Circuit Court for Anne Arundel County
Case No. C-02-CR-19-001515

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1971

September Term, 2019

ERIC ALLEN HARLEY

v.

STATE OF MARYLAND

Graeff,
Arthur,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: January 25, 2021

Appellant Eric Harley was convicted of resisting arrest, but acquitted of disorderly conduct, the crime for which he was placed under arrest. He appealed, arguing principally that the police lacked probable cause to arrest him for disorderly conduct (and thus that he had the right to resist an unlawful arrest). We shall affirm the conviction for resisting arrest.

FACTUAL AND PROCEDURAL HISTORY

After a traffic stop in downtown Annapolis on November 17, 2018, the State charged Harley with disorderly conduct and resisting arrest. Harley demanded a jury trial, and his case was transferred to the Circuit Court for Anne Arundel County.

On the day of trial, Harley waived his right to a jury trial. The case proceeded to trial before a circuit court judge.

At the trial, the court heard from one witness: Detective Jacob Horner of the Annapolis City Police Department.

Detective Horner testified that on the morning of Saturday, November 17, 2018, he responded to a call concerning an older black sedan, with paint chips on the hood, that was driving backwards, in circles, and in the wrong lane on West Street in downtown Annapolis. Upon approaching a red light at the three-way intersection of West, Calvert, and Cathedral Streets, Detective Horner saw a black sedan with paint chips on the hood run a red light while traveling in the opposite direction from him. Detective Horner turned around and made a traffic stop of the sedan. Harley was the driver.

Detective Horner got out of his car and approached the passenger's side of Harley's car, because the driver's side was protruding into traffic. As Detective Horner

approached the car, a second officer, Officer Wyatt Davis, arrived on the scene and approached the passenger side as well.

In the car were Harley and a female passenger. Detective Horner asked Harley for his license, but he ignored the request. Detective Horner explained that he had stopped Harley because he had run the red light. Harley continued to ignore him.

After Harley's second failure to acknowledge Detective Horner, the female passenger began yelling and screaming at the officers. Because Detective Horner had been speaking to Harley through the passenger side, the woman's yelling and screaming rendered any discussion with the driver impossible.

Harley eventually produced his license. After receiving the license, Detective Horner asked Harley to get out of the car so that he could talk to him away from the female passenger, but Harley was "defiant." According to the detective, Harley's hands were "locked on the wheel," and he gave no indication that he intended to get out of the car.

At this point, Detective Horner and Officer Davis approached the driver's side of the car and attempted to pull Harley out of the car. When they pulled on him "a little," Harley emerged from the car without further resistance.

Once Harley was out of the car, the female passenger moved to the driver's seat and continued to yell and scream at the officers. The passenger eventually handed over her identification card, got out of the car, and was directed to stand with Officer Davis and Harley. Detective Horner briefly returned to his car with Harley's driver's license and the passenger's identification card to check for outstanding warrants, etc. Although

the detective would ordinarily use the computer in his car to perform that task, he planned to use his radio in this case so that he could "keep [his] hands free with the commotion going on."

Meanwhile, Harley took out his cell phone and was yelling at Officer Davis. The passenger was yelling too. In response to the yelling, Detective Horner got back out of his car and instructed both Harley and the passenger to stop or they would be arrested for disorderly conduct. The detective had previously warned them to quiet down, but had not previously mentioned the possibility of arrest.

After the detective delivered the warning, both Harley and the passenger "calmed down a little bit," and Detective Horner returned to his car to complete the traffic stop. But as soon as Detective Horner sat down in his patrol car the second time, both Harley and the passenger began yelling again. Detective Horner could hear them in his car, from approximately 20 feet away.

Detective Horner got back out of his car and told Harley and the passenger that they were under arrest. Officer Davis attempted to put handcuffs on Harley, but Harley began pulling away from the officer. When Detective Horner attempted to assist his colleague, Harley began pulling on the detective as well. Harley continued pulling on the officers after they told him that he was under arrest. He was trying to keep from being handcuffed.

Eventually, the officers succeeded in forcing Harley to the ground. Once they had pinned Harley to the ground, the officers put Harley in handcuffs.

The scuffle lasted approximately 20 seconds. For this entire period, Harley was "resistive [sic], yelling, [and] not cooperating with the orders [given]." He kept yelling even after he had been physically subdued.

Near the scene of Harley's encounter with the police, a number of businesses were open. As soon as Harley got out of his car, several groups of onlookers had begun to gather in front of the businesses because their attention was drawn to the encounter. Detective Horner estimated that there were three to four small groups of onlookers, totaling 20 people. One of the observers attempted to assist the officers in their struggle with Harley.

On cross-examination, the defense established that Harley's complaints concerned the police officers' conduct and that, as far as Detective Horner knew, Harley did not address his comments to the bystanders.

After the State concluded its case, Harley moved for a judgment of acquittal. In support of his motion, Harley relied chiefly on *Diehl v. State*, 294 Md. 466 (1982). In that case, a majority of the judges on the Court of Appeals agreed that the defendant did not violate a previous version of the disorderly conduct statute when he used vulgar language to express his outrage to a police officer who had engaged in misconduct by issuing an unlawful order. *Id.* at 471-72.[1] The court denied Harley's motion, citing a

[1] The previous version of the statute prohibited a person from willfully disturbing any neighborhood with loud and unseemly noise." Md. Code Ann., art. 27, § 121(1) (1957, 1976 Repl. Vol.). The current statute states that "[a] person may not willfully act in a disorderly manner that disturbs the public peace." Crim. Law § 10-201(c)(2).

distinction between the content of the defendant's speech and the volume of the defendant's speech.

After Harley exercised his right not to testify, the court found him not guilty of disorderly conduct, but guilty of resisting arrest.

On the charge of disorderly conduct, the court found it "likely" that the crowd was gathering because of Harley's "behavior and loudness" and because he was "being argumentative." But the court could not "say beyond a reasonable doubt" that Harley was "guilty of disorderly conduct."

The court correctly recognized, however, that the question of whether Harley was guilty of disorderly conduct was different from the question of whether he was guilty of resisting arrest for disorderly conduct. *See Diehl v. State*, 294 Md. at 483 (Rodowsky, J., dissenting)("insufficiency of the evidence to convict is not to be equated with an absence of probable cause[]"). In the court's view, "[t]he police absolutely had probable cause to make the arrest for the disorderly conduct." Thus the court found beyond a reasonable doubt that Harley had resisted a valid arrest. Had Harley not resisted, the court observed, he might have walked out of the courthouse without a conviction.

Harley filed a timely appeal.

QUESTION PRESENTED

Harley presents one question, which we have reformulated in the interest of concision: Did the circuit court err concluding that the police had probable cause to arrest Harley for disorderly conduct?[2]

STANDARD OF REVIEW

"'[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.'" *Maryland v. Pringle*, 540 U.S. 366, 370-71 (2003) (quoting *Illinois v. Gates*, 461 U.S. 213, 232 (1983); *accord State v. Wallace*, 372 Md. 137, 148 (2002) (stating that probable cause is "a nontechnical conception of a reasonable ground for belief of guilt"). A finding of probable cause requires "less evidence than is necessary to sustain a conviction, but more than would merely arouse suspicion." *State v. Wallace*, 372 Md. at 148 (citations omitted).

"To determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide 'whether these historical

[2] Harley formulated the question as follows:

> In light of *Diehl v. State*, 294 Md. 466 (1982), did the Circuit Court err in finding that there was probable cause for the Appellant's arrest on a charge of disorderly conduct, where the State failed to prove that any disturbance was caused by anything other than the manner of the traffic stop conducted by the State, and where the only loud noises made by the Appellant were conceded by the State's only witness to be speech directed solely at the police officers detaining the Appellant, and to be in protest of his detention, and were therefore protected by the First and Fourteenth Amendments of the United States Constitution? (Appellant's Brief at 3.)

facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause." *Id.* at 371 (quoting *Ornelas v. United States*, 517 U.S. 690, 695 (1996)).

"The probable cause determination is neither entirely a factual determination nor a question of law; rather, it is a mixed question of fact and law, an application of the applicable law to the facts, as found." *Longshore v. State*, 399 Md. 486, 521 (2007) (internal citation omitted). "When there is a conflict in the evidence, an appellate court will give great deference to a hearing judges first-level factual and credibility determinations." *Id.* at 520; *accord Ornelas v. United States*, 517 U.S. at 699 (stating that "a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers"). "Conclusions of law, while permissibly drawn by the trial courts, are not entitled to the same deference." *Longshore v. State*, 399 Md. at 521; *accord Ornelas v. United States*, 517 U.S. at 699 (holding that "as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal[]").

DISCUSSION

The crimes of disturbing the peace and disorderly conduct are currently codified in Md. Code (2002), § 10-201 of the Criminal Law Article ("Crim. Law"). The State charged Harley with violating § 10-201(c)(2), which states: "A person may not willfully act in a disorderly manner that disturbs the public peace."

In a case decided under an earlier version of the statute, this Court held that disorderly conduct requires the "presence of other persons who may witness the conduct

or hear the language and who may be disturbed or provoked to resentment thereby." *In re Nawrocki*, 15 Md. App. 252, 258 (1972). Conduct that offends, disturbs, incites, or tends to incite, a number of people gathered in the same area is considered disorderly. *Id.*

Viewing the facts in the light most favorable to the State, it would certainly seem that the officers had probable cause to conclude that Harley had willfully acted in a disorderly manner that disturbed the public peace. As soon as he was removed from his car, Harley became argumentative and was yelling and screaming at the officers in the presence of a crowd of onlookers. Detective Horner warned him to calm down and lower his voice, but Harley continued. Detective Horner warned him again to stop or he would be arrested for disorderly conduct. After calming down for a short while, Harley started up again, prompting his arrest. At this point, the scene had drawn the attention of several small crowds, totaling 20 people, in a commercial area of downtown Annapolis.

In view of the size of the crowd, the several unsuccessful warnings, and the volume of Harley's protests, the circuit court found it "likely" that the crowd was gathering because of Harley's loud and argumentative conduct. We are required to defer to the court's first-level factual finding. In view of that finding, Detective Horner had reasonable grounds to believe Harley was guilty of disorderly conduct. Detective Horner reasonably believed that Harley was willfully acting in a disorderly manner that was offensive, disturbing, provoking, or tending to incite the number of people that had gathered.

In advocating a contrary conclusion, Harley relies, as he did in the circuit court, on *Diehl v. State*, 294 Md. 466 (1982). *Diehl* does not govern the outcome in this case.

In *Diehl* a police officer conducted a traffic stop because a driver was squealing his wheels. Diehl was a passenger. *Id.* at 467.

Diehl and the driver got out of the car. *Id.* at 468. The officer ordered them to get back in. *Id.* The driver complied, but Diehl did not. *Id.* Instead, he "began yelling, said that he knew his rights, and said that [the officer] could not tell him to get back into the car." *Id.* Among other things, Diehl said "fuck you" to the officer. *Id.*

The officer told Diehl that if he did not get back into the car, he would be arrested. *Id.* In the meantime, a crowd had begun to gather. *Id.* When Diehl refused to get back into the car, the officer arrested him "'for screaming obscenities and . . . drawing a crowd.'" *Id.*

The State charged Diehl under an earlier version of the disorderly conduct statute, which made it a crime to "'wilfully disturb any neighborhood in . . . [any] city, town or county [of this State] by *loud and unseemly noises*'" or to "'*profanely curse and swear or use obscene language* upon or near to any such street or highway within the hearing of persons passing by or along such highway.'" *Id.* at 469-70 (quoting Md. Code Ann. Art. 27, § 121 (1957, 1976 Repl. Vol.) (emphasis and alterations added in *Diehl*). Diehl was convicted. On appeal, he challenged the sufficiency of the evidence to support the conviction. *See id.* at 471.

The *Diehl* majority analyzed the case against the backdrop of the First Amendment's general prohibition against laws abridging the freedom of speech. The majority reasoned that "Diehl's oral communication in this situation clearly constituted speech." *Id.* According to the majority, the arresting officer "did not have any right" to

order that Diehl get back into the car. *Id.* Diehl, the majority said, addressed the officer only after he had made this unauthorized "demand." The majority explained

> Diehl's communication expressed his outrage with this unlawful police conduct, it was addressed only to [the officer] (he was not trying to disturb others or exhort them to breach the peace), and his words were chosen to emphasize his outrage (not to offend others). [The officer's] order precipitated the entire episode. Diehl's speech was merely a response. Even the time and decibel level of this response was a communication that, although distasteful, should not have been surprising to [the officer].

Id. at 471-72.[3]

Having categorized Diehl's utterances as protected speech, the majority went on to conclude that he did not violate the disorderly conduct statute. The majority reasoned, first, that "Diehl did not wilfully disturb anyone."

> Diehl was speaking to [the officer]. His actions were motivated solely as a response to [the officer's] order. The evidence simply does not indicate that Diehl intended to disrupt the quiescence of the neighborhood. People might have begun to stop, look and listen, forming a crowd; however, there also is no evidence showing that any of the observers was disturbed – they probably were mere curiosity seekers.

Id. at 472.

In addition, the majority reasoned that Diehl's "speech" could not "qualify as a loud and unseemly noise" under the statute. *Id.* "As speech protected by the First

[3] In a subsequent decision, a majority of the judges of the Court of Appeals questioned the central premise of the *Diehl* majority opinion, that a law enforcement officer has no right to order a passenger to get back into a car during a traffic stop. *Polk v. State*, 378 Md. 1, 10 n.4 (2003). "Today, there is no question as to the lawfulness *vel non* of an officer's order, following a traffic stop, to the passenger of the stopped vehicle either to remain in or exit the vehicle. *Id.* (citing *Maryland v. Wilson*, 519 U.S. 408 (1997)). In view of the developments in the law since *Diehl* was decided, the Court wrote, "It is not at all clear that, on its facts, *Diehl* would be decided today as it was in 1982." *Id.*

Amendment," the majority explained, "Diehl's conduct must have advocated imminent lawless action and been likely to incite a breach of the peace in order to be proscribable by the State." *Id.* In the *Diehl* majority's view, the statute was "not intended to prevent a citizen, outraged by police misconduct toward him, from loudly protesting such misconduct." *Id.*[4] Accordingly, the majority held where "a person is acting in a lawful manner (a passenger getting out of a stopped car) and is the object of an unlawful police order, it is not usually a criminal violation for such person to verbally protest a police officer's insistence upon submission to such an order." *Id.* at 478.

In a subsequent case, the Court of Appeals held, again in split decision, that *Diehl* applies only when a disorderly conduct prosecution is based on the content of the defendant's speech, not on its volume. *Eanes v. State*, 318 Md. 436, 458 (1990). In *Eanes* the Court of Appeals distinguished *Diehl* in upholding the conviction of a defendant who had protested, loudly, in front of an abortion clinic. *See id.* at 441-43. *Diehl*, the majority said, did not deal "with a conviction based on objectionable loudness, but with one based on allegedly objectionable content." *Id.* According to *Eanes*, *Diehl* applies only when the prohibition against disorderly conduct "seeks to regulate the content of the speech." *Id.* "Even protected speech is not equally permissible in all

[4] The majority also held that Diehl did not use obscene language in violation of the statute (*id*. at 473-74) and that he did not use "fighting words," which are not entitled to First Amendment protection, when he said "fuck you" to the arresting officer. *Id.* at 474.

places and at all times." *Id.* at 446. Rather, all speech is subject to content-neutral restrictions on time, place, and manner. *Id*. at 447-48.[5]

The *Eanes* majority viewed the previous version of the disorderly conduct statute as a content-neutral restriction on the manner of speech. *Id.* at 449. The majority recognized that, as a regulation on the manner of expression, the statute had to be narrowly tailored to serve a substantial government interest. *Id.* In the majority's view, the statute served the substantial government interest of protecting a captive audience of unwilling listeners from unwelcome noise. *Id.* at 449-54. Proceeding from that premise, the majority affirmed the defendant's conviction for disorderly conduct. *See id*. at 458.

Similarly, in *Polk v. State*, 378 Md. 1, (2003), the Court of Appeals, in another split decision, affirmed a conviction for disorderly conduct when the defendant, who was loudly uttering vulgarities in a tirade inside a hospital, violated an officer's order to keep her mouth shut or to keep her mouth quiet. The trial court had found that the officer's orders were directed at the volume of the defendant's speech, not at its content. *See id*. at

[5] In *Polk*, 378 Md. at 10, the majority interpreted *Diehl* to mean that "[b]ecause Diehl was protesting an *unlawful* order, any disturbance created by Diehl's protests did not constitute disorderly conduct." (Emphasis added.) That interpretation appears reasonable in light of the *Diehl* majority's repeated references to Diehl's right to protest "unlawful" orders and police "misconduct." Harley, however, does not challenge lawfulness of the traffic stop that led to his detention. Nor does Harley contend that Detective Horner or Officer Davis issued any "unlawful" orders or engaged in any form of police "misconduct."

6. A majority of the Court upheld the conviction on the ground that the trial court's finding was not clearly erroneous. *See id*. at 21.[6]

In our judgment, this case is governed by *Eanes* and *Polk*, not by *Diehl*. Unlike *Diehl*, where the arrest was based on the content of the defendant's speech, we see no evidence that Officer Horner arrested Harley because of anything he said. To the contrary, the only evidence is that Officer Horner arrested Harley because of the volume of what he was saying – the "yelling" and "commotion" that were audible when the officer was in his patrol car 20 feet away. The circuit court found it "likely," if not certain beyond a reasonable doubt, that a crowd was gathering because of Harley's obstreperous conduct. In addition, the court could reasonably infer that Harley's conduct might disturb some members of the public, such as the employees and proprietors of the several nearby businesses who could not simply walk away from the unwelcome spectacle that Harley was creating.

In these circumstances, the circuit court did not err in concluding that Officer Horner had probable cause to arrest Harley for disorderly conduct. The officer arrested Harley because of the noise that he was making and his refusal to quiet down, not because of whatever words he used in protest of the traffic stop.

[6] *Polk* concerns the subsection of the disorderly conduct statute that prohibits a person from "willfully fail[ing] to obey a reasonable and lawful order that a law enforcement officer makes to prevent a disturbance to the public peace." Crim. Law § 10-201(c)(2). The State did not charge Harley with violating that subsection. Consequently, we do not consider whether the circuit court could have found Harley guilty of violating that subsection.

Harley does not dispute that he resisted arrest for disorderly conduct, but claims that he had the right to resist because, he says, the arrest was illegal. *State v. Wiegmann*, 350 Md. 585, 607 (1998) (recognizing a "long-standing common law privilege permitting persons to resist an illegal warrantless arrest[]"). But because the officer had probable cause to arrest Harley for disorderly conduct, Harley had no right to resist arrest. Crim. Law § 9-408(b)(1) ("[a] person may not intentionally resist a lawful arrest"). Consequently, we affirm his conviction for resisting arrest.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.