Circuit Court for Baltimore County
Case No.: 3-K-17-00587

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 829

September Term, 2018

MAURICE EUGENE BRITTON

v.

STATE OF MARYLAND

Graeff,
Beachley,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: June 11, 2019

*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.

Appellant, Maurice Eugene Britton, was indicted in the Circuit Court for Baltimore County, Maryland, and charged with: one count of illegal possession of a firearm, under Section 5-622 of the Criminal Law Article (Count 1); two counts of illegal possession of a regulated firearm under Section 5-133 (c) of the Public Safety Article (Counts 2, 4); two counts of illegal possession of a regulated firearm under Section 5-133 (b) of the Public Safety Article (Counts 3, 5); wearing, carrying and transporting a handgun on his person, under Section 4-203 of the Criminal Law Article (Count 6); wearing, carrying and transporting a handgun in a vehicle, under Section 4-203 of the Criminal Law Article (Count 7); and, illegal possession of ammunition, under Section 5-133.1 of the Public Safety Article (Count 8). After his motion to suppress was denied, appellant was convicted by a jury of illegal possession of a firearm and was sentenced to fifteen years' incarceration, the first five without possibility of parole. Appellant timely appealed and presents the following questions for our review:

1. Did the circuit court err in denying appellant's motion to suppress?
2. Did the trial court err in denying appellant's motion to reopen the suppression hearing?
3. Did appellant knowingly and intelligently waive his right to testify?
4. Did the trial court impose an illegal sentence?

For the following reasons, we shall vacate appellant's sentence and remand this case for resentencing, but, otherwise shall affirm.

BACKGROUND[1]

On January 24, 2017, at approximately 1:00 a.m., Sergeant Paul Borowski, a sixteen-year veteran of the Baltimore County Police Department, was conducting surveillance near the Howard Johnson Motel, located at 407 Reisterstown Road in Pikesville. This particular motel was known for "a lot of crime and prostitution and human trafficking, drug dealing" and "to package drugs" and was often rented by individuals who were "wanted" by the police. In fact, Sergeant Borowski testified that he had made more than 50 arrests at this motel.

As he was driving near the motel, Sergeant Borowski noticed a four-door sedan "sitting in the front of the building with its lights on." The sedan remained in the same location for several minutes. Asked whether he could see inside the vehicle, Sergeant Borowski replied that he could not because "the window tint on the vehicle was so dark you could not see if anyone was in the vehicle, um, how many people or if anyone at all was in the vehicle."

After approximately five minutes, the sedan drove away from the front of the motel, made a right turn out of the parking lot, and then went to the rear of the motel. After another short while, the vehicle drove back to the front of the building, and began "changing positions from, um, different parking spots." The vehicle moved around the front parking lot two or three times, again, into different parking spots. The vehicle then

[1] The following background facts are from the record of the suppression hearing. Additional details from the trial will be provided as necessary in our discussion of the issues.

exited the front of the lot and returned to the area behind the motel. At that time, at approximately 1:21 a.m., Sergeant Borowski determined he would stop the vehicle. He also called for a K-9 team to respond to the scene because he was "suspicious of drug activity."

As Sergeant Borowski approached the vehicle on foot, he noticed that the windshield was cracked. He also reaffirmed that the window tint was "very, very dark" and that he could not "see anything inside the vehicle" including the driver. After the driver, identified as appellant, rolled down his window, Sergeant Borowski saw that he was alone and that no one else was inside the vehicle.

At around that same time, another officer, Officer Justin Haines, arrived on the scene to assist in the stop. Sergeant Borowski advised Officer Haines of his suspicions and reason for the stop. Sergeant Borowski then went to the driver's side window, while Officer Haines went to the passenger side window, and asked appellant to roll down the windows so he could see inside the vehicle. Appellant then lowered just the passenger rear window. According to Sergeant Borowski, appellant seemed "very nervous to me," and "his eyes were wide open" and that he "just had a stare."

After obtaining appellant's license and registration, Sergeant Borowski returned to his patrol vehicle to check the status of those documents, as well as whether there were any outstanding warrants for appellant. Sergeant Borowski explained that he could check certain law enforcement computerized indices, namely the National Crime Information Center [NCIC]; and the Maryland Interagency Law Enforcement System [MILES], on the computer inside his patrol car, but he had to contact Baltimore County Police to check for

local warrants. The Baltimore County dispatcher advised Sergeant Borowski that there were two possible unserved warrants for appellant from Baltimore City.

On cross-examination, Sergeant Borowski agreed that he spoke with appellant near the car for approximately twelve (12) minutes. He also clarified that, prior to the stop, when appellant was parked in the front lot of the motel, he was parked diagonally over at least two or three parking spots. He agreed that appellant told him he was visiting his girlfriend who had a room at the motel. Sergeant Borowski also testified that he believed appellant was issued a repair order for the window tint violation.

Officer Haines, who had been with the police department since 2008, was called to the scene as a backup officer. When he arrived, he saw that Sergeant Borowski was speaking to appellant at the driver's side window. Officer Haines approached the passenger side of appellant's vehicle, where he remained while Sergeant Borowski went back to his vehicle to check on appellant's license and warrant status. During that time, appellant asked if he could exit the vehicle, and that request was denied. Appellant also asked to be able to smoke a cigarillo, and Officer Haines instructed him not to do so during the stop. Officer Haines also told appellant to "[p]ut your hands on the wheel." Appellant remained in the vehicle, prior to getting out for the K-9 scan, for approximately 11 to 12 minutes. He also testified that, after the K-9 scanned the vehicle and gave a positive alert, he searched the vehicle and recovered a loaded Lorcin L380 handgun in the center console.

No narcotics were found during the course of the stop. Officer Haines confirmed that he was wearing a body camera and that it recorded portions of the stop.[2]

Corporal William Kelly, the K-9 unit officer, received a call to respond to the scene at 1:25 a.m., and arrived with his dog, Inferno, at approximately 1:37 a.m. Inferno alerted on the driver's side door. Based on this, Corporal Kelly opened the vehicle door to let Inferno inside to continue the scan. At that point, Officer Kelly observed approximately 15 air fresheners hanging from the rearview mirror, an air freshener aerosol spray can in the back seat, as well as containers of baking soda and scented bath soap which could be used as masking agents, according to the officer. Despite the presence of these items, Inferno gave another positive alert at the driver's seat. Corporal Kelly informed the officers that there was a positive alert and the officers then searched appellant's vehicle as indicated.

After the testimony concluded, the State argued this was a valid stop under *Terry v. Ohio*, 392 U.S. 1 (1968), "based on the officer's investigation, based on the high crime area, and I think more importantly, the constant movement of his vehicle back and forth in this parking lot." The court interjected and noted that another factor was the dark window

[2] The court reviewed the body cam footage and that footage is included with the record on appeal. There are three sequential video files of the stop. The first video file begins from the moment Officer Haines arrives, lasts approximately 13:03 minutes, and is taken from Officer Haines's viewpoint standing outside the rear passenger side window of the vehicle while appellant remains seated in the driver's seat at the wheel. In the second video file, which is a continuation of the first video, appellant is removed from the vehicle by the officers at the 5:30 minute mark, or approximately 18:33 after the start of the first recording. Appellant was placed under arrest at the 8:00 minute mark, or approximately 21:03 after the body cam footage began. The handgun was then discovered at around 9:25 on the second video file, or approximately 22:28 after the video recording began.

tinting. The State continued that reasonable articulable suspicion was further enhanced by appellant's nervousness after the stop, as well as his behavior during the course of the stop. The State then maintained that "this is clearly a *Terry* type stop, from, I would say, from the very beginning." The State also contended that the duration of the stop was reasonable under the circumstances.

Appellant responded that this case should be considered as a traffic stop instead of a *Terry* stop, and that, under that analysis, the stop was unreasonable under the Fourth Amendment. Further, even if considered a valid *Terry* stop, the duration of the stop was unreasonable in that "[h]e was detained, well past any reasonable opportunity to give him a work order repair." More specifically, defense counsel argued:

> But you have this young man who is -- especially a young black male who's surrounded by all of these police officers, um, late at night for a hunch and some suspicion.
>
> It -- they detained him. They held him. He could -- was not free to leave. Um, more than enough time elapsed to get a ticket, because you have Sergeant Borowski who's standing there, who's not even writing a ticket. Who's not even doing anything.
>
> Mr. Britton is out of the car. Um, they said -- they take him out of the car while waiting for the, um, K9. He says the K9 was on its way.
>
> Officer Haines says that he didn't see the K9 unit, but they just take him out. And he's out of the car.
>
> Officer Borowski he's not doing anything to further, um, writing a ticket, writing anything for a traffic stop.
>
> Mr. Britton was seized, and he was seized for the -- an unusual length of time. And while 12 minutes might seem normal if you are doing something fun and good, um, and 12 minutes pass and you think, oh, wow, where did the time go.

The court denied the motion, as follows:

Um, I'm persuaded that this was both a valid *Terry* stop and a traffic stop. The, um, familiarity that the officers have with that particular, um, motel and the criminal activity that takes place there, along with the -- the behavior of the defendant, driving first to the front and then to the back of the hotel, and so forth, um, was reasonable -- and give the officers reasonable articulable suspicion to suspect that criminal activity was afoot.

But in addition to that, one thing that the video really confirmed was the Officer Borowski's testimony with regard to the darkness of the tint. Um, that's clearly reflected -- reflected in the video.

And, um, even though Officer Borowski did not have the meter with him that -- that is able to, um, definitively determine the level of at this particular time, it certainly was clear to me, at least, that it would be highly unlikely that this would be within the parameters of the law because you really couldn't see anything inside the car until the windows went down.

The court continued:

Um, there's absolutely no evidence that the stop was prolonged for purposes of, um, obtaining the presence of the dog. Because the, um, Officer Borowski described, um, not only did he have to check the -- for criminal records, the driver's license, um, the, um, the tags, um, but there, um, arose a, um, issue with regard to two outstanding warrants. And the -- and the officer had to check to make sure, um, that they -- that those were valid and that they had or had not been served.

And what the video shows, and I forget the name of the officer who was wearing the body cam, is that you can see, um, well into the stop Officer Borowski in his car at the computer. The, um, car door is open as the other officer is sort of walking around the -- the various vehicles, and you can see the door open. You can see the computer and Officer Borowski at the computer.

So it's -- it's clear to the Court that, um, the officer was not prolonging the traffic stop for the purposes of obtaining a, um, K9.

And with respect to the defendant's behavior inside the car. I disagree with [Defense Counsel] only to the extent that he was not following the directions when it came to keeping his hands on the steering wheel, and that can be a safety issue for the officers.

In any event, this was a valid stop. Valid search and -- and seizure. Obviously, the search takes place after the dog alerts.

> Whether or not there are drugs ultimately found inside the car, um, really, um, doesn't go to the validity of the search because once the dog alerts then the, um, officers clearly have probable cause to search the vehicle.
>
> So, this in my view was a valid search and seizure. So the motion's denied.

We shall include additional detail in the following discussion.

DISCUSSION

I.

Appellant first contends that the court erred in denying his motion to suppress because the traffic stop for the tinting violation exceeded the permissible scope and duration of what was reasonable under the circumstances. The State first responds that appellant's argument was waived because appellant stated he did not object when the fruits of the stop, a handgun, were admitted into evidence at trial. The State continues that this was a valid traffic stop for the tint violation and the duration of the stop was reasonable. Alternatively, the State also asserts that this was a valid *Terry* stop to investigate whether appellant was involved in drug activity.

We first address the State's waiver argument. The following testimony occurred during Officer Haines's direct examination at trial:

> Q. Officer, is that the weapon that you recovered from Mr. Britton's vehicle?
>
> A. Yes, sir.
>
> [PROSECUTOR]: Your Honor, I introduce this as State's 1 at this time.
>
> THE COURT: All right. Without objection it's in.

(States Exhibit 1, previously marked for identification was received into evidence.)

[DEFENSE COUNSEL]: There's none, your Honor.

THE COURT: All right. [3]

We are persuaded that appellant's first issue was waived because defense counsel affirmatively waived any objection to the gun's admission. Generally, Maryland Rule 4-252 (h) (2) (c) provides, in relevant part, that "[a] pretrial ruling denying [a] motion to suppress [evidence] is reviewable . . . on appeal of a conviction" even if no contemporaneous objection is made at trial. *See generally Jackson v. State*, 52 Md. App. 327, *cert. denied*, 294 Md. 652 (1982). However, "if a pretrial motion is denied and at trial appellant says he has no objection to the admission of the contested evidence, his statement effects a waiver." *Jackson*, 52 Md. App. at 332 (citing *Erman v. State*, 49 Md. App. 605, 630 (1981)). It has been "long-established that '[f]orfeiture is the failure to make a timely assertion of a right, whereas waiver is the intentional relinquishment or abandonment of a known right.'" *Joyner v. State*, 208 Md. App. 500, 512 (2012) (quoting *Savoy v. State*, 420 Md. 232, 240 (2011)); *see also Carroll v. State*, 202 Md. App. 487, 514 (2011) ("[W]ithdrawing a motion, an affirmative act of commission as opposed to an act of omission, constitutes a waiver rather than a forfeiture"), *aff'd*, 428 Md. 679 (2012).

Even if not waived, we are persuaded that the stop was reasonable under the totality of the circumstances. Appellate review of a motion to suppress is "limited to the record

[3] The defense theory of the case was that the State was unable to prove, beyond a reasonable doubt, that appellant knew that a handgun was located inside the center console of the vehicle.

developed at the suppression hearing." *State v. Johnson*, 458 Md. 519, 532-33 (2018) (quoting *Moats v. State*, 455 Md. 682, 694 (2017)). "We view the evidence and inferences that may be drawn therefrom in the light most favorable to the party who prevails on the motion," here, the State. *Raynor v. State*, 440 Md. 71, 81 (2014). And, "[w]e accept the suppression court's factual findings unless they are shown to be clearly erroneous." *Id.* "[W]e review legal questions *de novo*, and where, as here, a party has raised a constitutional challenge to a search or seizure, we must make 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, 14-15 (2016) (quoting *State v. Wallace*, 372 Md. 137, 144 (2002)).

The permitted duration of a vehicular stop depends on whether the stop is a traffic stop or for some other purpose, such as to investigate a violation of the drug laws. The motions court found that the stop was reasonable under both the theory that it was a valid stop under *Terry v. Ohio*, 392 U.S. 1 (1968), and a valid traffic stop. We shall first consider whether the stop was reasonable under *Terry*.

It is well settled that police may stop and briefly detain a person for purposes of investigation if the officer has a reasonable suspicion supported by articulable facts that criminal activity may be afoot. *See Terry v. Ohio*, 392 U.S. at 30; *accord Holt v. State*, 435 Md. 443, 459 (2013). Reasonable suspicion is "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Illinois v. Wardlow*, 528 U.S. 119, 128 (2000) (quoting *United States v. Cortez*, 449 U.S. 411, 417-18 (1981)). Further, "[w]e have described the standard as a 'common sense, nontechnical conception

that considers factual and practical aspects of daily life and how reasonable and prudent people act.'" *Holt*, 435 Md. at 460 (citations omitted). "While the level of required suspicion is less than that required by the probable cause standard, reasonable suspicion nevertheless embraces something more than an 'inchoate and unparticularized suspicion or hunch.'" *Id.* (quoting *Terry*, 392 U.S. at 27, 88 S.Ct. 1868) (internal quotations omitted). Even seemingly innocent behavior, under the circumstances, may permit a brief stop and investigation. *Illinois v. Wardlow*, 528 U.S. at 125-26 (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").

Moreover, reviewing courts "must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *United States v. Arvizu*, 534 U.S. 266, 273-74 (2002); *see also Bost v. State*, 406 Md. 341, 356 (2008) ("The test is 'the totality of the circumstances,' viewed through the eyes of a reasonable, prudent, police officer") (citation omitted). And, "the court must . . . not parse out each individual circumstance for separate consideration." *Holt*, 435 Md. at 460 (quoting *Crosby v. State*, 408 Md. 490, 507 (2009) (quoting *Ransome v. State*, 373 Md. 99, 104 (2003)); *see also In re: David S.*, 367 Md. 523, 535 (2002) ("Under the totality of circumstances, no one factor is dispositive").

The case of *Chase v. State*, 449 Md. 283 (2016) is instructive. There, two detectives assigned to the Vice/Narcotics Unit of the Baltimore County Police Department were

conducting surveillance near a Days Inn, located off Security Boulevard in an area known for narcotics activity, when they noticed a white Jeep Cherokee backed up into a parking spot. *Chase*, 449 Md. at 289-90. After about two minutes, a Lexus arrived and double parked adjacent to the Jeep. *Id*. at 290. The driver of the Lexus then got out and entered the passenger side of the Jeep. *Id*. One of the detectives testified that, based on his training and experience, as well as the fact that the area was known as a high drug area and neither suspect appeared to be a guest of the hotel, he believed that an illegal drug transaction was underway. *Id*. at 290-91. After observing the suspects for a short while, the detectives drove up and detained the two individuals, placing them in handcuffs. *Id*. at 292. The detectives explained that, upon approaching the vehicle, they observed furtive movements by the occupants of the Jeep, including moving things around and reaching under the seat. *Id*. at 292.

After the occupants were removed from the vehicle and placed in handcuffs for officer safety, the detectives questioned them at the scene. The suspects gave conflicting stories about the purpose of their meeting in the hotel parking lot. *Chase*, 449 Md. at 292. The detectives then called for a K-9 unit to respond to the location. Approximately eight minutes later, a K-9 drug detection dog alerted to the presence of narcotics on the passenger side of the Jeep. *Id*. at 293. The suspects were arrested and a motel key was seized from Chase during the ensuing search incident to arrest. *Id*. After obtaining a search warrant for the hotel room, police recovered 138 grams of cocaine and other narcotics paraphernalia. *Id*. at 294.

After considering a long line of Maryland cases under *Terry*, the Court of Appeals determined that the stop and frisk of Chase and the other man was founded on reasonable articulable suspicion to believe that the men were engaged in drug distribution and may have been armed and dangerous. *Chase*, 449 Md. at 307-08. The Court also determined that the use of handcuffs did not convert the *Terry* stop into an arrest based on the detective's reasonable belief that weapons may have been present due to the "mannerisms and 'furtive' movements of Chase and his companion as the Detective approached the Jeep." *Id*. at 312.

Here, similar to the facts in *Chase*, Sergeant Borowski was conducting surveillance of a motel located in an area known for drug activity when he first observed appellant's vehicle parked in the parking lot. The heavily-tinted vehicle was moving around in the parking lot, alternating from the front to the back of the building, as well as parking in different spots. It was then, at approximately 1:21 a.m., that the officer, a 16-year veteran of the police department who had made more than 50 arrests at that same location, decided to stop the vehicle because he was suspicious of drug activity.

We are persuaded that there was reasonable articulable suspicion to support an investigatory stop under *Terry*. As the Supreme Court has explained, even seemingly innocent behavior, under the circumstances, may permit a brief stop and investigation. *Illinois v. Wardlow*, 528 U.S. at 125-26 (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 State v. Ofori*, 170 Md. App. 211, 248 (2006) ("Reasonable articulable suspicion is assessed not by examining individual clues in a vacuum but by getting a "sense" of what may be afoot from the confluence of various circumstances. Suspicion, particularly to a trained law enforcement officer, may be greater than the sum of its parts"). Other factors similarly support the motion court's ruling, including the officer's experience, the appellant's nervous, evasive behavior, and the known notorious nature of the area. *See, e.g.*, *Illinois v. Wardlow*, 528 U.S. at 124 (observing that nervous, evasive behavior "is a pertinent factor in determining reasonable suspicion," and "that the stop occurred in a 'high crime area' among the relevant contextual considerations in a *Terry* analysis") (citation omitted). We hold that Sergeant Borowski acted reasonably under *Terry* in stopping appellant to perform further investigation.

Considered as a lawful *Terry* stop, we are also persuaded that the stop's duration was not unreasonable under the totality of the circumstances. "Obviously, if an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop." *United States v. Sharpe*, 470 U.S. 675, 686 (1985) (stating that "[O]ur cases impose no rigid time limitation on *Terry* stops"). However:

> For purposes of analysis, a *Terry*-stop is not frozen in time at the split second of its inception. It is a continuing investigative activity, and as it unfolds, reasonable suspicion may mount. As suspicion mounts, moreover, it may justify a longer detention than would initially have been justified.

Carter v. State, 143 Md. App. 670, 682, *cert. denied*, 369 Md. 571 (2002).

The evidence at the motions hearing, including the officers' testimony and the body cam footage, reveals that Sergeant Borowski was conducting a check on appellant's license

and registration, as well as his warrant status, prior to the arrival of the drug dog. "A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Adams v. Williams*, 407 U.S. 143, 146 (1972) (citing *Terry*, 392 U.S. at 21-22). Moreover, this Court has explained that "a brief check for open warrants on a suspect is a recognized investigatory technique in the course of a *Terry* stop." *Brown v. State*, 124 Md. App. 183, 193 (1998). Notably, the dispatcher indicated there were two possible unserved warrants for appellant from Baltimore City.

Moreover, the overall duration of the stop appears to have been less than 25 minutes. According to the testimony, Sergeant Borowski stopped the vehicle at 1:21 a.m. and Officer Haines arrived shortly thereafter. In addition, Corporal Kelly, the K-9 officer, arrived at 1:37 a.m. Although it is not clear when exactly the K-9 alerted on the vehicle, Officer Haines's body cam footage indicates that appellant was arrested within 21 minutes of his arrival.

From this, we glean that appellant was detained a relatively short period of time, most likely just over 21 minutes, from the moment of the stop until the alert by the K-9, before he was arrested. We conclude that this time frame was reasonable. *See Carter*, 143 Md. App. at 696 (concluding that a twenty-five-minute delay while police awaited arrival of a drug sniffing dog permissible); *see generally State v. Ofori*, 170 Md. App. at 251 ("The *Terry*-stop for drugs very deliberately and patiently does await the arrival of the dog. The dog's arrival is, indeed, the primary reason for waiting"). And, the K-9 alert gave probable cause to search the vehicle. *See Grimm v. State*, 232 Md. App. 382, 399-400 (2017) ("[A]

well-trained dog's alert establishes a fair probability -- all that is required for probable cause -- that either drugs or evidence of a drug crime . . . will be found"), *aff'd*, 458 Md. 602 (2018), *cert. denied*, 139 S. Ct. 263 (2018). Thus, the motions court correctly held that the stop was lawful under *Terry v. Ohio*.

Alternatively, the stop was justified as a traffic stop to allow the officer to investigate the cracked windshield and the apparent window tinting violation. Although a vehicle stop implicates Fourth Amendment rights, *see Brice v. State*, 225 Md. App. 666, 695 (2015), *cert. denied*, 447 Md. 298 (2016), a "traffic stop may also be constitutionally permissible where the officer has a reasonable belief that 'criminal activity is afoot.'" *Rowe v. State*, 363 Md. 424, 433 (2001) (quoting *Terry*, 392 U.S. at 30)). Furthermore, "[a] seizure for a traffic violation justifies a police investigation of that violation." *Rodriguez v. United States*, 575 U.S. __, 135 S. Ct. 1609, 1614 (2015); *see also Santos v. State*, 230 Md. App. 487, 495 (2016) ("In assessing the traffic stop, the only concern is whether the officer possessed sufficient information to objectively justify the stop; the officer's subjective intent is irrelevant"), *cert. denied*, 453 Md. 26 (2017). And, "[i]t is clear that an officer conducting a routine traffic stop may request a driver's license, vehicle registration, and insurance papers, run a computer check, and issue a citation or a warning." *Nathan v. State*, 370 Md. 648, 661-62 (2002) (citations omitted).

Section 22-406 (i) of the Transportation Article permits a police officer to stop a vehicle if that officer observes that the window tinting does "not allow a light transmittance through the window of at least 35%[.]" *See* Md. Code (1977, 2012 Repl. Vol.) § 22-406 (i) of the Transportation ("Trans.") Article; *see also* COMAR 11.14.02.14 (vehicle

glazing). The Court of Appeals considered stops for window tint violations in *State v. Williams*, 401 Md. 676 (2007). In that case, a Harford County Deputy Sheriff stopped a vehicle, ostensibly on a pretext, because the rear window was "darker than 'normal.'" *State v. Williams*, 401 Md. at 679. The State argued that the stop was supported by reasonable articulable suspicion that there was an apparent equipment violation of Section 22-406 (i) of the Transportation Article, the statute that prohibits window tinting that did not allow "a light transmittance through the window of at least 35%." *State v. Williams*, 401 Md. at 683, 691.

The Court of Appeals disagreed, concluding that there was no reasonable articulable suspicion in that case to stop the appellee for a window tinting violation. While recognizing that there may be occasions to justify such a stop "if those observations truly suffice" to give reasonable articulable suspicion, the Court stated that:

> [I]n noting that appellee's rear window was darker than "normal," Deputy Wood was comparing the darkness of the rear window to a window without any tinting. Obviously, a tinted window is going to appear darker than a window without any tinting, especially at night; that is the natural effect of tinting. The law permits a substantial tinting, however - substantial enough to block out 65% of the light striking the window.

State v. Williams, 401 Md. at 691.

Therefore, the Court concluded:

> The test urged by the State, and applied by Deputy Wood, would allow police officers to stop any car with any tinted window, simply because it appears darker than an untinted window, and that cannot be the test for Fourth Amendment purposes, for it would effectively strip away Fourth Amendment protection for any person driving or owning a car with tinted windows. If an officer chooses to stop a car for a tinting violation based solely on the officer's visual observation of the window, that observation has to be in the context of what a properly tinted window, compliant with the 35%

> requirement, would look like. If the officer can credibly articulate that difference, a court could find reasonable articulable suspicion, but not otherwise.

State v. Williams, 401 Md. 676, 692 (2007).

Following *State v. Williams*, this Court addressed a similar issue in *Turkes v. State*, 199 Md. App. 96 (2011). There, a police officer stopped a vehicle with window tinting because the officer suspected the tinting was "darker than legally permissible . . ." *Id.* at 104. One issue on appeal was whether the stop was supported by reasonable articulable suspicion. After discussing *State v. Williams, supra*, including the requirement that a vehicle have a label or sticker indicating that the tinting is in compliance with Maryland law, this Court agreed that there was reasonable articulable suspicion to justify the stop. We stated:

> In this case, Officer Smith stopped appellant on a sunny morning. Officer Smith testified that, when he saw appellant's vehicle, he was unable to see into the vehicle at all to tell the number of occupants in the car or to distinguish movement in the car. He also did not see an inspection sticker on the tint. He testified that he had approximately 8 to 10 seconds to observe the car before initiating a stop.
>
> Those facts justified the stop, especially in light of Officer Smith's training and experience in recognizing legally tinted windows. Officer Smith testified that he was familiar with the appearance of a legal tint at 35% and had observed the difference between legal and non-legal tints during traffic stop training at the police academy. He also had conducted at least 100 traffic stops for tinted windows. Officer Smith noted that, based on his training and experience, if a window's tint is legal, a person should be able to see into the window because sunlight can get through. We affirm the trial court's finding that the stop was supported by a reasonable articulable suspicion.

Turkes, 199 Md. App. at 115-16; *see also Baez v. State*, 238 Md. App. 587, 597 (2018) (concluding that a stop to investigate a suspected tinting violation was reasonable and

observing that “[l]aw enforcement needs only reasonable suspicion, not probable cause, to stop a vehicle on the highway to investigate further”).

Here, with respect to the window tint and cracked windshield, Sergeant Borowski testified as follows on cross-examination:

> Q. And did you, once it got to the location and you -- you were safe, did you in any way document this alleged crack windshield?
>
> A. It’s documented in the report, the incident report.
>
> Q. And did you, um, you indicated that it was a body -- a window tint issue?
>
> A. Yes, ma’am.
>
> Q. Did you take out the, um, the tinting --
>
> A. The tint meter?
>
> Q. And determine what the tint was on the window?
>
> A. No, ma’am. We are not equipped with a tint meter.
>
> Q. Did you have that come in?
>
> A. Did I have what come in?
>
> Q. Someone come in and --
>
> A. We don’t have a tint meter.
>
> Q. And so, um, the way a person stands sometimes that could affect your ability to see inside, you know, not looking straight on, that could impact your ability to see?
>
> A. As far as the tint goes?
>
> Q. Um-hum.
>
> A. Yes, ma’am.

Q. And if it's under light and the way it sits on the tint that can have an impact on --

A. Yeah, sure.

Q. -- the ability to see in; is that correct?

A. Yes, ma'am.

The trial court then asked some clarifying questions:

THE COURT: Officer, when -- when you approach a vehicle that has tinted windows --

THE WITNESS: Um-hum.

THE COURT: -- what do you use as your sort of threshold for, I understand you don't have a tint meter, but what is it, um, about the tint that causes you to suspect that it may be, um, beyond that level that's allowed by law.

THE WITNESS: I -- I use specific details from the interior of the vehicle. If -- if I can see specific details such as the light from the radio, gender of the person, what they're wearing maybe, if I can see anything from the inside of the vehicle, um, I use that, plus my training, knowledge and experience of making numerous tint stops.

And there was a time where we did have a tint meter, but we haven't had one since I've worked -- since I've been re-stationed back there.

Um, and -- and if I can -- based on my training and -- and the multiple stops I've had, and seeing any details inside the vehicle, the – the actual radio will illuminate enough to where we can, even though it's dark out, you can still see the --

THE COURT: The light from the radio?

THE WITNESS: -- it gives it -- right. It gives it enough backlight to see just how dark that tint is. And -- and like I said, I could not see anything.

The officer compared the apparent tint violation to his "experience of making numerous tint stops." We are persuaded that this was sufficient under *State v. Williams*

and *Turkes, supra*. Furthermore, the cracked windshield presented a safety hazard. *See Muse v. State*, 146 Md. App. 395, 405 (2002) (holding that an officer may stop a vehicle to investigate a cracked windshield) (citing Trans. § 22-101 (a) (1) (i)). Therefore, we conclude that the officer articulated facts that provided reasonable articulable suspicion to stop the vehicle.

Appellant argues that, even if the stop was reasonable, its duration was not. In *Rodriguez, supra*, the Supreme Court explained:

> Like a *Terry* stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's "mission" -- to address the traffic violation that warranted the stop, . . . Because addressing the infraction is the purpose of the stop, it may "last no longer than is necessary to effectuate th[at] purpose." Authority for the seizure thus ends when tasks tied to the traffic infraction are -- or reasonably should have been --completed.

Rodriguez, 135 S. Ct. at 1614.

In determining whether a traffic stop was stalled to accommodate a K-9 scan, courts naturally consider the overall duration of the stop. S*ee generally, Byndloss v. State*, 391 Md. 462 (2006) (analyzing cases addressing permissible length of detention for traffic stops); *Jackson v. State*, 190 Md. App. 497, 511-12 (2010) ("Even by the fast-moving stopwatch of a traffic stop, eight minutes does not come close to the outer permissible limits."). "In almost all of the cases, the critical breaking point between permissible and unreasonably prolonged traffic detentions occurs at somewhere near the 20 to 25 minute marker." *Jackson*, 190 Md. App. at 512.

Even were we to consider the stop purely as a traffic stop, without the aforementioned lawful investigatory purpose under *Terry*, we would conclude that the

duration of the stop was not unreasonable under the circumstances. Sergeant Borowski was checking on appellant's license, registration and warrant status when the K-9 arrived. And, the approximate duration of the entire stop, from the moment the sergeant stopped appellant's vehicle to the K-9 alert, was less than 25 minutes. Even if not waived, we hold that the motions court properly denied the motion to suppress.

II.

Appellant next asserts that the trial court failed to exercise discretion in not reopening the suppression hearing. The State maintains that the issue was waived, as discussed in Issue I, *supra*, and that, in any event, the court properly exercised its discretion.

For reasons articulated in the prior discussion, we agree that this issue was waived. *See Jackson*, 52 Md. App. at 332; *Erman*, 49 Md. App. at 630. And, even were we to consider the merits, we conclude there was no abuse of discretion. Prior to trial, appellant retained a new and different counsel from the one that litigated the motion to suppress. Appellant then moved for a supplemental hearing and/or a hearing *de novo* on this motion. *See* Md. Rule 4-252 (h)(2)(C).[4] Appellant's counsel argued that the motions judge was biased against prior defense counsel because prior counsel did not file a written motion prior to trial. Counsel then reargued points of law that were similar to the arguments raised at the prior suppression hearing. This included a concession that the stop for the tint

[4] That rule provides: "If the court denies a motion to suppress evidence, the ruling is binding at the trial unless the court, on the motion of a defendant and in the exercise of its discretion, grants a supplemental hearing or a hearing de novo and rules otherwise. A pretrial ruling denying the motion to suppress is reviewable on a motion for a new trial or on appeal of a conviction." *Id*.

violation was lawful but that the duration of the stop was unreasonable. Defense counsel also contended that prior defense counsel did not ask Sergeant Borowski more detailed questions about whether "his investigation was not illegally prolonged just to wait for the arrival of the K9." Defense counsel continued:

> The questions that should have been asked are what steps did you take. Did you confirm or dispel a warrant. How long were you sitting in your car. How long were you on with dispatch. And in, essence, when you read that transcript carefully, I suggest to you respectfully, that none of those questions were asked, and therefore, although it was [prior Defense Counsel's] responsibility, she didn't provide through her cross-examination or through her introduction of evidence enough to give Judge Purpura the flavor as to what the motion was about.

The State responded that the motion was "fully litigated," that all the officers involved in the stop testified, that prior defense counsel, in fact, argued that the duration of the stop was unreasonable, and that there was no good cause to reopen the suppression motion. The trial court agreed.

> THE COURT: All right. I'm going to deny the motion. The -- there is a history to the case. I am bound by the law of the history of this case.
>
> Judge Purpura has heard the argument, and giving you another bite at the apple would be manifestly unfair given what you make assertions of.
>
> The fact that you don't agree with the way she approached it is not sufficient basis for me to, in essence, give you -- your client a do over. The matter has been fully litigated. The history of the case determines that.
>
> The motion is denied.

A decision whether to reopen a suppression hearing falls within the discretion of the trial judge. *Marr v. State*, 134 Md. App. 152, 179 (2000), *cert. denied*, 362 Md. 623 (2001). Although it is true that a failure to exercise discretion may be considered an abuse of

discretion, *see Gray v. State*, 368 Md. 529, 565 (2002), we discern no failure in this case. The trial judge afforded appellant's new defense counsel an opportunity to present argument as to why the suppression hearing should be reopened, namely, on the grounds that defense counsel did not adequately challenge Sergeant Borowski's account of the duration of the stop. However, our review of the record shows that prior defense counsel did challenge the duration of the traffic stop. We are simply not persuaded that, under these circumstances, the trial court abused its discretion in denying new counsel's request to reopen the suppression hearing in order to relitigate the motion.

III.

Appellant next asserts that his waiver of his right to testify was not made knowingly and intelligently because counsel informed him that he could be impeached with his prior conviction for first degree assault. The State concedes that defense counsel gave erroneous advice, but this issue is governed by *Savoy v. State*, 218 Md. App. 130 (2014). We agree.

After the State rested and after the court denied appellant's motion for judgment of acquittal, discussed *infra*, the court then turned to whether appellant wished to testify on his own behalf:

> [THE COURT]: Does the -- the Defense wish to put on a case?
>
> [DEFENSE COUNSEL]: No. I will advise him.
>
> THE COURT: Okay. I'd like you to advise him, please. Thank you.
>
> [DEFENSE COUNSEL]: Yes. Thank you.
>
> Mr. Britton, in our case if you chose to present a case you'd have an opportunity to testify or remain silent. If you chose to testify you would take

the witness stand, you would be sworn. I could ask you questions, the State's Attorney could ask you questions.

It would most certainly be relevant information that would, if the State chose to ask you questions about any crimes of moral turpitude on the record, and that means they could potentially ask you if you've been convicted of possession with intent to distribute.

Is there any other crime that you could ask about?

[PROSECUTOR]: First degree assault.

[DEFENSE COUNSEL]: I'm sorry?

[PROSECUTOR]: First degree assault.

[DEFENSE COUNSEL]: First degree assault is an infamous crime, so they could also ask you and prove that you have been convicted of first degree assault.

THE DEFENDANT: Not with the signed stipulation.

[DEFENSE COUNSEL]: Keep in mind -- keep in mind that the jury does not know about that at this point in time. And if you chose to remain silent, which is my understanding is what you're going to do, the jury will make their decision based solely on the evidence that is presented and my argument as to why they should find you not guilty.

Do you understand that the difference, sir, between testifying and remaining silent? You do understand that?

THE DEFENDANT: Yes.

[DEFENSE COUNSEL]: Okay. And it's my understanding you do not wish to take the stand and testify; is that true, Mr. Britton?

THE DEFENDANT: Yes.

[DEFENSE COUNSEL]: Okay, sir. Thank you.

The Fifth, Sixth and Fourteenth Amendments to the United States Constitution guarantee the accused in a criminal case the right to choose whether or not to testify on his own behalf. *Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987); *Malloy v. Hogan*, 378 U.S. 1, 8

(1964). In Maryland, a criminal defendant possesses a statutory right to testify in his own defense, which may only be waived knowingly and intelligently "with a basic appreciation of what the choice entails." *Dallas v. State*, 413 Md. 569, 590 (2010) (citations omitted).

Under Maryland law, if a defendant is represented by counsel, a presumption arises that counsel has fully advised his client of the right to testify or remain silent. *Thanos v. State*, 330 Md. 77, 91-92 (1993) (discussing *Gilliam v. State*, 320 Md. 637, 652 (1990)). "[T]he trial court is entitled to assume that counsel has properly advised the defendant about [the right to testify] and the correlative right to remain silent and, if the defendant does not testify, that he has effectively waived his right to do so." *Tilghman v. State*, 117 Md. App. 542, 555 (1997), *cert. denied*, 349 Md. 104 (1998). Thus, absent an indication that the defendant misunderstood or was misinformed about his right to testify, the court may assume that the defendant's choice to waive that right is knowing and intelligent. *Gregory v. State*, 189 Md. App. 20, 35-36 (2009).

When trial counsel provides incorrect advice to a defendant about his right to testify, the defendant has the burden to "establish that the incorrect advice influenced his election not to testify." *Savoy,* 218 Md. App. at 155. "It is appellant's burden to show reliance upon his counsel's legal advice, not the State's burden to show he did not rely on the misstatement." *Id*. "Absent detrimental reliance, appellant is not entitled to reversal." *Id*. (citations omitted).

In *Savoy*, counsel incorrectly advised the defendant that the State could impeach him with his conviction for first-degree assault if he testified. *Savoy*, 218 Md. App. at 155. After Savoy was advised by his counsel, the judge adjourned for the day. Savoy then "met

with his attorney over the evening recess and told the court the next day that he did not wish to testify." *Id*. at 156. We held that Savoy did not show that he relied on that specific advice in making his decision. We stated:

> There is no indication in the case *sub judice* that appellant relied detrimentally on his trial counsel's advice. Appellant does not claim that he would have testified but for the erroneous advice given by his counsel. He baldly asserts, by argument only, that it is "highly likely" that his election was affected, which is mere speculation.

Id.

We also considered the circumstances of the case, including that appellant made inculpatory statements to the police prior to trial, and concluded that "appellant had nothing to gain from testifying and much to lose." *Savoy*, 218 Md. App. at 156. Thus, "the question of whether appellant detrimentally relied on his attorney's advice is best left for post-conviction proceedings," which "can elucidate the factors that influenced appellant's election, as well any off-the-record conversations between appellant and his attorney about his decision." *Savoy*, 218 Md. App. at 157-58.

Here, notwithstanding the prosecutor's erroneous advice, repeated by defense counsel, that appellant could be impeached with a prior first degree assault conviction, we are not persuaded that appellant has met his burden on this issue. Indeed, after the State rested, the court asked the defense if it wished to put on a case, and defense counsel replied, "No. I will advise him." Defense counsel then proceeded to inform appellant that he could be impeached with his prior conviction for possession with intent to distribute. A fair reading of this exchange suggests that defense counsel and appellant decided prior to trial

whether appellant would testify, as well as the possibility of impeachment with a prior conviction.

Furthermore, just prior to this exchange, there was a discussion on the record which suggests that appellant knew the danger presented by the possible admission of his prior convictions. As noted by the parties, at the end of the State's case-in-chief, the parties discussed the language of the stipulation. The parties agreed to delete a paragraph referring to the technician for fingerprints, and agreed that the details of appellant's prior record would not be before the jury. Appellant was concerned that, by signing the stipulation, that he was waiving his appellate rights. Defense counsel then explained the following to appellant, on the record:

> Judge, he, sir, I want to explain to you something. There's a stipulation, I know you were concerned about your appeals rights, the stipulation is an agreement between the parties that affects whether or not the State would call a witness or introduce certified documents to tell the jury that you've been convicted of first degree assault, firearm possession, while being prohibited as a felon and possession with intent to distribute.
>
> If you stipulate under this agreement and sign, the jury will only receive the stipulation to say "I acknowledge that I have been convicted of a crime that could prohibit me from possessing a gun".
>
> If you don't sign it, the State has certified records that I've reviewed that are going to come in, even if we object to them. And the jury will know you've been convicted of assault, first degree, firearm felony possession, and possession with intent to distribute.
>
> It is my advice as your lawyer, for doing this for 20 years, that it is in your significantly best interest to sign this stipulation.

Defense counsel continued that, were he not to agree to stipulate to the prior sanitized conviction, his prior, certified criminal history would likely be admitted and

would "severely prejudice you in front of this jury. And the stipulation is in your best interest so that the jury does not hear about the extent of your violent drug dealing record." Further, defense counsel advised:

> If you can prevent the jury under your lawyer's advice, who you've hired to represent you, not to let the jury hear that you're a dangerous weapon carrying drug dealer in your past.
>
> So, please take that into consideration. And please understand the limited appellate right you're waiving. And I encourage you strongly to sign this stipulation, because if you don't, in a moment when the jury comes out they're going to get the records and the rest will be history. [5]

In sum, because appellant has not demonstrated his reliance on the erroneous advice, we conclude that appellant's argument that he did not knowingly or voluntary waive his right to testify is without merit.

IV.

Appellant's final argument is that he was illegally sentenced because, even though the commitment record and docket entries indicate he was convicted under Section 5-133 (b) of the Public Safety Article, he was sentenced under Section 5-133 (c) to 15 years, the first five of which are to be served without possibility of parole. *See* Md. Code (2003, 2018 Repl. Vol.) § 5-133 (b), (c) of the Public Safety Article. As will be explained, we agree with appellant and shall vacate his sentence and remand for resentencing.

[5] After advising appellant that he could still appeal "any issue with regard to lack of calling the firearms" witness, and could go on to post convict trial counsel himself, appellant agreed to sign the stipulation.

Although there was no objection to the verdict or sentence in this case, Maryland Rule 4-345(a) provides that "[t]he court may correct an illegal sentence at any time." A motion to correct an illegal sentence is not waived "even if 'no objection was made when the sentence was imposed' or 'the defendant purported to consent to it[.]'" *Johnson v. State*, 427 Md. 356, 371 (2012) (quoting *Chaney v. State*, 397 Md. 460, 466 (2007)). Whether a sentence is illegal is a question of law that we consider *de novo*. *Bonilla v. State*, 443 Md. 1, 6 (2015).

However, "the scope of this privilege, allowing collateral and belated attacks on the sentence and excluding waiver as a bar to relief, is narrow." *Colvin v. State*, 450 Md. 718, 725 (2016) (citation omitted). As the Court of Appeals has explained, "[t]he purpose of Rule 4-345 (a) is to provide a vehicle to correct an illegal sentence where the illegality inheres in the sentence itself, not for re-examination of trial court errors during sentencing." *Meyer v. State*, 445 Md. 648, 682 (2015) (citations omitted). In other words, there is no relief under Rule 4-345 (a) where "the sentences imposed were not inherently illegal, despite some form of error or alleged injustice." *Matthews v. State*, 424 Md. 503, 513 (2012) (citations omitted). A sentence is considered "illegal" for purposes of Rule 4-345 (a) only where "there either has been no conviction warranting any sentence for the particular offense or the sentence is not a permitted one for the conviction upon which it was imposed and, for either reason, is intrinsically and substantively unlawful." *Colvin*, 450 Md. at 725 (citing *Chaney*, *supra*, 397 Md. at 466); *see also Veney v. State*, 130 Md. App. 135, 145 ("[A]n enhanced penalty imposed improperly is an illegal sentence"), *cert. denied*, 358 Md. 610 (2000).

In brief, appellant's contention is that he was sentenced for the wrong crime. The indictment charged him with both violations of Public Safety § 5-133 (b), in Counts 3 and 5, and Public Safety § 5-133 (c), in Counts 2 and 4. Pertinent to our discussion, Public Safety Section 5-133 (b) provides that "[a] person may not possess a regulated firearm if the person . . . has been convicted of a disqualifying crime[.]" A "disqualifying crime," defined in Public Safety § 5-101, is: "(1) a crime of violence; (2) a violation classified as a felony in the State; or (3) a violation classified as a misdemeanor in the State that carries a statutory penalty of more than 2 years." Pursuant to Public Safety § 5-144, a person guilty of violating § 5-133(b) is guilty of a misdemeanor and "is subject to imprisonment not exceeding 5 years or a fine not exceeding $10,000, or both." Public Safety § 5-144. *See also Jones v. State*, 420 Md. 437, 456 (2011) (holding that prior Public Safety § 5-143, now renumbered as 5-144, contains the penalty for a violation of § 5-133 (b))

Public Safety § 5-133 (c) (1) provides that "[a] person may not possess a regulated firearm if the person was previously convicted of: . . . a crime of violence;" a violation of certain narcotics offenses; or, a similar offense under the laws of another state or the United States. A person guilty of violating this subsection is, under Public Safety § 5-133 (c) (2), guilty of a felony and is subject to imprisonment for a mandatory minimum of 5 years, and a total sentence not to exceed 15 years. Public Safety § 5-133 (c) (2). Although there is overlap between the two subsections, there is a significant difference in penalties depending upon which subsection of Section 5-133 is proven beyond a reasonable doubt. And, our review of appellant's prior record reveals that he would have qualified under either provision as he had, according to the State's unobjected-to proffer at sentencing,

multiple disqualifying convictions, including prior convictions for possession with intent to distribute cocaine, illegal possession of a firearm, first degree assault and use of a handgun in the commission of a crime of violence.

This issue, however, finds its origin in the following exchange at the end of the State's case-in-chief:

> THE COURT: State's case, sir.
>
> [DEFENSE COUNSEL]: Yes, thank you.
>
> THE COURT: State's only sending out one count?
>
> [PROSECUTOR]: One count.
>
> [DEFENSE COUNSEL]: One count.
>
> Okay. I would make a --
>
> THE COURT: So would you like to make a motion on that?
>
> [DEFENSE COUNSEL]: Yes, sir. Motion for Judgment Acquittal on the prohibited person in possession of a firearm.
>
> I would suggest to the Court that even in the light most favorable to the State, there's insufficient [sic] on the knowledge of it. In other words, although, uh, there's certainly no evidence that he had immediate control, uh, he didn't touch it. There's no print obviously.
>
> But, um, I suggest to you that merely being in possession of a car that has not been in any way legally connected, uh, would be insufficient at this point in time to satisfy the dual prongs of -- of the -- obviously, the prior record is satisfied, but the -- the element of proof as to possession is not satisfied.
>
> THE COURT: All right. State?
>
> MR. WEBSTER: I'll submit, your Honor.

> THE COURT: All right. I'm going to deny your motion. I think that's an evidentiary question for the jury to determine whether he has possessory interest in it. So your motion is denied.

Although there were four counts in the indictment which could be classified as "illegal possession of a regulated firearm," *i.e.*, two under subsection 5-133 (b) and two under subsection 5-133 (c), the prosecutor failed to clarify, and the court failed to confirm, which subsection was being submitted for the jury's consideration. Moreover, neither the verdict sheet submitted to the jury, the instructions, nor closing argument, clarifies which subsection was at issue. The verdict sheet simply asked the jury to determine whether appellant was not guilty or guilty for "Illegal Possession of a Regulated Firearm." And, the jury instructions informed the jurors that the parties had stipulated that "Maurice Eugene Britton was prohibited from possessing a regulated firearm due to a prior criminal conviction which disqualified him from doing so." More specifically, the jury was instructed, in pertinent part, as follows:

> Ladies and gentlemen, in this case the defendant is charged with the possession of a regulated firearm after having been convicted of a crime that prohibits him from possessing a regulated firearm.
>
> In order to convict the defendant of this crime, the State must prove, one, that the defendant possessed, owned, carried or transported a firearm. And, two, that at the time the defendant possessed the firearm he had been convicted of a crime that prohibits him from possessing the firearm.

We recognize that, in instructing on a charge under Section 5-133, "[t]he judge should not describe the previous conviction with any more particularity or by using the categories of crimes under [Public Safety §§ 5-133(b), (c)] (such as 'crime of violence' or 'felony')." *Nash v. State*, 191 Md. App. 386, 400 (2010) (quoting *Carter v. State*, 374 Md.

693, 722 (2003)). However, the instructions can be read to apply to both subsections and we simply are unable to discern whether the count submitted was under the broader provisions of Section 5-133 (b), which talks of a "disqualifying crime," defined under Section 5-101 as crimes of violence, felonies, and misdemeanors with penalties exceeding 2 years, or was under the more restrictive provisions, and harsher penalties, of Section 5-133 (c) which concerns prior convictions of crimes of violence and narcotics offenses.

Also noteworthy is the fact that, after the verdict was returned, the trial clerk's worksheet indicated that appellant was found guilty under Count 3 of the indictment which charged a violation of Public Safety § 5-133 (b). The clerk's worksheet also notes that all remaining counts, including the counts under Section 5-133 (c), were nol prossed.[6]

The State asks us to resolve this case on the grounds that the parties appeared to presume that the "one count" submitted was one of the two charges in the indictment under Section 5-133 (c). Indeed, there is an abundance of anecdotal evidence suggesting that appellant was aware that the greater penalty was in play. Appellant was notified prior to trial that the State would be seeking the mandatory minimum sentence under Public Safety § 5-133 (c). And, prior to jury selection, he was offered, and rejected, a plea deal that was less than the 15 years maximum of "a straight five without parole. No split time. No probation." Nevertheless, we are left with a record that did not resolve an ambiguous conviction and sentence.

[6] We are unable to find when the nol prosses to the remaining counts were entered on the record.

Some general principles guide our analysis. Initially, the general rule is that when courts are faced with an ambiguous verdict, the court should take steps to correct that uncertainty. *See Lattisaw v. State*, 329 Md. 339, 345 (1993) (observing that, when a jury's verdict "is ambiguous, inconsistent, unresponsive, or otherwise defective, it is the duty of the trial judge to call the jury's attention to the defect and to direct them to put the verdict in proper form either in the presence of the court or by returning to their consultation room for the purpose of further deliberation.") (quoting *Heinze v. State*, 184 Md. 613, 617 (1945)). We recognize that this case is somewhat problematic because it is arguable that the jury was simply asked to determine whether appellant illegally possessed a handgun. However, we are persuaded that an ambiguity does exist because that determination could have, under these facts, applied to either the charge under Section 5-133 (b) or Section 5-133 (c).

The second guiding principle is that, when there is an ambiguity in sentencing, the defendant prevails. *See Snowden v. State*, 321 Md. 612, 618 (1991) (resolving an ambiguity in defendant's favor and merging sentences because this Court "could not determine whether the general verdict of guilty of abuse was based on the sex offense as a lesser included offense or on other reasons"); *see also Scott v. State*, 351 Md. 667, 675 (1998) (observing that ambiguous penal statutes are "subject to the 'rule of lenity,' which requires that such statutes be strictly construed against the State and in favor of the defendant"); *Robinson v. Lee*, 317 Md. 371, 379-80 (1989) ("Fundamental fairness dictates that the defendant understand clearly what debt he must pay to society for his transgressions. If there is doubt as to the penalty, then the law directs that his punishment

must be construed to favor a milder penalty over a harsher one"). Applying these general principles to the unusual circumstances of this case, we are persuaded that the ambiguity should be resolved in appellant's favor. Accordingly, we shall vacate appellant's sentence and remand for resentencing under Public Safety § 5-133 (b).

REMAND WITH INSTRUCTIONS TO VACATE SENTENCE AND RESENTENCE IN ACCORDANCE WITH THIS OPINION. JUDGMENT OTHERWISE AFFIRMED.

COSTS TO BE PAID ONE-HALF BY APPELLANT AND ONE-HALF BY BALTIMORE COUNTY