

Circuit Court for Prince George's County  
Case No. CT-190928X

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 398

September Term, 2021

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ABDUL MAHMOUD

v.

STATE OF MARYLAND

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Graeff,  
Zic,  
Wright, Alexander, Jr.  
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Zic, J.

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Filed: November 29, 2022

\* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Abdul Mahmoud, appellant, was charged in the Circuit Court for Prince George’s County with three counts of possession of a counterfeit credit card and one count of possession of a false government identification document. Mr. Mahmoud filed a motion to suppress the wallet’s contents that police recovered during a warrantless stop and search. The circuit court denied Mr. Mahmoud’s suppression motion. Mr. Mahmoud entered a not guilty plea with an agreed statement of facts, and the circuit court found Mr. Mahmoud guilty on all four counts. The court then sentenced Mr. Mahmoud to fifteen years of incarceration with all but three months suspended, followed by three years of supervised probation.

Mr. Mahmoud then timely filed this appeal. He presents one question for our review<sup>1</sup>: Did the circuit court err in denying Mr. Mahmoud’s motion to suppress? For the reasons that follow, we answer in the affirmative. Accordingly, we shall reverse the judgment of the circuit court.

### **BACKGROUND**

On August 25, 2019, a citizen advised that individuals were smoking marijuana in a parking garage at 14716 Baltimore Avenue, Laurel, Maryland 20707. Accordingly, Detective Kropff, a member of the Laurel Police Department, reported to the parking garage. Detective Kropff testified that, upon his arrival, he smelled the odor of marijuana and observed two people by a parked vehicle in the garage. Detective Kropff walked

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<sup>1</sup> Mr. Mahmoud presents the question as follows: “Did the trial court err in denying Appellant’s motion to suppress?”

towards the two individuals to investigate and locate the marijuana odor. He testified that, as he approached the vehicle, he saw Mr. Mahmoud, who was initially outside of the vehicle, enter the front passenger seat and rummage through something “under the seat or on the floorboard.” Another individual, later identified as John “Zor” Ichenozor, was outside the front passenger side door when Detective Kropff approached.

Upon Detective Kropff’s arrival, Mr. Mahmoud exited the vehicle. Detective Kropff shined his flashlight on the two men and informed them that he was audio-visual recording and that “someone complained about marijuana coming from this area.”<sup>2</sup> Mr. Ichenozor then indicated that they were about to shoot a music video and denied smoking marijuana, but he did express that he had a medical marijuana card. Detective Kropff asked for their identification, and both Mr. Ichenozor and Mr. Mahmoud showed him pictures of their identification cards on their cell phones. The vehicle was registered in Mr. Ichenozor’s name. While removing his cell phone from his pocket, Mr. Mahmoud started to move away from Detective Kropff, prompting the detective to say: “Sir, hang out over here please. Don’t be walking away. Take your hand out of your pocket for me. Thank you.” While reviewing Mr. Mahmoud’s and Mr. Ichenozor’s identification, Detective Kropff stated that he would check Mr. Ichenozor’s medical marijuana card, and then “we’ll be good to go.”

Officer Edwin Monarrez then arrived on the scene. Detective Kropff asked Mr. Ichenozor and Mr. Mahmoud to stand with Officer Monarrez by the officer’s patrol

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<sup>2</sup> Unless otherwise stated, everything said by Detective Kropff and Officer Monarrez was in the presence of both Mr. Ichenozor and Mr. Mahmoud.

vehicle, and Officer Monarrez placed handcuffs on Mr. Ichenozor. Detective Kropff shined his flashlight inside the front passenger side of Mr. Ichenozor’s vehicle. Detective Kropff testified that he saw a large plastic bag with suspected marijuana on the floorboard in plain view when using a flashlight from outside the vehicle. Detective Kropff testified that the bag was “ripped open slightly” when he first observed it. To Officer Monarrez at the time, Detective Kropff noted, “there is probably like 30 grams sitting on the front seat.”

Officer Monarrez told Mr. Ichenozor, “we’ll take [the handcuffs] off when you’re done.” Detective Kropff then placed handcuffs on Mr. Mahmoud but stated, “You’re not under arrest. . . . You’re not under arrest. You understand?” Mr. Mahmoud replied, “Yes, sir.” Detective Kropff then stated, “I’m just going to pat you down for weapons.” To Mr. Ichenozor, Officer Monarrez stated, “We’re just investigating. Once we finish the investigation, you guys will be on your way to go.”

Detective Kropff asked Mr. Ichenozor where his medical marijuana card was and then approached the back passenger side of Mr. Ichenozor’s vehicle and removed the bag that Mr. Ichenozor indicated contained the card. When Detective Kropff returned from Mr. Ichenozor’s vehicle, he stated,

Zor, there is a sizeable amount of marijuana in the car. I’m not asking you about the marijuana. Obviously, when I came up, [Mr. Mahmoud] was in the front seat of your car. The bag is open. I am not asking you any questions. I’m just letting you know what’s going on so far.

Detective Kropff then spoke first with Mr. Ichenozor, then with Mr. Mahmoud at the back of the police vehicle while Officer Monarrez stood with the other at the front of the

vehicle. When Detective Kropff spoke with Mr. Mahmoud, he began by reciting the *Miranda* warnings. When Mr. Mahmoud inquired, “Am I under arrest?” Detective Kropff responded, “No you’re not under arrest. You’re just being detained for this investigation, but I need to read you your rights, and I’m going to explain to you what’s going on.” After finishing the recitation of rights, Detective Kropff explained that Mr. Ichenozor was allowed to be in possession of the marijuana because of his medical marijuana card, but Mr. Mahmoud was not. During this conversation, Mr. Mahmoud stated that Mr. Ichenozor had permitted him to remove a small amount of marijuana for his personal use.

After Detective Kropff finished speaking with Mr. Mahmoud, they returned to the front of Officer Monarrez’s vehicle. Mr. Ichenozor stated that there was “just a little” more marijuana in the car, and Detective Kropff asked, “Do you have . . . any objection for me checking?” When Mr. Ichenozor indicated that he objected, Detective Kropff explained that “the problem” was that Mr. Ichenozor’s medical marijuana card did not permit him to give marijuana to other people. He also explained, “I’m trying to enforce the law but do so in effect that it doesn’t affect both of you that much.” Detective Kropff again asked, “Is there any large medical marijuana in the car . . . ?” Mr. Ichenozor responded in the negative, and Detective Kropff said, “Okay. All right. Bear with me.” He then proceeded to search the passenger side of the vehicle, in the front and back seat, where he recovered “probably . . . forty grams” of marijuana.

Detective Kropff addressed Mr. Ichenozor, who was standing next to Mr. Mahmoud:

Here's the problem. You can get arrested right now. . . .  
Okay. I'm not going to arrest you. . . . *I'm not going to  
arrest [Mr. Mahmoud] right now. . . . I can take him down to  
the jail. I can take you down to the jail. . . . I'm not going to  
do that for either. I'm going to give [Mr. Mahmoud] a ticket.  
You're going to be advised, and this [marijuana] is coming  
with me.*

(emphasis added). Detective Kropff then asked if there was any other marijuana in the vehicle, to which Mr. Ichenozor responded in the negative. Detective Kropff asked Mr. Ichenozor, "Do you have any problem with me checking [the trunk]?" Mr. Ichenozor consented and opened the trunk with his key. Detective Kropff searched the trunk and the driver's side of the vehicle in both the front and back seats, including the center console, but he found no additional marijuana. As Detective Kropff returned to his vehicle to complete the paperwork, he stated, "I'll be right back. Hopefully, we'll be out of here very shortly." In Detective Kropff's absence, Officer Monarrez spoke with Mr. Ichenozor and Mr. Mahmoud about why Detective Kropff was confiscating the marijuana. Officer Monarrez stated:

[A]pparently, he has enough probable cause to take it. . . . So I mean, it is what it is. You learn your lesson. He learns his lesson. You out a couple hundred dollars. . . . *[A]t least you ain't getting arrested, and he ain't getting arrested. . . . He had enough evidence to arrest him. So -- but he's not arresting either one of you. He's probably just going to give you a ticket, and then that's it.*

(emphasis added).

Mr. Mahmoud then asked if the officers had to handcuff them, and Officer Monarrez responded that they had been handcuffed because they were "digging" in their

pockets, which, Officer Monarrez stated, can be an indication that someone has a weapon on his person. He then stated, “like I said, you’re not being arrested. You’re just being detained right now.”

Detective Kropff returned from creating the citation and informed Mr. Mahmoud that he would tell Mr. Mahmoud’s probation officer that he was “very cooperative” and “forthcoming,” and, “It was just a misunderstanding here of circumstances.” Detective Kropff told Mr. Mahmoud and Mr. Ichenozor that they would be able to “go about [their] way and shoot [their] video.”

Detective Kropff thanked everyone for their cooperation. Then, Detective Kropff stated to Officer Monarrez about Mr. Mahmoud, “Well, he’s under arrest now, so I’m just going to do a quick, one more search here,” and proceeded to search Mr. Mahmoud’s person. As Officer Monarrez removed Mr. Ichenozor’s handcuffs, he stated, “No, he’s not under -- he’s giving him a criminal citation for the -- he’s leaving with you.” At the same time, Detective Kropff removed Mr. Mahmoud’s handcuffs and showed him the citation paperwork and explained:

It’s a citation for marijuana, 10 grams or more. . . . A maximum penalty of six months. I’m not charging him with distribution or anything else like that. Okay? You understand? I’m not saying you’re going to get six months. It’s the maximum penalty. It’s just a marijuana -- it’s just a criminal citation. You will get a court date in the mail. You will have to explain what’s going on. They’ll probably give you community service if you’re straight. . . . I would suggest you notify your probation officer. Okay? Just -- you just sign here. You’re not admitting that you’re guilty. You’re just saying you received a copy of the citation here today.

Mr. Mahmoud signed the citation.

Immediately after Mr. Mahmoud signed the citation, Officer Monarrez addressed Mr. Mahmoud because he had discovered a wallet approximately one to two feet underneath the front passenger side of his police cruiser, where Mr. Mahmoud had been leaning while handcuffed earlier. Officer Monarrez retrieved the wallet and asked, “Whose wallet is that right there? . . . Is that your wallet?” Mr. Mahmoud turned to face Officer Monarrez and responded, “Yeah.” Officer Monarrez asked, “Okay. Why is it underneath my car?” Mr. Mahmoud stated, “I guess it fell out of my pocket.” Officer Monarrez handed the wallet to Detective Kropff rather than to Mr. Mahmoud. Detective Kropff opened the wallet and said,

Some -- this doesn't look right to me, sir. What's going on with this? . . . That's not your name. Why do you have a ID with someone else's name on it? . . . [P]ut your hands back behind your back. I'm going to double check what it is.

Detective Kropff then re-handcuffed Mr. Mahmoud and asked, “What else is in here?” Mr. Mahmoud stated that he had his cousin's and his child's mother's debit cards in his wallet. Detective Kropff returned to his vehicle to further investigate the license in Mr. Mahmoud's wallet.

Detective Kropff discovered that the name on the license with Mr. Mahmoud's photograph belongs to another person, who lives in Baltimore City. Mr. Mahmoud told Detective Kropff multiple times that he did not know the cards were in there and that the cards were old. Detective Kropff removed the contents of the wallet to inspect them, then returned to his vehicle again to further investigate the nature of the cards.



Mr. Mahmoud explained that the debit cards belonged to family members, but

Detective Kropff stated,

. . . I can't verify that right now. That's going to require me to do more investigation to figure out what's going on. Okay? So the music video is over. I need to verify some more information at the police station. . . . You're going back to the police station for now, and I'm going to make a decision on what I'm going to do.

At this point, Detective Kropff had stated that Mr. Ichenozor was free to go. When Detective Kropff returned to his car, Officer Monarrez told Mr. Mahmoud, "You're not under arrest right now." Detective Kropff shortly thereafter transported Mr. Mahmoud to the police station, after patting him down once more.

During transport to the station, Detective Kropff told Mr. Mahmoud that because of the fraudulent identification card, "this is more than just the marijuana ticket at this point. I need to conduct a complete investigation and make a determination that's appropriate." Detective Kropff testified that, at the police station, he discovered that Mr. Mahmoud's wallet contained three fraudulent bank cards in addition to the fraudulent identification card.

Mr. Mahmoud was charged in the Circuit Court for Prince George's County with three counts of possession of a counterfeit credit card (Counts 1, 2, and 3) and one count of possession of a false government identification document (Count 4).<sup>3</sup> Mr. Mahmoud

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<sup>3</sup> On the statement of charges, Mr. Mahmoud was also charged with Possession of 10 or More Grams of Marijuana.

filed a motion to suppress the wallet that police recovered during the warrantless stop and search.

On November 21, 2019, the circuit court held a hearing on Mr. Mahmoud's motion to suppress. Mr. Mahmoud made three arguments in support of this motion, noting throughout that the State had the burden to prove this warrantless search fell into an established exception to the warrant requirement. First, he challenged the initial seizure, arguing that the officers lacked reasonable suspicion to detain him. Second, he challenged the search of his person and wallet, arguing that he was not under arrest at the time the wallet was recovered so it was not a proper search incident to arrest. Third, he argued that the wallet was not abandoned at any time during his encounter with the officers.

The State made two arguments against suppression of the evidence recovered from the wallet. First, the State argued that recovery of the wallet was a lawful search incident to arrest because Detective Kropff had probable cause to arrest Mr. Mahmoud in light of the odor of marijuana, and because the officers placed Mr. Mahmoud under arrest before discovering the wallet. Second, the State asserted that the wallet was abandoned property and, therefore, not subject to Fourth Amendment protection.

The motions court concluded that Mr. Mahmoud had not abandoned his wallet. It went on, however, to deny Mr. Mahmoud's motion to suppress, finding that the officers conducted a permissible search incident to arrest based on probable cause to arrest.

Accordingly, on December 2, 2019, evidence of the contents of the wallet recovered by the officers was offered by the State during Mr. Mahmoud's hearing for his

not guilty plea with an agreed statement of facts. The circuit court found Mr. Mahmoud guilty on all four counts and sentenced him to fifteen years of incarceration with all but three months suspended, followed by three years of supervised probation. On Count 1, the court sentenced Mr. Mahmoud to fifteen years of incarceration with all but three months suspended, followed by three years of supervised probation. On Counts 2 and 3, the court sentenced Mr. Mahmoud to fifteen years of incarceration for each count with all suspended and concurrent to the sentence for Count 1. On Count 4, the court sentenced Mr. Mahmoud to six months of incarceration with all suspended and concurrent to the sentences for Counts 1, 2, and 3.

Mr. Mahmoud timely noted this appeal. On appeal, Mr. Mahmoud challenges the court's denial of his motion to suppress.

### **STANDARD OF REVIEW**

When we review a circuit court's decision on a motion to suppress evidence, we accept the motion court's factual findings unless they are clearly erroneous. *Lindsey v. State*, 226 Md. App. 253, 262 (2015) (citing *Brown (Randy) v. State*, 397 Md. 89, 98 (2007)). Also, we look only to the record of the suppression hearing and do not weigh the evidence admitted at trial. *Dashiell v. State*, 374 Md. 85, 93-94 (2003). If that record does not reflect an explicit finding of fact made by the motions judge, we consider the presented facts in the light most favorable to the prevailing party. *In re Tariq A-R-Y*, 347 Md. 484, 488 (1997). We, however, review legal conclusions de novo, making an "independent constitutional evaluation by reviewing the relevant law and applying it to

the unique facts and circumstances of the case.” *State v. Wallace*, 372 Md. 137, 144 (2002).

## DISCUSSION

### **I. MR. MAHMOUD PRESERVED THE ISSUE OF WHETHER THE OFFICERS HAD REASONABLE SUSPICION WHEN THEY INITIALLY APPROACHED MR. MAHMOUD.**

The State argues that Mr. Mahmoud waived the argument that he was seized when Detective Kropff first instructed him not to walk away, even before the marijuana was discovered. The State contends that, at the motions hearing, Mr. Mahmoud identified the moment of seizure as the placement of handcuffs on Mr. Mahmoud, while, on appeal, he identifies the moment of seizure as when Detective Kropff asked Mr. Mahmoud not to walk away. The State argues, therefore, that Mr. Mahmoud’s “argument below expressly contradicted the one he now makes on appeal,” and the “motions court was denied the opportunity to gather evidence and to hear argument” regarding the moment of seizure as when Detective Kropff asked Mr. Mahmoud not to walk away.” Pursuant to Rule 8-131(a), the State concludes that this Court cannot consider the issue.

Mr. Mahmoud, however, contends that he raised the issue in closing argument at the suppression hearing. Specifically, defense counsel stating in closing argument:

I do want to preserve the argument . . . that the Officers, upon their approach did not have even reasonable articulable suspicion to handcuff and detain and seize [Mr. Mahmoud]. Smoking marijuana, the smell of, the odor of marijuana in a public area, especially when you have the other person saying I have a valid medical marijuana card, does not give [the officers] the right to then handcuff [Mr. Mahmoud], frisk him.

Parties may not ordinarily raise new issues on appeal, but they may raise additional arguments. *Kopp v. Shrader*, 459 Md. 494, 512 n.12 (2018). The Court of Appeals has repeatedly distinguished new issues from new theories or arguments. *See Crown Oil and Wax Co. of Del. Inc. v. Glen Const. Co. of Va., Inc.*, 320 Md. 546, 560-61 (1990) (considering an additional theory for direct arbitration between the parties even though this theory was not raised in the trial court, because the issue of direct arbitration had been “an issue in this action from its inception”); *O’Leary v. Shipley*, 313 Md. 189, 196 (1988) (considering a First Amendment theory not raised in the trial court, within its review of the First Amendment issue).

On appeal, Mr. Mahmoud’s theory regarding when the Fourth Amendment was triggered has shifted, but he continues to argue the issue of whether the officers had reasonable suspicion to stop him. We therefore conclude the issue is preserved.

**II. DETECTIVE KROPFF HAD REASONABLE SUSPICION TO STOP MR. MAHMOUD WHEN HE DETECTED THE ODOR OF MARIJUANA COMING FROM MR. MAHMOUD’S VICINITY.<sup>4</sup>**

Mr. Mahmoud argues that the motions court erred when it found that the officers had reasonable suspicion to stop him upon detecting the odor of marijuana in his vicinity. Mr. Mahmoud asserts that, looking at the totality of the circumstances, the stop began when Detective Kropff “approached the vehicle and demanded Mr. Mahmoud[’s] and Mr. Ichenozor’s identification.” He then asserts that the odor of marijuana alone does not create reasonable suspicion of criminal activity.

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<sup>4</sup> The State argues on appeal only that Mr. Mahmoud waived this argument; the State does not address the merits of Mr. Mahmoud’s arguments.

The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const., amend. IV. Apart from a few established exceptions, warrantless searches or seizures are presumptively unreasonable. *Grant v. State*, 449 Md. 1, 16-17 (2016). Under the Fourth Amendment, a law enforcement officer must have probable cause to seize a person. *Terry v. Ohio*, 392 U.S. 1, 20 (1968). An officer, however, may conduct a brief investigative stop of an individual if the stop is supported by reasonable suspicion of criminal activity. *Id.* at 16-17.

A “brief investigatory detention based solely on the odor of marijuana is reasonable, whereas an arrest . . . is unreasonable if based solely on the odor of marijuana.” *In re D.D.*, 479 Md. 206, 232 (2022); *Robinson v. State*, 451 Md. 94, 133 (2017) (stating “[d]espite the decriminalization of possession of less than ten grams of marijuana, the odor of marijuana remains evidence of a crime”). In *In re D.D.*, the Court of Appeals stated,

When a police officer smells marijuana on someone, it is certainly the case that the person may possess less than 10 grams of marijuana, or they may possess no marijuana at all. But it also is possible that the person is presently in possession of 10 or more grams of marijuana.

479 Md. at 238. If, however, an “officer does not quickly obtain additional information that provides probable cause to believe that the person has committed a . . . criminal offense, the officer must allow the person to go on their way.” *Id.* at 233. Therefore, the odor of marijuana permits officers to briefly detain an individual to investigate whether that person committed a criminal offense. *Id.*

In *In re D.D.*, two Prince George’s County police officers responded to a call complaining of “loud music and the smell of marijuana” originating from the basement of an apartment building. 479 Md. at 217. After entering the building, the officers “smelled a strong odor of marijuana” coming from a group of young men, including D.D., who were emerging from the basement of the apartment complex. *Id.* The two officers stopped and questioned the young men. *Id.* Because of D.D.’s subsequent “evasive” behavior, one of the officers performed a *Terry* frisk on D.D. and discovered a loaded handgun in his waistband. *Id.* at 218-19. The Court of Appeals found that the officers had reasonable suspicion to conduct the investigatory stop of D.D. based solely on the odor of marijuana. *Id.* at 221-22. The Court of Appeals held, therefore, that the motions court properly denied the defendant’s motion to suppress. *Id.* at 232.

Here, a citizen informed the police that “there were individuals in the parking garage that he believed to be smoking marijuana.” When Detective Kropff arrived in the parking garage and approached Mr. Mahmoud and Mr. Ichenozor, he detected the odor of marijuana emanating from the area of Mr. Ichenozor’s vehicle, where both individuals were located. Detective Kropff testified that, as he approached the vehicle, Mr. Mahmoud was in the front passenger seat, rummaging through something on the floor. Pursuant to *In re D.D.*, Detective Kropff’s identification of the odor of marijuana related to the location of Mr. Mahmoud and Mr. Ichenozor created reasonable suspicion for Detective Kropff to briefly detain and investigate them to determine whether they had committed a criminal offense. *See also Pacheco v. State*, 465 Md. 311, 330 (2019) (stating odor of marijuana gives rise to reasonable suspicion of unlawful possession of

marijuana but does not give rise to reasonable suspicion that an individual is armed or dangerous or to probable cause). Although it was possible that Mr. Mahmoud and Mr. Ichenozor possessed less than 10 grams of marijuana, it was also possible that either individual possessed more than 10 grams of marijuana. We therefore agree with the circuit court, that the officers had reasonable suspicion to detain the individuals based on the odor of marijuana.

### **III. MR. MAHMOUD DID NOT ABANDON HIS WALLET.**

Mr. Mahmoud argues that, pursuant to the relevant factors, he did not abandon his wallet. In *Stanberry v. State*, 343 Md. 720 (1996), the Court of Appeals identified various factors that courts look to in determining whether property is abandoned: (1) location of the property and security of the area, (2) length of time the property was in the location from which it was recovered, (3) condition of the property upon recovery, (4) whether the owner requested that a third party watch the property, and (5) “whether the owner disclaimed or failed to claim the property when questioned by police.” *Id.* at 733. “Intention is a prime factor in considering whether there has been an abandonment.” *Morton v. State*, 284 Md. 526, 531 (1979).

Here, the circuit court found that “based on the factors analyzed in the case law,” Mr. Mahmoud had not abandoned his wallet. The wallet was one to two feet away from where Mr. Mahmoud had been leaning against Officer Monarrez’s vehicle. It had been there for no longer than 30 minutes. The wallet had not been left to deteriorate or been thrown into the trash. *See Williamson v. State*, 413 Md. 521, 533-39 (2010) (concluding cup discarded with other debris on the floor constituted was abandoned for purposes of



Fourth Amendment). Finally, Mr. Mahmoud did not disclaim the wallet but rather claimed the wallet when Officer Monarrez questioned him. In claiming the wallet as his own, Mr. Mahmoud demonstrated a clear intent not to abandon his wallet. We therefore agree with the motions court’s conclusion that Mr. Mahmoud had not abandoned his wallet.

**IV. MR. MAHMOUD’S WALLET WAS NOT RECOVERED AND SEARCHED PURSUANT TO A LAWFUL SEARCH INCIDENT TO ARREST.**

Initially, we note that the motions court did not make explicit findings of fact on this issue apart from the following: “[T]he Defendant was being issued a citation that carries a jailable offense up to six months. He was told he was under arrest. They removed the handcuffs in order to complete the signing of the citation.” We shall consider the remaining presented facts in the light most favorable to the State and draw reasonable conclusions therefrom.

Mr. Mahmoud argues that the wallet was not recovered or searched pursuant to a lawful search incident to arrest, because he was not under custodial arrest at the time the wallet was searched. Mr. Mahmoud argues that he was never under custodial arrest because Detective Kropff’s objective conduct and subjective intent never consummated a custodial arrest of Mr. Mahmoud and, thus, the wallet recovered incident to his encounter with the police must be suppressed.

A warrantless search is “per se unreasonable under the Fourth Amendment, subject to a few exceptions.” *Belote v. State*, 411 Md. 104, 112 (2009) (quoting *Cherry v. State*, 86 Md. App. 234, 240 (1991)). The search incident to arrest exception “is the

oldest and most quantitatively significant of all the firmly rooted exceptions” to the warrant requirement of the Fourth Amendment. *Anderson v. State*, 78 Md. App. 471, 480 (1989). This Court has previously stated that the “search incident to arrest” exception is a misnomer in that “the precise sequence between the incidental search and the arrest is not of critical importance,” but rather the “cause-and-effect relationship is.” *Id.* Although “the arrest will ordinarily take place first,” “there is no rigid requirement that the arrest literally precede its search incident.” *Id.* at 480-81. The two primary rationales that justify police officers in searching an arrestee incident to a lawful custodial arrest are: (1) “to seize weapons from the arrestee that might be used to effect an escape or to harm law enforcement officers,” or (2) “to recover evidence that might be destroyed by the arrestee.” *Belote*, 411 Md. at 113; *United States v. Robinson*, 414 U.S. 218, 234 (1973). “Where there is no custodial arrest,” however, “these underlying rationales . . . do not exist.” *Belote*, 411 Md. at 113.

A custodial arrest occurs when the officer objectively manifests an intent to arrest an individual, and the individual understands that he is under arrest. *Id.* “[A]n officer’s objective ‘manifestation of purpose and authority’ at the ‘moment of arrest,’ by words or conduct” are “significant in determining whether a custodial arrest has occurred.” *Id.* In *Bouldin v. State*, 276 Md. 511 (1976), the Court of Appeals articulated a definition for “custodial arrest”:

It is generally recognized that an arrest is the taking, seizing, or detaining of the person of another (1) by touching or putting hands on him; (2) or by any act that indicates an intention to take him into custody and that subjects him to the

actual control and will of the person making the arrest; or (3) by the consent of the person to be arrested.

*Id.* at 515-16 (citations omitted). The court further stated, “[F]our 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.” *Id.* (citations omitted). A custodial arrest typically involves “the taking of a suspect into custody and transporting him to the police station,” as compared to, for example, issuance of a traffic citation. *United States v. Robinson*, 414 U.S. 218 234-35 (1973).

To evaluate an officer’s subjective intent, courts can consider officers’ testimony regarding whether they placed a defendant under arrest, but that testimony is not dispositive. *Id.* at 126. When an officer’s conduct is unambiguous, the officer’s intent and testimony are not weighed heavily in court; in contrast, when an officer’s conduct is ambiguous, the subjective intent of an officer “increases in importance to a court’s legal inquiry into whether a custodial arrest of the suspect occurred.” *Id.* at 117.

In *Belote v. State*, the Court of Appeals found that a search of the defendant’s pockets that revealed the defendant possessed marijuana was not a lawful search incident to arrest because the defendant had never been placed under custodial arrest. 411 Md. at 108. Instead, the officer completed an application of charges over a month after the encounter. *Id.* at 110. In that case, the officer approached the defendant because of the odor of marijuana emanating from his person, conducted a *Terry* frisk, and then, upon noticing a bulge in the defendant’s pocket, removed baggies of marijuana from the

defendant’s pocket. *Id.* at 109-10. The officer then released the defendant. *Id.* The court found that the officer’s objective conduct did not manifest an intent to place the defendant under custodial arrest at the time, and held that the motion to suppress evidence recovered from that search should have been granted. *Id.* at 120, 129.

Conversely, in *Bailey v. State*, 412 Md. 349 (2010), the court found that the officer’s objective conduct unambiguously manifested an intent to place the defendant under arrest. *Id.* at 373. In that case, the uniformed officer approached the defendant; noted that he was standing in the shadows, not responding to the officer, and smelled of ether, which is associated with phencyclidine (PCP); physically restrained him; conducted a search of his person; and took him into custody immediately thereafter. *Id.* at 359-60, 373.

The present case falls somewhere between *Belote* and *Bailey*. Detective Kropff’s objective conduct unambiguously indicated that neither Mr. Ichenozor nor Mr. Mahmoud were under arrest throughout most of the encounter on August 25, 2019. Collectively, Detective Kropff and Officer Monarrez explicitly stated that Mr. Mahmoud was not under arrest more than five times during a 30-minute encounter. First, Detective Kropff placed handcuffs on Mr. Mahmoud but stated, “You’re not under arrest. . . . You’re not under arrest.” Next, he explained that both individuals could be arrested but that he was not going to arrest either of them. Officer Monarrez also commented that Detective Kropff was not arresting either individual. He then told Mr. Ichenozor, in Mr. Mahmoud’s presence, “like I said, you’re not being arrested.” When Mr. Mahmoud asked whether he was under arrest after hearing his *Miranda* rights, Detective Kropff

responded, “No you’re not under arrest. You’re just being detained for this investigation . . . .”

Both officers also communicated the same message implicitly throughout the encounter. At the very beginning of the stop, Detective Kropff stated that he would check Mr. Ichenozor’s medical marijuana card, and then “we’ll be good to go.” Even as Mr. Mahmoud and Mr. Ichenozor were placed in handcuffs, Officer Monarrez stated, “We’re just investigating. Once we finish the investigation, you guys will be on your way to go.” After he seized the marijuana, Detective Kropff stated, “I’ll be right back. Hopefully, we’ll be out of here very shortly,” again indicating that he would not be transporting either individual. When he returned from creating the citation to issue to Mr. Mahmoud, Detective Kropff stated that Mr. Mahmoud had been “very cooperative” and “forthcoming,” and that both individuals would be able to “go about [their] way and shoot [their] video.” Until this point, Detective Kropff’s conduct and words unambiguously manifested that Mr. Mahmoud was not under arrest and would be issued a criminal citation rather than being placed under custodial arrest.

Then, without any explanation, Detective Kropff stated to Officer Monarrez, “Well he’s under arrest now so I’m going to search him again really quick,” and emptied Mr. Mahmoud’s pockets. Detective Kropff, however, went on to remove Mr. Mahmoud’s handcuffs and explain that Mr. Mahmoud would receive a notice in the mail to appear in court for the citation, and that he would be tried and sentenced at that later time, indicating that Detective Kropff would not presently be transporting him to the police station or jail. Mr. Mahmoud then signed the citation, Officer Monarrez

simultaneously recovered the wallet, Mr. Mahmoud indicated it belonged to him, and Detective Kropff opened the wallet. At the time Detective Kropff opened the wallet, Mr. Mahmoud was unhandcuffed and had finished signing the citation. Also, even after recovery of Mr. Mahmoud’s wallet, Officer Monarrez told Mr. Mahmoud, “You’re not under arrest right now.”

Detective Kropff’s earlier statement that Mr. Mahmoud was “under arrest now” and Mr. Mahmoud’s eventual custodial arrest created some ambiguity as to whether Mr. Mahmoud was under arrest at the time he signed the citation, so we look to Detective Kropff’s testimony at the motions hearing: “I stated that the Defendant was under arrest and that’s why I was conducting a search of his person.” This testimony merely repeats Detective Kropff’s statement at the time and provides little insight into his subjective mindset.

At the moment Mr. Mahmoud signed the citation, he was not under custodial arrest. Looking to the *Bouldin* elements that “must ordinarily coalesce to constitute a legal arrest,” Detective Kropff may have had the subjective intent to arrest Mr. Mahmoud (although he communicated the very opposite several times and in various ways throughout the encounter), Detective Kropff communicated his police authority, and Mr. Mahmoud was detained for about 30 minutes. Here, however, even though we draw factual inferences in favor of the State, we cannot reasonably infer that Mr. Mahmoud understood himself to be under arrest at the time that he signed the citation. Pursuant to *Bouldin*, the person being arrested ordinarily must understand that he is under arrest. 276 Md. at 515-16; *see also Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) (“A policeman’s

unarticulated plan has no bearing on the question whether a suspect was ‘in custody’ at a particular time; the only relevant inquiry is how a reasonable man in the suspect’s position would have understood his situation.”). Detective Kropff stated one time—to Officer Monarrez, not Mr. Mahmoud—that Mr. Mahmoud was under arrest, but he also stated at least four other times that Mr. Mahmoud was not under arrest, and his other conduct throughout the encounter, detailed above, would have led a reasonable person to understand he was not under arrest at that time. Even after the wallet was recovered, Officer Monarrez again stated, “You’re not under arrest right now.”

Because, looking at the totality of the circumstances, we find that Mr. Mahmoud was not under custodial arrest when he signed the citation and Officer Monarrez recovered his wallet, the two underlying rationales—officer safety and evidence preservation—for a search incident to arrest did not exist at that time either. A search incident to arrest is not justified absent a custodial arrest. *Knowles v. Iowa*, 525 U.S. 113, 119 (1998).

Additionally, federal courts have distinguished custodial arrests from stops resulting in a citation. *United States v. Leal-Felix*, 665 F.3d 1037, 1042-43 (9th Cir. 2011) (“ . . . Supreme Court case law provides ample support in other contexts for distinguishing an arrest from a citation.”); *Berkemer v. McCarty*, 468 U.S. 420, 423 (1984) (stating police did not inform defendant that “his detention [during a traffic stop] would not be temporary,” and concluding he was not under arrest until “formally placed under arrest” and transported to the jail). When an officer chooses to issue a citation for an offense rather than effect a custodial arrest, a search incident to arrest cannot be

justified by that same offense. *Knowles*, 525 U.S. at 119. In *Knowles*, the United States Supreme Court held that a search incident to arrest was invalid when a police officer issued a traffic citation, then searched the defendant’s car, then arrested the defendant based upon the fruits of that search. *Id.* Under Iowa law, the officer had the option to issue a citation or to arrest the individual based on the traffic offense. *Id.* at 115. The Supreme Court found that, because the officer had chosen to issue a citation, he could not justify the subsequent search of the defendant’s car as a search incident to arrest on the basis of the traffic offense for which he had just issued a citation. *Id.* at 118-19.

Similarly, here, Detective Kropff chose to issue Mr. Mahmoud a citation for marijuana possession rather than arresting him. Therefore, the subsequent search of Mr. Mahmoud’s wallet cannot be justified as a search incident to arrest based on the marijuana possession. Because the probable cause for possession of counterfeit credit cards and possession of a false government identification document was uncovered during the search of the wallet, the search cannot be justified as incident to his arrest based on those offenses either.

Accordingly, we reverse the circuit court’s decision denying Mr. Mahmoud’s motion to suppress.

**JUDGMENT OF THE CIRCUIT COURT  
FOR PRINCE GEORGE’S COUNTY  
REVERSED; COSTS TO BE PAID BY  
PRINCE GEORGE’S COUNTY.**