Circuit Court for Montgomery County
Case No. 137292C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 814

September Term, 2021

DESMOND JONES

v.

STATE OF MARYLAND

Kehoe,
Arthur,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: April 22, 2022

The State indicted appellant Desmond Jones in the Circuit Court for Montgomery County on charges of possessing a regulated firearm as a prohibited person and other related offenses. After the court denied Jones's motion to suppress the firearm that the police took from him in a search incident to a warrantless arrest, a jury convicted him of one count of illegal possession of a regulated firearm; wearing, carrying, or transporting a handgun; and reckless endangerment. The court sentenced Jones to eight years of incarceration for the illegal possession of a regulated firearm; an additional five years, to be served consecutively to the five-year sentence, for reckless endangerment; and three years, to be served concurrently with the five-year sentence, for wearing, carrying, or transporting a handgun.

On this timely appeal, Jones asks whether the circuit court erred in denying his motion to suppress.[1]

For the following reasons, we shall affirm.

BACKGROUND

Because the issue dispositive of this appeal concerns the denial of Jones's pretrial motion to suppress, we focus on the evidence presented in connection with that motion and the circuit court's ruling.

At the hearing on the motion to suppress, Officer Addison White of the Montgomery County Police Department testified that at around 10:00 p.m. on November

[1] Jones phrased the question as follows: "Did the motions court err when it denied Appellant's motion to suppress the seizure of the handgun and other items recovered from his car and person on November 7, 2020?" The arrest and seizure occurred on November 7, 2019.

6, 2019, he responded to a Sunoco station in Silver Spring after the police received multiple calls reporting that shots had been fired. Upon his arrival, Jones's mother and Jones's cousin informed Officer White that Jones had discharged a firearm. According to the witnesses, Jones had left the station in a silver Mercedes with a Virginia license plate and the words "Black Lives Matter" on the front bumper.

Jones's cousin worked at the Sunoco station. He told Officer White that Jones had come to the station earlier that evening and had begun arguing with him about family matters. Jones left, but he returned and began arguing again. The cousin called Jones's mother and asked her to come to the station to get Jones to calm down and to persuade Jones to leave. Jones's mother arrived, but she was unsuccessful in breaking up the argument.

According to Jones's mother, Jones said that "you guys" were "trying to kill" him and that he was "going to hurt you guys." At that point, Jones got into his silver Mercedes and drove off. Before he got out of the gas station, Jones fired a shot through the sunroof. He fired four or five more shots at a nearby intersection.

Officer White surveyed the area. He found a shell casing at the gas station and multiple shell casings at the nearby intersection. He concluded that a .40 caliber firearm had been discharged at the scene.

Officer White prepared an arrest warrant for Jones. In the course of his investigation, he learned that Jones was a "prohibited felon" – i.e., a person who was prohibited from possessing a firearm because of a prior felony conviction. The officer

also learned that a silver Mercedes, with a Maryland tag, was associated with Jones's name.

At around 2:30 a.m. the next morning, or approximately four and a half hours he initially responded to the call about Jones, Officer White learned that another police officer, Sergeant Jeff Innocenti, had located a silver Mercedes matching the description of the one that Jones had been driving earlier that evening. Sergeant Innocenti found the Mercedes in a parking lot about 1000 feet from the Sunoco station. The car had a Virginia license plate on the rear and a custom plate on the front that read "BL*LVSMTR."

Officer White and about five other officers joined Sergeant Innocenti at the parking lot. They had difficulty seeing inside the Mercedes because it had darkly tinted windows. With the aid of a flashlight, however, they observed Jones lying down in the back seat, asleep. The sergeant grabbed a rear door handle, pulled it, and opened the door, which was unlocked.

The officers ordered Jones to get out, to get on the ground, to show his hands, and not to reach for anything. Jones woke up, moved towards the other side of the car, and started to lift his shirt and reach towards his groin. Based on his training and experience, Officer White knew that it is common for people to carry or conceal a handgun in the waistband.

The officers yelled "hands on," to indicate that they were grabbing Jones. One officer opened the door behind Jones and pulled him out of the car. Jones was placed under arrest.

In a search incident to the arrest, the officers found a loaded handgun near Jones's groin, "right in the front of his waistband," in a concealed holder. One round was in the chamber, and other rounds were in the magazine.

In support of the motion to suppress, defense counsel began with the premise that Jones was arrested without a warrant. Counsel implicitly recognized that the police may make a warrantless arrest if they have probable cause to believe that a person has committed a felony or is committing a felony or misdemeanor in their presence. She argued, however, that the officers did not see Jones commit a criminal offense. When the officers encountered Jones, she argued, they saw a sleeping man, and not a gun.

The court denied the motion to suppress. After recounting the evidence, the court reasoned that, based on the information that Officer White had received from Jones's relatives and the information that the officer had generated in his investigation, the police knew that Jones was a felon in possession of a firearm, which itself is a felony. On that basis, the court concluded that the police had probable cause to believe that Jones had committed a felony.

The court also reasoned that Jones was unlikely to have gotten rid of the firearm. The court observed that little time had passed since Jones had been seen in possession of the weapon, that he had not traveled very far in that time, and that he may have thought his relatives would not call the police on him. Consequently, the court concluded that the police had probable cause to believe that Jones still possessed the weapon when they encountered him and thus that he was committing a felony at that time.

Because the officers had probable cause to make a warrantless arrest, the court concluded that the search incident to the arrest was valid. Accordingly, the court denied the motion to suppress the evidence, including the gun, that the officers found in the search incident to Jones's arrest.

DISCUSSION

Our review of a circuit court's denial of a motion to suppress evidence is limited to the record developed at the suppression hearing. *Trott v. State*, 473 Md. 245, 253-54 (2021). "'When reviewing the disposition of a motion to suppress evidence alleged to have been seized in contravention of the Fourth Amendment . . . , we view the evidence adduced at the suppression hearing, and the inferences fairly deducible therefrom, in the light most favorable to the party that prevailed on the motion.'" *Bailey v. State*, 412 Md. 349, 362 (2010) (alteration in original) (quoting *Crosby v. State*, 408 Md. 490, 504 (2009)). "'[A]n appellate court reviews for clear error the trial court's findings of fact, and reviews without deference the trial court's application of the law to its findings of fact.'" *Varriale v. State*, 444 Md. 400, 410 (2015) (quoting *Hailes v. State*, 442 Md. 488, 499 (2015)).

The question presented is whether the police had probable cause to make a warrantless arrest of Jones and to search him incident to that arrest.

"The prerequisite to a lawful search of a person incident to arrest is that the police have probable cause to believe the person subject to arrest has committed a felony or is committing a felony or misdemeanor in the presence of the police." *Lewis v. State*, 470 Md. 1, 20 (2020). Probable cause is a "'practical, nontechnical conception' that deals

with 'the factual and practical considerations of everyday life on which reasonable and prudent [persons], not legal technicians, act.'" *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (quoting *Illinois v. Gates*, 462 U.S. 213, 231 (1983) (further citations and quotation marks omitted)); *accord Pacheco v. State*, 465 Md. 311, 324 (2019). Probable cause is a "fluid concept," which "is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances." *Maryland v. Pringle*, 540 U.S. at 370-71; *accord Pacheco v. State*, 465 Md. at 324. "Probable cause does not depend on a preponderance of the evidence, but instead depends on a 'fair probability' on which a reasonably prudent person would act." *Robinson v. State*, 451 Md. 94, 109 (2017) (quoting *Florida v. Harris*, 568 U.S. 237, 244 (2013)); *accord Pacheco v. State*, 465 Md. at 324. Ultimately, probable cause concerns "a reasonable ground for belief of guilt," which "must be particularized with respect to the person to be searched or seized." *Maryland v. Pringle*, 540 U.S. at 371 (citing *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979)).

If police officers have probable cause to make a warrantless arrest, they "may search 'the person of the arrestee' as well as 'the area within the control of the arrestee' to remove any weapons or evidence that could be concealed or destroyed." *Conboy v. State*, 155 Md. App. 353, 364 (2004) (quoting *United States v. Robinson*, 414 U.S. 218, 224 (1973)); *accord Barrett v. State*, 234 Md. App. 653, 664 (2017). "The justifications underpinning the search incident to arrest exception include the confiscation of weapons potentially used to resist arrest, escape custody, or endanger police officers' safety, and the seizure of evidence 'to prevent its concealment or destruction.'" *Lewis v. State*, 470

Md. at 20 (quoting *Riley v. California*, 573 U.S. 373, 383 (2014) (further quotation omitted)).

Under § 5-133(c) of the Public Safety Article of the Maryland Code (2003, 2018 Repl. Vol.), it is a felony to possess a regulated firearm if one has been convicted of certain offenses. Jones's relatives told Officer White that Jones had fired a gun (and thus that he had possessed one); the ballistic evidence at the scene confirmed their statements; and Officer White ascertained that Jones was prohibited from possessing a firearm because of his prior convictions. In these circumstances, the police had ample probable cause to believe that Jones had violated § 5-133(c). On this basis alone, therefore, the police had probable cause to make a warrantless arrest.

Jones does not appear to dispute that conclusion, which itself is dispositive of the appeal. Instead, he argues that it was unreasonable to infer that he still possessed that firearm when the police arrested him. It is more likely, he says, that he would have gotten rid of the weapon than that he would have kept it.

As the State points out in its appellate brief, Jones's argument is essentially one of staleness, or the dissipation of probable cause because of the passage of time. The general rule of staleness has been explained as follows:

> The ultimate criterion in determining the degree of evaporation of probable cause . . . is not case law but reason. The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock: the character of the crime (chance encounter in the night or regenerating conspiracy?), of the criminal (nomadic or entrenched?), of the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), of the place to be searched (mere criminal forum of convenience or secure operational base?), etc. The observation of a halfsmoked marijuana cigarette in an ashtray at a

> cocktail party may well be stale the day after the cleaning lady has been in; the observation of the burial of a corpse in a cellar may well not be stale three decades later. The hare and the tortoise do not disappear at the same rate of speed.

Andresen v. State, 24 Md. App. 128, 172, *cert. denied*, 274 Md. 275 (1975), *cert. granted in part*, 423 U.S. 822 (1975), *aff'd*, 427 U.S. 463 (1976)); *accord Patterson v. State*, 401 Md. 76, 93 (2007).

In our judgment, it was reasonable for the police officers to infer that Jones was probably still in possession of his gun a mere four and a half hours after he had shot it, when the police found him in the car (from which he had shot the weapon), about 1000 feet from the scene of the shooting. Because guns are valuable and have continued utility, people are often unwilling to part with them. Moreover, Jones appears not to have returned home (where he might have stashed the weapon), because he was sleeping in his car. And because the police found Jones less than a quarter of a mile from where he had fired the shots, it was unlikely that he had traveled somewhere else to dispose of the weapon. The police, therefore, had probable cause to make a warrantless arrest on the additional ground that Jones was committing the crime of being a felon in possession of a firearm.

In summary, the officers had multiple grounds upon which to make a warrantless arrest. It follows that the search incident to the arrest was constitutionally permissible. The circuit court, therefore, did not err in denying Jones's motion to suppress the

evidence found in that search.[2]

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

[2] The State asserts that § 2-203 of the Criminal Procedure Article of the Maryland Code (2001, 2018 Repl. Vol.) also permitted the warrantless arrest. Section 2-203 permits a warrantless arrest if a law enforcement officer has probable cause to believe that a person has committed certain enumerated offenses, including wearing, carrying, or knowingly transporting a handgun, and that, unless the person is arrested immediately, the person "(i) may not be apprehended; (ii) may cause physical injury or property damage to another; or (iii) may tamper with, dispose of, or destroy evidence." Jones points out that that the court did not rely on that argument in denying the motion to suppress, and the State acknowledges that it did not advance the argument in the circuit court. We decline to consider the argument, as it was neither raised in nor decided by the circuit court. Md. Rule 8-131(a).