Circuit Court for Prince George's County
Case No. CT150237X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1738

September Term, 2016

TRE DAWSON

v.

STATE OF MARYLAND

Meredith,
Reed,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: July 3, 2018

Appellant Tre Cornell Dawson was convicted by a jury in the Circuit Court for Prince George's County of possession of a regulated firearm following a felony conviction, carrying a handgun on his person, and theft in an amount less than $1,000. The circuit court sentenced appellant to fifteen years' incarceration for illegal possession of a handgun and suspended all but five years. For carrying a firearm and theft, the court sentenced appellant to concurrent sentences of three years' and eighteen months' incarceration, to be followed by three years' supervised probation. Appellant presents one question for our review, which we have rephrased slightly:

> Did the circuit court err in denying appellant's motion to suppress evidence?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

I.

Prior to trial, appellant moved to suppress evidence which he argued was obtained as a result of an illegal arrest and search. He argued that the firearm the police seized from his jacket pocket was the fruit of an unconstitutional arrest, which occurred when Officer William Bankhead of the Prince George's County Police Department touched appellant's right hand without probable cause to believe appellant had committed a crime. Alternatively, appellant argued that he was subject to an illegal *Terry* frisk because there was no reasonable suspicion to believe that he was engaged in criminal activity or that he was armed or dangerous.

Officer Bankhead, the only witness at the suppression hearing on August 14, 2015,

testified that at approximately 9:26 p.m. on February 5, 2015, he and his partner, Officer Kavon Lewis, received a call for a trespassing complaint at the Brinkley Mart convenience store located on Brinkley Road in Prince George's County. The call reported that three black men and a black woman were trespassing at the convenience store. As Officer Bankhead was familiar with the store and its workers, he identified the two men behind the counter as the store's owner and manager and said that he usually goes to the store several times during a shift in response to complaints for trespassing, loitering, and disorderly conduct. He also said that the store had been robbed at gunpoint several times.

The officers arrived at the store approximately seventeen minutes after the dispatch call. Officer Bankhead testified that as soon as he and Officer Lewis entered the store, the owner pointed out appellant and his companion, Demetri Adkins, who were standing near the registers, as the people he had called about. Neither man was shopping or purchasing anything at the store. Appellant was looking at his cellphone and removing items from his pocket. The State introduced a video recording at the motions hearing.

Officer Bankhead testified to the evening's events as follows:

> "[THE STATE]: When you arrived for this trespassing complaint, what happened when you walked into the store?
>
> [OFFICER BANKHEAD]: My partner and I arrived on the scene. We walked into the store. The first thing I saw was [appellant] seated at the table there, and the co-defendant Demetri Adkins, standing inside the store. The owner and manager of the store was standing behind the booth with the bulletproof glass, and he pointed to both [appellant] and co-defendant.
>
> [THE STATE]: Now, in terms of this store, are you familiar with that store, this convenient store?

[OFFICER BANKHEAD]: Yes, ma'am. We respond to the store several times usually throughout a shift for various things, loitering complaints, disorderly complaints . . . you know, people hanging out in the area. It's also been robbed several times, most often at gunpoint.

***

[THE STATE]: What did you do upon seeing [appellant] and Mr. Adkins?

[OFFICER BANKHEAD]: I observed [appellant] seated at the table here. He was standing nearest to the counter, leaning up against it. I approached after the manager and owner pointed to him. I approached [appellant].

And based on the circumstances, the nature of the call, the time it had been—I mean it had been an extended period of time from when we initially received the call to when I arrived on the scene. Basically in that amount of time and then prior to that, the owner had come to the conclusion [appellant] and co-defendant had been trespassing in the store for an extended period of time.

[DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: Overruled. I'll give it whatever weight is appropriate.

[THE STATE]: You can keep testifying. What did you do?

[OFFICER BANKHEAD]: I approached [appellant]. And based on that information, based on his clothing, bulky clothing known to hide weapons, I attempted to conduct a pat-down of [appellant] for weapons. When I reached out to take control of [appellant's] right hand, he immediately broke free of my grasp and made a run for the door where my partner intercepted him.

***

[OFFICER BANKHEAD]: I also attempted to put [appellant] under arrest. [Appellant] resisted. He grabbed hold of the door with his right hand. We attempted to take him to the ground to

> effect the arrest. He maintained control of the door in an attempt to evade that.
>
> After an extensive struggle, we were able to place [appellant] into handcuffs under arrest.
>
> [THE STATE]: After you were able to finally gain control of [appellant], what was your next step?
>
> [OFFICER BANKHEAD]: At that point, a search incident to arrest. Any time we place somebody under arrest, we have to inventory all of their belongings, everything in their pockets, any property they might have brought with them to the place we arrested them.
>
> In this case, when I searched [appellant], I located a .38 caliber handgun in the pocket of his jacket."

The trial court denied the motion to suppress on August 21, 2015, explaining as follows:

> "Good morning. All right. So we're here for the Court to render a decision in this case. And I've had an opportunity to consider the evidence in this case, and that is the testimony taken in this case as well as the surveillance video that was provided to the Court by the State with the consent of the defense counsel.
>
> It's interesting to the Court how different individuals can look at a video, surveillance video, and see different things. In this instance, from the Court's perspective and in light of the argument, it's really three different perspectives.
>
> The State says that the clerks were pointing at [appellant]. [Appellant] says that they were clearly pointing at the codefendant. After reviewing the survey, I can't say that I am persuaded that they were—I couldn't tell who they were pointing to. There were lots of places where parts of the room, the store, were not actually on the video, so when they're pointing, I'm not even so sure they were pointing, but when they were looking in different directions, I don't know who was on the other side of that.
>
> So what the Court observed, and a lot of what I saw was consistent with portions of the officer's testimony anyway, but what the Court saw was a situation where [appellant] and the codefendant were clearly loitering. From the Court's

observation on the video, whatever they were up to, it was suspect. They were there for quite some time. They made no purchases. I think it was [appellant] that was back and forth, up and down the aisles in areas where you couldn't see what he was doing.

There was I think one or both of them at different times on a cell phone. It looks like they're scrolling, looking for maybe numbers or phone numbers or whatever. I don't know what they were looking for because you really couldn't see. All you could see was the phone in their hands and them looking like they're scrolling down.

There was a patron who walked in, I'm not sure if it was [appellant] or codefendant who kind of started messing with her a little bit, but it looked like they knew each other. So there appears to be no dispute that both [appellant] and codefendant were asked to leave, that they did not leave, which is clearly obvious from the fact that they were both still present and milling around doing pretty much nothing. When I say nothing, I mean nothing that made no sense to the Court in terms of why they were there. They weren't making purchases, they weren't making any inquiries of the two guys who worked there. And there also seems to be no dispute that the police were called because they were, at that point, trespassing and had been asked to leave.

So as soon as the police arrived, one of the officers went to grab—and when I say 'grab,' he reached for [appellant's] arm and really, before he could even—maybe even before he could touch [appellant], but he may have grabbed him, he m[a]y have actually made contact. But it's really not very clear, 100 percent clear in the video. But certainly, it is clear that [appellant] immediately dropped whatever he had in his hand. I think it was his cell phone, snatched his arm away and bolted.

And when you look at that scene, coupled with the police officer's testimony which the Court found to be credible, that he was intending to conduct a pat down, I think that that testimony is consistent with what the Court saw on the video.

So generally considering the cases that were cited, I don't think that there is a problem with the effort to conduct an initial pat down. I think once [appellant] bolted, I think that going after him and conducting a pat down and ultimately a search is not a violation of [appellant's] rights. I think that also

> consistent with some of the cases and what is testified to, that that is an area where there's been a lot of trouble in that store in the past. And officers are aware of the problems with the store and the area and certainly, I think that coupled with that knowledge and getting a call and arriving and having [appellant] bolt, I think certainly their actions are consistent with and reasonable in light of the totality of the circumstances that they were presented with and so the Court is not persuaded that [appellant's] rights were violated and so the Court is going to deny their motion to suppress."

The jury convicted appellant of all charges, and the court sentenced him to concurrent terms of incarceration of fifteen years, all but five years suspended, three years, and eighteen months, for possession of a regulated firearm, carrying a firearm, and theft, respectively, to be followed by three years' supervised probation.

This timely appeal followed.

II.

Before this Court, appellant argues that the suppression court erred in denying his motion to suppress because Officer Bankhead arrested him without probable cause. He argues that he was arrested when Officer Bankhead approached him and grabbed—or attempted to grab—his arm, and that because the officer lacked probable cause, the evidence obtained after this arrest should have been suppressed. If not an arrest, appellant contends that he was subjected to an illegal frisk under *Terry v. Ohio*, 392 U.S. 1 (1968), because Officer Bankhead failed to conduct an investigatory stop prior to the frisk. He argues, alternatively, that the officer illegally conducted a *Terry* frisk without reasonable suspicion that appellant was armed or dangerous. *See Terry*, 392 U.S. at 24–25. Lastly,

appellant argues that the police searched him unjustifiably, because he had fled an illegal arrest or *Terry* frisk, and that the evidence seized should have been suppressed as fruit of the poisonous tree.

The State maintains that appellant was neither arrested nor frisked by Officer Bankhead and that appellant was the subject of a permissible investigatory stop based on reasonable suspicion of criminal activity. The State contends that even if appellant was subject to an illegal *Terry* stop or frisk, he was not privileged to flee or resist it, and that appellant's resistance constituted new crimes, which purged the taint of any earlier illegal police conduct.

III.

On appellate review of a trial court's denial of a motion to suppress, we view the evidence in a light most favorable to the prevailing party, in this case the State, and accept the court's findings of fact unless we find them to be clearly erroneous. *Sinclair v. State*, 444 Md. 16, 27 (2015). "We review the circuit court's legal conclusions *de novo* and 'exercise our independent judgment as to whether an officer's encounter with a criminal defendant was lawful.'" *State v. Donaldson*, 221 Md. App. 134, 138 (2015) (quoting *Brown v. State*, 397 Md. 89, 98 (2007)), *cert. denied*, 442 Md. 745 (2015).

The core issue before us in this case is whether the initial detention—or attempted detention—of appellant rose to the level of an arrest without probable cause or whether it was a permissible *Terry* stop. In *Little v. State*, 300 Md. 485 (1984), the Court of Appeals

considered the question of what constitutes an arrest under Maryland common law. Chief Judge Robert C. Murphy, writing for the Court, explained as follows:

> "We have defined an arrest in general terms as the detention of a known or suspected offender for the purpose of prosecuting him for a crime. An arrest is effected (1) when the arrestee is physically restrained or (2) when the arrestee is told of the arrest and submits. In sum, 'an arrest is the taking, seizing or detaining of the person of another, *inter alia*, 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.'"

Id. at 509–10.

An investigative stop or a *Terry* stop "is less intrusive than a formal custodial arrest and must be supported by reasonable suspicion that a person has committed or is about to commit a crime and permits an officer to stop and briefly detain an individual." *Swift v. State*, 393 Md. 139, 150 (2006). The mere use of force does not elevate an investigative stop into an arrest "simply because the police used measures more traditionally associated with arrest than with investigatory detention." *Barnes v. State*, 437 Md. 375, 391 (2014). In certain circumstances, "arrest-level force may be warranted in making a stop, 'to protect officer safety or to prevent a suspect's flight.'" *Riggins v. State*, 223 Md. App. 40, 62–63 (2015) (quoting *Elliott v. State*, 417 Md. 413, 429 (2010)).

We consider the totality of the circumstances in determining whether an investigatory stop requiring reasonable suspicion is in actuality an arrest requiring probable cause. *In re David S.*, 367 Md. 523, 535 (2002). No one factor is dispositive. *Johnson v. State*, 154 Md. App. 286, 297 (2003). The nature of the location is an important factor to consider, as is the officer's experience and training. *See Chase v. State*, 224 Md. App. 631,

644–45 (2015), *aff'd*, 449 Md. 283 (2016) (determining that based on the totality of the circumstances, the defendant was subject to an investigatory stop, not an arrest, and the detectives were justified in frisking the defendant for weapons where, based on the detectives' training and experience, the defendant was in a parked vehicle in a high drug trafficking area and the defendant made furtive movements as the detectives approached); *see also Crosby v. State*, 408 Md. 490, 508 (2009) ("In making its assessment, the court should give due deference to the training and experience of the law enforcement officer who engaged in the stop at issue.").

Appellant contends that Officer Bankhead "demonstrated an objective show of force" and "manifested a clear intent to take him into custody" and that under the circumstances, any reasonable person would have assumed that he was under arrest. We disagree.

Officer Bankhead testified that he attempted to grab hold of appellant's right hand but that appellant immediately broke free from him and ran toward the door. Appellant did not submit to the officer's show of authority but instead broke free and then ran away, which is "neither restraint nor submission to custody." *Riggins*, 223 Md. App. at 62. Under the totality of the circumstances, we are persuaded that appellant was not arrested when Officer Bankhead attempted to grasp his hand and detain him.

Appellant argues alternatively that if he was not arrested, then he was frisked illegally because Officer Bankhead lacked reasonable suspicion that appellant was engaged in criminal activity. Appellant contends that based on the description provided by the caller, who reported four suspects, including "one black suspect, male, and then listed a

Number 3 next to that, and then one black female," there was insufficient information to identify him as one of the reported trespassers. Appellant further argues that Officer Bankhead did not have reasonable suspicion that appellant was trespassing, because there was no indication that Officer Bankhead was aware of whether appellant had received due notice to leave the store.

According to Officer Bankhead, whom the suppression court credited, he was responding to a trespassing complaint at this store, as he had done many times before. Approximately seventeen minutes had elapsed from the time that he received the trespassing call until he and his partner arrived at the store, which he characterized as "an extended period of time" for appellant to remain inside the store.[1] Upon the officers' arrival, the store owner and manager pointed immediately to appellant, at which point Officer Bankhead observed appellant leaning up against a counter. Moreover, as the suppression court found from observing the surveillance video, appellant at that time was not making purchases or inquiring of store employees but was merely "milling around and pretty much doing nothing" and scrolling through his phone.

We hold that Officer Bankhead had reasonable articulable suspicion, based on his experience and observations upon his arrival at the store, that appellant was engaged in criminal activity, justifying his investigatory stop of appellant. While proof that appellant had received due notice may be required to establish probable cause for an arrest, it was not required for the officer to conduct an investigatory *Terry* stop. Officer Bankhead was

[1] Officer Bankhead testified that he received the call for the trespassing complaint at 9:26 p.m. and that he and his partner arrived at the store at 9:43 p.m.

permitted to investigate further, based on reasonable suspicion, whether appellant was trespassing. *See Terry*, 392 U.S. at 22 ("a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest")

We are persuaded also that a limited frisk for weapons would have been warranted under these circumstances even though no frisk actually occurred. *See State v. Smith*, 345 Md. 460, 468 (1997) ("The reasonableness of a *Terry* stop and frisk thus must be assessed on a case-by-case basis."). In *Hicks v. State*, 189 Md. App. 112, 124–25 (2009), this Court recognized that although the police officer's attempt to frisk the defendant "was abortive," he was entitled to pat him down before speaking to him if he had reasonable suspicion that the defendant may be armed and dangerous. In order to establish reasonable suspicion for a *Terry* frisk, "[t]he officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.* at 124, quoting *Terry*, 392 U.S. at 27. Based on Officer Bankhead's experience in responding to multiple crimes at that location, including armed robberies, appellant's appearance in "bulky clothing known to hide weapons," and the fact that it was evening in a high crime area, he was warranted in attempting to conduct a pat down for his safety based upon his reasonable suspicion that appellant may have been armed and dangerous.

Appellant's reliance on *Ames v. State*, 231 Md. App. 662 (2017), for the proposition that Officer Bankhead illegally frisked him without first conducting a *Terry* stop is misplaced. In *Ames*, a police officer who responded to a "bare bones anonymous telephone

tip" of an individual with a gun in the waistband of his pants was unable to independently verify the tip when he observed an individual who matched the description but did not appear suspicious and, upon his approach, did not attempt to flee. *Id*. at 666, 671. The officer proceeded to question the individual, who made no threatening gestures, but whom the officer described as appearing "very nervous." *Id*. at 666. The officer also observed that the individual kept touching his left front pocket, which the officer attributed to an "involuntary response" to hiding contraband. *Id*. The officer then conducted a frisk and discovered heroin and drug paraphernalia. *Id*. at 666–67. We determined that the officer did not have reasonable suspicion that the defendant was engaged in criminal activity before frisking him for weapons. *Id*. at 671. As Judge Charles E. Moylan Jr., writing for this Court, explained:

> "A reasonable suspicion to believe that a crime has occurred imposes upon an officer the sometimes dangerous duty to stop a suspect and to investigate further even in hazardous surroundings. In such circumstances, the officer is permitted the additional safeguard for his own protection. The [*Terry*] stop and the [*Terry*] frisk are inseparable parts of the same package."

Id. at 676–77. Because the officer in *Ames* lacked reasonable suspicion to justify a *Terry* stop, the Court explained that he could not frisk the defendant, absent reasonable articulable suspicion that criminal activity was afoot to justify a stop or that he was armed and dangerous. *Id*. at 671. In other words, "[the officer] barged impetuously on to the Beta of a [*Terry*] frisk without having gone through the Alpha of a [*Terry*] stop." *Id*. at 678.

Here, when Officer Bankhead approached appellant, he had reasonable suspicion that appellant was engaged in criminal activity and that appellant may have been armed

and dangerous. Under the circumstances, Officer Bankhead was not required to initiate conversation with appellant before conducting a frisk for his safety. *See Hicks*, 189 Md. App. at 125 (concluding that officer's pat down of defendant *before* speaking to him was justified based on reasonable suspicion that defendant was armed and dangerous).

Moreover, regardless of whether the *Terry* stop was lawful, appellant was *not* entitled to resist it because "[t]here is no privilege to resist either an unlawful *Terry* stop or an unlawful frisk." *See id.* (internal citations omitted). When appellant attempted to flee and forcibly struggled with the police officers, he was not resisting an illegal arrest, but rather obstructing and hindering law enforcement officers in the performance of their duty and committing a second-degree assault, which gave them cause to arrest him. Appellant's commission of new crimes was an intervening circumstance that attenuated the taint from any prior illegal police activity. *See State v. Holt*, 206 Md. App. 539, 565 (2012) (holding that "a new crime, even if causally linked to illegal activity on behalf of law enforcement, is an intervening circumstance that attenuates the taint from that illegal [police] activity" and that "[e]vidence of the new crime should not be suppressed"), *aff'd on other grounds*, 435 Md. 443 (2013).

Once Officer Bankhead had probable cause to arrest appellant, he could search him incident to arrest. *See Arizona v. Gant*, 556 U.S. 332, 338 (2009) ("Among the exceptions to the warrant requirement is a search incident to a lawful arrest."); *see also Belote v. State*, 411 Md. 104, 113 (2009) ("[T]he fact of a custodial arrest alone is sufficient to permit the police to search the arrestee."). The hearing court, therefore, did not err in denying

appellant's motion to suppress where the stop of appellant was lawful, as was the search that resulted in the recovery of the .38 caliber handgun from his person.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.