer to put the alley light on him which spotlighted him at roughly midnight or thereabouts." The court credited Officer Martin's testimony that he used the lights on the back of his patrol car and rejected appellant's testimony on that point**.** Based on this, the court opined that the first encounter was not a mere accosting or consensual and that "there was a stop involved, an investigative detention" based on the underlying facts**.**

Further, after recognizing that *Terry* allowed for stops based on arguably innocuous conduct under certain circumstances, the motions court in this case found as follows:

> In this case we have Sergeant Franks, who has been on the force 23 years, she is a night supervisor, she has been in that area -- the east Columbia area -- for at least three years. She testified that there is a history of car breaking, breaking into automobiles at Lake Elkhorn. And she testified that her understanding was that there was a couple in a car at Lake Elkhorn in that parking lot that she is familiar with. They were made afraid by a black male wearing an Orioles jacket or sweatshirt as he ran towards the car. And what she did was she positioned herself based on her knowledge of the area in a place where she would see him coming, that person coming from based on what little she knew.
>
> What she saw and was able to articulate were specific factors: a black male and I note that there has been no issue of racism brought up in this case; the description was clearly of a black male made by the victims. That was clearly what the dispatcher put out over the air. And she also observed an Orioles

> jacket. He was geographically and temporally proximate to the event that happened less than five minutes or some period of time earlier.
>
> There were no other people around. This was unusual to have a person walking down that road. Clearly she wanted to speak to him because something happened. Something had happened to cause these people to call the police, to spin out and perhaps damage their car on the way out. That's the information that she had.
>
> I will note that the police as a whole unit was also aware of the existence of a handgun at that time because the woman who spoke to the dispatcher before the dispatch was made mentioned a handgun. Dispatch didn't say it but for whatever value it has that was part of the whole package.
>
> So they were not aware of a handgun at the time. I believe that they had reasonable and articulable suspicion of criminal activity to investigate. It was not unreasonable for them to ask questions of this gentleman. . . .

The court then addressed the nearby black duffel bag containing men's clothing and an AK-47 rifle, discovered after appellant left the scene following his initial encounter with Sergeant Franks and Officer Martin:

> Now, to the bag. It was after they get more information that the sergeant then thinks to herself, he dipped over at that point. And -- can I have the pictures? Oh, I have them, thank you. And I'll note in looking at State's Exhibit -- I think it says F. It's the photograph of the bag and the guardrail where you can see the bag. It's taken from the road side of the guardrail. That bag is right there by the road. It is right there by the road and if you look at the other pictures of the bag there is nothing to suggest that that bag has been there for any length of time whatsoever. There is no debris on it, there is no dust from cars going by. It certainly appears to have been a fresh placement.
>
> The bag was left well before the initial attempt to have him stop walking was made. So whether or not it was a consensual interaction or whether or not I'm incorrect and it was an improper investigative detention as opposed to a proper one is irrelevant. Because the bag wasn't a part of that stop. The bag was sitting there. And to that extent once they saw the bag what was important is not only that the bag looked like it had just recently been placed there, but if you look at what's inside of the bag. And inside of the bag you have men's clothing; they're dealing with a man. Not a woman, they're dealing with a man. There's no evidence of any women's clothing in there.

> But there's also an Orioles hat. And the gentleman was wearing an Orioles jacket.
>
> At the very least there is evidence that the police could look at and connect that bag to this gentleman. And it seems to me that there was probable cause to arrest him for the bag. Because there is obviously ammunition, a loaded gun inside. They didn't know at that moment in time if it was a fully operable automatic or not. But clearly they had information there which in my mind comes to the probable cause to arrest this defendant for that bag.

Turning to the second encounter, the court found that the appellant returned to the area riding a bicycle and still wearing the Orioles jacket. At that point, the police had the duffel bag, as well as "more information that the person not only was a black male wearing an Orioles jacket or sweatshirt, but that he had a bandana on his face and was pointing what appeared to be a handgun." This information gave the police, at minimum, reasonable articulable suspicion to stop and frisk the appellant. Once they found the replica handgun on his person, the court continued, there was probable cause to place him under arrest.

The court then turned to the interview between appellant and Officer Bochinski at the police station. Noting that there was a factual dispute about whether and when appellant was read his *Miranda* rights, the court found as follows:

> Mr. Burgess takes the stand and he says they asked me all these questions but they didn't have me sign this form until after it was over with and I didn't even read the form anyway, I just went ahead and signed it. And, again, I – you read the form. It's not just the officer's word for it. He has the form also. And the form includes, interviewee acknowledges that each right has been read to him/her by placing his/her initials next to each statement. After that, do you understand your rights as explained? Yes. Have you been advised and are you willing to answer questions?
>
> This is a progression of events form. And what I am being asked to do is just to accept that he didn't read it so he didn't know what he was signing and he didn't sign it until it was over, as opposed to the testimony of a police officer who said I reviewed it with him and he signed it as I reviewed it. And I will

> accept the officer's testimony as credible and the defendant's testimony in this respect is not credible.
>
> The court then ruled as follows:
>
> So I will deny the motions to suppress. I will find that the confession was given after the proper advisement of *Miranda* rights, that it was voluntary and the product of a deliberate choice and not intimidation. And that his waiver was made with full awareness of the nature of the right being abandoned and the consequence of his decision to abandon it. I am satisfied that the totality of the circumstances support the admissibility of the results of the interrogation at Central Booking.

November 19, 2018 hearing - Case Number C-13-CR-18-000097

Appellant entered a not guilty plea on an agreed statement of facts to Count 2 of the indictment, alleging an attempted robbery of Jacob Lampf. After an inquiry, the court found that appellant knowingly, intelligently and voluntarily waived his right to trial and was entering a plea as indicated. The court then heard a statement of facts in support of the not guilty plea, and those facts substantially mirrored the facts elicited at the earlier motions hearing. The court found appellant guilty of attempted robbery and delayed sentencing.

August 2, 2019 Hearing - Case Number C-13-CR-18-000620

On August 2, 2019, the motions court heard two motions in the case charging appellant with the illegal possession of a regulated firearm after being previously convicted of a crime of violence in connection with the incident near Lake Elkhorn. Pertinent to the issues raised on appeal, appellant, without objection by the State, incorporated the motion and exhibits previously submitted at the November 13, 2018 hearing. He maintained that the evidence should be suppressed based on the arguments previously raised. The court and the parties agreed to also incorporate the court's ruling.

Addressing its prior ruling in the related case, the court stated:

> If I was just limited to the transcript itself I'd have to say I thought I was pretty right. The only thing I thought I might have been wrong on is that, you know, perhaps it was an accosting as opposed to an investigative detention when Sergeant Franks made the initial contact. I ruled investigative detention. Maybe it was an accosting. But if I was wrong about that, that favors the State and not the Defense.

After hearing appellant reiterate the arguments previously raised, the State argued that when appellant dropped the duffel bag on the other side of the guardrail, he lost standing to challenge its seizure. The court then turned to the transcript from the prior hearing and noted that, on several occasions, appellant disavowed any knowledge of the duffel bag. The court then stated:

> Now, he's not asserted a privacy interest in that bag. He has denied a privacy interest in that bag. I don't have the case law in front of me because this motion was filed two days ago. But it's my understanding that, for example, there's a case from the 70's or something about the car being parked in the front lawn and the defendants get out of it and they start walking away from it, and they disavow it being theirs. And so the police go ahead and search it and then come trial they try to suppress everything. And the Court of Special Appeals said, sorry, you can't have your cake and eat it, too. You can't say it's not mine and then when they go ahead and find something bad then try to suppress it.
>
> So you have a standing issue that is present here that was not addressed in the transcript.

After appellant submitted, the court observed that the issue in this case was simply whether appellant possessed the duffel bag and the contents therein. The court summarized the facts from the prior hearing **[,** and then ruled as follows:

> So in this instance I am going to, of course, incorporate everything that I've already ruled on in the transcript. I am going to deny the motion. But I am going to add to that, that he's disavowed any privacy interest in the bag as part of this record. And as such, he has an alternative holding. He doesn't

have standing to raise the motion in the first place. And that would be the ruling as to that.[9]

DISCUSSION

Appellant contends that the court denied the motion to suppress in both cases and presents four grounds for reversal. We shall detail appellant's arguments and the State's responses in the discussion that follows, but, in sum, and considered chronologically, our inquiry focuses on: (1) whether the initial encounter between appellant and Sergeant Franks and Officer Martin was an accosting or an investigative detention; (2) whether appellant had standing to challenge the seizure of the black duffel bag and its contents; (3) whether the second encounter after these officers received additional information from Officer Bochinski and discovered the black duffel bag was supported by probable cause to arrest; and, (4) whether the duffel bag, a replica handgun found on appellant's person, and his statement at the police station were fruits of the poisonous tree.[10]

Standard of Review

Our review of a circuit court's denial of a motion to suppress evidence is "limited to the record developed at the suppression hearing." *Pacheco v. State*, 465 Md. 311, 319

[9] Appellant then entered a not guilty plea on an agreed statement of facts to the illegal possession of a regulated firearm charge. Notably, in that statement of facts, the parties agreed that appellant could not be excluded as a source of DNA found on the Orioles knit cap found inside the duffel bag.

[10] Appellant and the State consider the standing issue last in their arguments. **[**Because standing is a threshold issue, *see White v. State*, 248 Md. App. 67, 77, 86-87 (2020), we shall consider it in chronological sequence in this case at the moment it arose, *i.e.*, when Sergeant Franks and Officer Martin discovered the black duffel bag prior to appellant's return to the scene on a bicycle and prior to his arrest.

(2019), (quoting *Moats v. State*, 455 Md. 682, 694 (2017)). And, the record is examined "in the light most favorable to the party who prevails on the issue that the defendant raises in the motion to suppress." *Norman v. State*, 452 Md. 373, 386, *cert. denied*, 138 S. Ct. 174 (2017). The trial court's factual findings are accepted unless they are clearly erroneous. When there is a constitutional challenge to a search or seizure under the Fourth Amendment, however, this Court performs an "independent constitutional evaluation by reviewing the relevant law and applying it to the unique facts and circumstances of the case." *Grant v. State*, 449 Md. 1, 15 (2016), (quoting *State v. Wallace*, 372 Md. 137, 144 (2002)); *accord Pacheco*, 465 Md. at 319-20.

Underlying every Fourth Amendment encounter is the question of reasonableness. *See Maryland v. King*, 569 U.S. 435, 447 (2013) ("[T]he ultimate measure of the constitutionality of a governmental search is 'reasonableness.'") (citation omitted); *Pacheco*, 465 Md. at 320 ("It is well settled that the Fourth Amendment . . . prohibits 'unreasonable' searches and seizures"). The Court of Appeals has explained:

> "What is reasonable depends upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985) (citation omitted). "[S]ubject only to a few specifically established and well-delineated exceptions, a warrantless search or seizure that infringes upon the protected interests of an individual is presumptively unreasonable." *Grant*, 449 Md. at 16-17 (footnote omitted); *see also Katz v. United States*, 389 U.S. 347, 357 (1967). "Whether a particular warrantless action on the part of the police is reasonable under the Fourth Amendment depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *Pacheco*, 465 Md. at 321 (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977) (internal quotations omitted)).

Lewis v. State, 470 Md. 1, 18 (2020).

Before we look to the individual encounters and the circumstances presented, we first consider the types of seizures implicated in this case. The Supreme Court has recognized that that there are only two types of seizures under the Fourth Amendment: 1) a physical touching of a suspect by a police officer combined with an intent by that officer to seize the person; or 2) a show of authority by the police *and* submission to that show of authority by the suspect. *California v. Hodari D.*, 499 U.S. 621, 626-28 (1991) ("[A] person has been seized "only if," not that he has been seized "whenever"; it states a *necessary*, but not a *sufficient*, condition for seizure - or, more precisely, for seizure effected through a "show of authority") (emphasis in original). And, our Court of Appeals also has explained that the Fourth Amendment is not at issue every time the police have contact with an individual. *Swift v. State*, 393 Md. 139, 151-52 (2006) ("Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen ...") (quoting *Florida v. Royer*, 460 U.S. 491, 506 (1983)).

Courts have looked at three tiers of interaction between the police and individuals in analyzing the applicability of the Fourth Amendment, *i.e.*, an arrest, an investigatory stop, and a consensual encounter. *Swift*, 393 Md. at 149-50. An arrest requires probable cause to believe that the person has committed, is committing, or is about to commit a crime. *Royer*, 460 U.S. at 499 (observing that the general rule is that "seizures of the person require probable cause to arrest"); *see also D.C. v. Wesby*, 138 S. Ct. 577, 586 (2018) ("A warrantless arrest is reasonable if the officer has probable cause to believe that the suspect

committed a crime in the officer's presence"), citing *Atwater v. Lago Vista*, 532 U.S. 318, 354 (2001). An investigatory stop or detention, known as a *Terry* stop, requires reasonable suspicion that criminal activity is afoot and permits an officer to stop and briefly detain an individual. *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968) (noting that "[e]ach case of this sort will, of course, have to be decided on its own facts"); *see also Ferris v. State*, 355 Md. 356, 384 (1999) (applying *Terry* to a "second stop" that transpired after the lawful purpose of the initial stop was completed). A consensual encounter is based upon a person's voluntary cooperation with non-coercive police contact and is not based upon acquiescence to police authority or force. *Swift*, 393 Md. at 151-52 ("Consensual encounters, therefore, are those where the police *merely* approach a person in a public place, engage the person in conversation, request information, and the person is free not to answer and walk away") (emphasis in original); *see also United States v. Mendenhall*, 446 U.S. 544, 553 (1980) ("[T]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets," and "[p]olice officers enjoy 'the liberty (again, possessed by every citizen) to address questions to other persons,' . . . although 'ordinarily the person addressed has an equal right to ignore his interrogator and walk away'") (citations omitted).

The Initial Encounter Between Appellant, Sergeant Franks and Officer Martin

The parties' dispute begins with the initial encounter between Sergeant Franks, Officer Martin, and appellant. Appellant contends that the encounter was an investigative detention unsupported by reasonable articulable suspicion, while the State argues that it was a mere accosting. Appellant replies that the encounter was not simply a casual

accosting and maintains that the police needed to justify his detention under the Fourth Amendment**.**

A mere accosting, also referred to as a consensual encounter, does not require probable cause or reasonable suspicion under the Fourth Amendment. As the Court of Appeals has explained:

> [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification.

Stanberry v. State, 343 Md. 720, 742 (1996), *Royer*, 460 U.S. at 497).

The Court of Appeals has highlighted several factors in determining whether an encounter was consensual:

> [T]he time and place of the encounter, the number of officers present and whether they were uniformed, whether the police removed the person to a different location or isolated him or her from others, whether the person was informed that he or she was free to leave, whether the police indicated that the person was suspected of a crime, whether the police retained the person's documents, and whether the police exhibited threatening behavior or physical contact that would suggest to a reasonable person that he or she was not free to leave.

Ferris, 355 Md. at 377.

Time and Place of Encounter, Number of Officers Present, Removal or Isolation

Here, looking to the facts in the light most favorable to the prevailing party, on Sunday, May 6, 2018, at approximately 11:49 p.m., after police received a 911 call that an armed African American male wearing an Orioles sweatshirt ran towards a couple in the

Lake Elkhorn parking lot while pointing a gun at them, Sergeant Franks parked her marked patrol car at a parking lot overseeing that same parking lot. Within five minutes, she observed appellant, an African American male wearing an Orioles jacket, walk by her location along Broken Land Parkway towards the Route 32 highway overpass.

She pulled out from the parking spot in her marked vehicle and started to drive alongside appellant as he walked on Broken Land Parkway towards the Route 32 overpass. Sergeant Franks eventually pulled over on the other side of the bridge in the gore area next to an on ramp leading to Route 32. At around this time, Officer Martin, arrived on the scene and parked his marked patrol car behind Sergeant Franks' vehicle. Both officers were in uniform. Once across the bridge, appellant crossed Broken Land Parkway and approached the two officers. Appellant was not removed to any location, but there were not many people around at this time of night.

Informed he was free to leave, or that he was suspected of a crime

There does not appear to be any evidence that appellant was told that he was free to leave. Appellant was told by Officer Martin that the police were investigating an incident at the Lake Elkhorn parking lot. Sergeant Franks maintained that, at this initial encounter, she did not know if a crime occurred. Appellant admitted to them that he saw the car in the parking lot, assumed the occupants were smoking marijuana, and watched as they drove away. Officer Martin testified that this story "made sense" because that area was known for marijuana use. The officers did not believe appellant had "done anything wrong[.]"

Documents retained or threatening behavior or physical contact

As Sergeant Franks drove alongside appellant, she informed him several times that she wanted to speak to him. At one point, she turned on her overhead alley light to illuminate appellant's person and to get his attention. Officer Martin turned on his rear flashers to alert oncoming traffic but did not turn on his emergency lights. Appellant continued to walk, testifying at one point that he was ignoring the officer, and all the while the appellant still was talking on his cell phone. Sergeant Franks maintained that she did not order appellant to cross the street and testified that "[h]e approached me."

There is no evidence that either officer engaged in any physical contact with appellant at any time during this initial encounter. He was not frisked or restrained during this part of the evening. Officer Martin did ask appellant for identification, but there is no indication that that information was retained. And, the officer testified that, after 10 minutes, the warrant check came back negative and appellant left the scene.

Appellant was "cooperative" and "very relaxed," and "[g]ave no indication of being deceitful." Instead, Sergeant Franks testified that they had "just a casual conversation about hey, what's your version of what happened at the lake because some kids called 911 and we're kind of confused here. That's it."

Based on our independent constitutional appraisal, we are persuaded by these facts that the initial encounter between appellant and the two uniformed officers was a consensual encounter and not an investigative detention. Although it occurred late at night near a highway on ramp, with few people around, the totality of the circumstances suggests that a reasonable person in appellant's position would have felt free to leave and continue

on towards his destination. In fact, that is exactly what appellant did at that point of the evening and we hold that this encounter does not merit further Fourth Amendment scrutiny.

Alternatively, even if we were to conclude that this initial encounter was a *Terry* stop, even seemingly innocent behavior, under the circumstances, may permit a brief stop and investigation. *See Illinois v. Wardlow*, 528 U.S. 119, 125-26 (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"); *see also Navarette v. California*, 572 U.S. 393, 403 (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)). Given the time of night and the closest in time to the underlying events, as well as the fact that appellant was wearing an Orioles jacket like the one reported in the 911 calls, we are persuaded that the circumstances also supported a momentary investigative detention, as occurred in this case.

Standing with Respect to The Black Duffel Bag

Chronologically, after appellant walked away from the initial encounter, Sergeant Franks and Officer Martin received additional information from Officer Bochinski that the suspect involved in the incident at the Lake Elkhorn parking lot had pulled a handgun on the victims**.** Based on this, the two officers on the scene went over to the guardrail, next to

where appellant was seen dipping his shoulder down. There, they found a black duffel bag containing a loaded AK-47 rifle, ammunition and additional Orioles-themed attire.[11]

Standing is the "threshold question of the entitlement to litigate the merits of the search and seizure." *Bates v. State*, 64 Md. App. 279, 282 (1985). It is "exclusively a threshold question of applicability, concerned only with the coverage by the Fourth Amendment of the defendant who seeks to raise a Fourth Amendment challenge." *State v. Savage*, 170 Md. App. 149, 174 (2006). If the State challenges the defendant's standing, then " [t]he proponent of a motion to suppress has the burden of establishing that his Fourth Amendment rights were violated by the challenged search and seizure." *Ricks v. State*, 312 Md. 11, 26 (1988), *cert. denied*, 488 U.S. 832 (1988); *see also Rakas v. Illinois*, 439 U.S. 128, 130 n. 1 (1978) ("The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure").

As we have recently explained:

> At the first of these levels, the very threshold of Fourth Amendment applicability, there must be 1) coverage of the place searched or thing seized, 2) coverage of the person of the searcher (state action), and 3) coverage of the person of the defendant under the circumstances of the case (standing to object). Absent such threshold applicability, the subsequent question of whether the Fourth Amendment merits might have been satisfied or might have been violated in some other world where the Fourth Amendment did apply would be absolutely irrelevant.

White v. State, 248 Md. App. 67, 77 (2020).

Fourth Amendment protection "does not extend to property that is abandoned or voluntarily discarded, because any expectation of privacy in the item searched is discarded

[11] In his statement, appellant denied any connection to the duffel bag.

upon abandonment." *Williamson v. State*, 413 Md. 521, 535 (citations omitted), *cert. denied*, 562 U.S. 984 (2010). The critical inquiry is not whether there has been an abandonment of all formal rights concerning the property or place but, rather, whether the party has relinquished any reasonable expectation of privacy in it. *Stanberry*, 343 Md. at 737. "[T]he expectation of privacy . . . is at the heart of the test for abandonment." *Duncan v. State*, 281 Md. 247, 262 (1977).

Abandonment occurs when "a person voluntarily discards or otherwise relinquishes his interest in property so that he no longer retains a reasonable expectation of privacy with regard to it[.]" *Morton v. State*, 284 Md. 526, 531 (1979) (citation omitted). As such, a search of abandoned property is not a "search" protected against by the Fourth Amendment because the state action does "not encroach upon the privacy upon which one may justifiably rely." *Morton*, 284 Md. at 531. *See also Powell v. State*, 139 Md. App. 582, 589 (holding that suspect who placed a brown paper bag on the curb of a public street had abandoned reasonable expectation of privacy in doing so), *cert. denied*, 366 Md. 248 (2001).

Here, under our *de novo* review, we conclude that appellant did not have a reasonable expectation of privacy in the black duffel bag. Accordingly, he did not have standing to challenge either its admission or its use in the subsequent probable cause analysis. *See Williamson*, 413 Md. at 547 (declining to hold that a warrant is required to analyze the contents of abandoned property, in this case, the defendant's DNA). As this Court has noted:

> "The significance of abandoned property in the law of search and seizure lies in the maxim that the protection of the fourth amendment does not extend to it. Thus, where one abandons property, he is said to bring his right of privacy therein to an end, and may not later complain about its subsequent seizure and use in evidence against him. In short, the theory of abandonment is that no issue of search is presented in such a situation, and the property so abandoned may be seized without probable cause." (Footnotes omitted).

Narain v. State, 79 Md. App. 385, 387 n. 2 (quoting Mascolo, *The Role of Abandonment in the Law of Search and Seizure: An Application of Misdirected Emphasis*, 20 Buffalo L.Rev. 399, 400-401 (1971)), *cert. denied*, 317 Md. 71 (1989).[12]

The Second Encounter and Arrest

Following discovery of the abandoned duffel bag and its contents, Sergeant Franks began to look for appellant. Within 15 minutes, appellant returned to the area on a bicycle. He was still wearing the Orioles jacket matching the description of the suspect seen pointing a handgun. Sergeant Franks agreed her intent at that time was to detain appellant and, in fact, he was placed in handcuffs and patted down by other male officers. Soon thereafter, if not simultaneously, a replica handgun was seized from his person.

Appellant contends that he was arrested during this second encounter**.** An arrest is "the detention of a known or suspected offender for the purpose of prosecuting him for a crime." *Wilkes v. State*, 364 Md. 554, 586 (2001), (quoting *Barnhard v. State*, 325 Md. 602, 611 (1992)). It occurs: "(1) when the arrestee is physically restrained or (2) when the arrestee is told of the arrest and submits." *Id*.; a*ccord Hodari D.*, 499 U.S. at 626. "It is said

[12] We decline appellant's invitation to apply the automatic standing set forth in the dissenting opinion in *Gahan v. State*, 290 Md. 310, 322-32 (1981). "It is axiomatic that a dissent is not controlling precedent." *Padilla v. State*, 180 Md. App. 210, 232, *cert. denied*, 405 Md. 507 (2008).

that four elements must ordinarily coalesce to constitute a legal arrest: (1) an intent to arrest; (2) under a real or pretended authority; (3) accompanied by a seizure or detention of the person; and (4) which is understood by the person arrested." *Bouldin v. State*, 276 Md. 511, 515-16 (1976).

Although the State agrees that appellant was seized during this second encounter, it argues, whether characterized as a *Terry* stop or an arrest, the seizure was not unreasonable under the circumstances. Further, addressing the use of handcuffs, the discovery of the replica handgun, and his immediate transport to the police station, the State asserts "[w]hile this establishes that the second encounter culminated in arrest, it does not establish that the encounter had already risen to the level of an arrest *before* the replica handgun was recovered." (emphasis in original).

What the police knew, collectively, is important to our discussion. Under the collective knowledge doctrine, and as the Court of Appeals and the U.S. Supreme Court have provided, "probable cause may be based on information within the collective knowledge of the police." *Ott v. State*, 325 Md. 206, 215, *cert. denied*, 506 U.S. 904 (1992); *accord Mobley and King v. State*, 270 Md. 76, 81 (1973), *cert. denied*, 416 U.S. 975 (1974); *see also Whiteley v. Warden*, 401 U.S. 560, 568 (1971) ("Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause").

Indeed, "a report of a felony and a description of the perpetrator over a police radio may furnish probable cause for an arrest" and "it is not essential that the arresting officer

himself have probable cause for the arrest where another member of the police team has probable cause and the arresting officer has been alerted over the police radio to make the arrest." *Bosley v. State*, 14 Md. App. 83, 87-88 (1972); *see also Mercer v. State*, 237 Md. 479, 482-83 (1964) (assuming *arguendo* initial arrest by first police officer on the scene was illegal because there was no probable cause to believe a felony had been committed, arrest by second officer, who was aware of information on a "look-out list," was "clearly legal").

Moreover, this doctrine extends to stops based on reasonable articulable suspicion. *See United States v. Hensley*, 469 U.S. 221, 231-32 (1985) (holding that "if a flyer or bulletin has been issued on the basis of articulable facts supporting a reasonable suspicion that the wanted person has committed an offense, then reliance on that flyer or bulletin justifies a stop to check identification, to pose questions to the person, or to detain the person briefly while attempting to obtain further information") (internal citation omitted). As this Court has explained:

> [A] a police officer, with proper justification for an arrest or search (with or without a warrant), may multiply his available arms and legs to execute his purpose by calling upon other policemen to aid him. By modern electronics, he may call upon those beyond the sound of his voice as well as upon those within his hearing. He does not have to impart to each of his executing agents the building blocks of probable cause that mounted up to his justification . . . [J]ust as a justification for police action is not diminished in transmission, neither is it enhanced. If the justification is adequate at the point where the message is transmitted, it is no less so at the point where the message is received. Conversely, if the justification is inadequate at the point where the message is transmitted, that inadequacy endures and will not somehow be dissipated on the wires or on the airwaves.
>
> *Peterson, et al. v. State*, 15 Md. App. 478, 487 (1972) (citing *Whiteley, supra*).

Here, considered collectively, under the totality of the circumstances, and in the light most favorable to the State as the prevailing party on the motion, the information known to the arresting officers may be summarized as follows: (1) at around 11:45 p.m. on Sunday, May 6, 2018, a black male wearing an Orioles sweatshirt displayed a handgun while running towards two victims who had been in a parked car at the Lake Elkhorn parking lot located off Broken Land Parkway; (2) within five minutes of that 911 call, Sergeant Franks observed appellant, alone and matching the description provided, walking along Broken Land Parkway towards Route 32 [Id. at 15-19; (3) appellant slowed down and was seen bending down in an area on the Broken Land Parkway overpass over Route 32 near the guardrail; (4) during the initial conversation with Sergeant Franks and Officer Martin, appellant admitted that he had just been in the aforementioned parking lot and saw a vehicle leaving the area after he approached them; (5) after he was released, a black duffel bag was found near the location where appellant paused and dipped down, and the bag contained a loaded orange-and-black-wrapped AK-47 rifle, ammunition, and men's clothing, including other Orioles-themed attire **;** (6) within 15 minutes after he left the area, appellant returned to the scene on a bicycle, still wearing the Orioles jacket.

Based on these historical facts, we conclude that an objectively reasonable police officer could deduce that appellant was the person seen pointing a handgun at the victims in the Lake Elkhorn parking lot a short time before he was identified walking away from the area. Both appellant's statements during the initial consensual encounter, as well as the abandoned duffel bag and its contents, could be considered as part of that analysis. We recognize that no one testified that they saw appellant carrying the black duffel bag,

however, the circumstantial evidence that it contained Orioles attire similar to the jacket appellant was wearing, along with the manner in which the AK-47 rifle was wrapped in orange and black tape, colors associated with the Baltimore Orioles, suggested a connection to appellant in this case. Coupled with the fact that he slowed his pace and dipped down in that same area, as well as the fact that he returned to the area after the initial encounter with the police, further supported this connection.

As for the use of handcuffs when appellant returned, their use, standing alone, "does not ordinarily transform a *Terry* stop into an arrest." *Chase v. State*, 449 Md. 283, 311 (2016) (citation omitted). Moreover, in a situations such as here, where Sergeant Franks testified she was concerned that appellant might flee on his bicycle , this Court has recognized that "[r]easonable force may be used to prevent a suspect's flight, and such force may include handcuffing that suspect." *Trott v. State*, 138 Md. App. 89, 118 (2001). We concur with the State that the use of handcuffs to restrain appellant when he returned to the scene of the encounter with Sergeant Franks and Officer Martin was entirely reasonable under the circumstances. At minimum, it was supported by reasonable articulable suspicion to believe that criminal activity was afoot. *See In re David S.*, 367 Md. 523, 534 (2002) (acknowledging that force may be used in *Terry* stops and stating, "it is important to recognize that there are no per se rules or bright lines to determine when an investigatory stop and frisk becomes an arrest and is elevated to the point that probable cause is required").

The circumstances further support appellant's eventual arrest because a replica handgun was found in his waistband after he was detained. Although the timing of the

retrieval of that item was not entirely clear, it is irrelevant that the search *incident* to arrest may have preceded the arrest, rather than vice versa. *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980) (upholding a search incident to arrest where the formal arrest followed the challenged search). *See also Pacheco*, 465 Md. at 323 (recognizing that a valid arrest supported by probable cause authorizes a contemporaneous "search of the arrestee's person and the area 'within his immediate control'") (citation omitted); *Carter v. State*, 236 Md. App. 456, 474 (observing that "the search incident to arrest exception 'is applicable as long as the search is "essentially contemporaneous" with the arrest'") (quoting *Barrett v. State*, 234 Md. App. 653, 672 (2017), *cert. denied*, 457 Md. 401 (2018)), *cert. denied*, 460 Md. 9 (2018)); *Conboy v. State*, 155 Md. App. 353, 367 (2004) ("As to how quickly the arrest must follow the search, Maryland's appellate courts have approved searches when the arrest occurred immediately after the search, and when it occurred 'a few minutes' later") (internal citations omitted).

Furthermore, once the replica handgun was found, 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)).

Alternatively, even were we to conclude that appellant was arrested at the moment he was physically restrained by the use of handcuffs, we also are persuaded that this was supported by probable cause. As this Court has recently reiterated:

> Probable cause is "a practical, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." [*Barrett v. State*, 234 Md. App. 653, 666 (2017)] (quoting *Maryland v. Pringle*, 540 U.S. 366, 370, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003)). It is a fluid construct that depends on an assessment of probability within a specific factual context. *Id*. "A finding of probable cause requires less evidence than is necessary to sustain a conviction, but more evidence than would merely arouse suspicion." *Id*. (citation omitted).

Williams v. State, 246 Md. App. 308, 335 (2020); *see State v. Johnson*, 458 Md. 519, 534 (2018) ("The obligation to review a probable cause determination in light of the totality of the circumstances precludes a 'divide-and-conquer analysis'") (citations omitted); *see also Freeman v. State*, __ Md. App. __, No. 2150, Sept. Term, 2019 (Filed Jan. 28, 2021) (slip op. at 25) ("[P]robable cause can be the product not of one or two high profile observations but of a totality of many observations, large and small").

As this Court recently has observed, "[w]ith respect to the burden of persuasion, moreover, the case law has been careful to point out that probable cause means something less than 'more likely than not.'" *Freeman, supra*, (slip op. at 30) (citations omitted). "[T]he establishment of probable cause does not require proof to the 'preponderance of the evidence' level." *Id*. (slip op. at 31) (citing *State v. Johnson*, 458 Md. at 535). And, "[t]he burden of persuasion is also less than 'a prima facie showing.'" *Freeman* (slip op. at 31); *see also Kaley v. United States*, 571 U.S. 320, 134 S.Ct. 1090, 188 L.Ed.2d 46 (2014) ("Probable cause is not a high bar").

Accordingly, as the State points out in its brief, under our *de novo* standard of review of the totality of the circumstances in this case, we conclude that there was, at minimum, probable cause to believe that appellant had committed a first-degree assault. *See* Md. Code (2002, 2012 Repl. Vol.) § 3-202 (a) of the Criminal Law Article (prohibiting an assault with a firearm). *See also Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) (observing that an officer's "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause"). Thus, we hold that the second stop of appellant was supported by both reasonable articulable suspicion and probable cause and was reasonable under the Fourth Amendment.

There Was No Poisonous Tree and No Fruit to Suppress

Finally, we address appellant's argument that the replica handgun, the duffel bag and its contents, and his statements were inadmissible fruit of the poisonous tree**.** Generally, "[u]nder the 'fruit of the poisonous tree' doctrine, evidence tainted by Fourth Amendment violations may not be used directly or indirectly against the accused." *Miles v. State*, 365 Md. 488, 520 (2001); *see also Wong Sun v. United States*, 371 U.S. 471, 488 (1963) ("[T]he more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint'").

Because we hold that there was no illegality, either in the initial consensual encounter, the recovery of the abandoned duffel bag and its contents, or in the second encounter which was reasonable under the totality of the circumstances, there is no

poisonous tree and no fruit to suppress. *See Spell v. State*, 239 Md. App. 495, 509 n. 10 (2018) ("Because we have determined that the stop, detention, arrest, and search of appellant were reasonable under the Fourth Amendment, there is no 'poisonous tree,' and therefore, there is no 'fruit' as a result of improper police conduct") (citing *Cox v. State*, 194 Md. App. 629, 652 (2010)), *cert. denied*, 462 Md. 581 (2019). In sum, we hold that the court properly denied the motion to suppress.

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