UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0523

September Term, 2015

TAROD STEWART

v.

STATE OF MARYLAND

Graeff,
Leahy,
Wilner, Alan M.
(Retired, Specially Assigned),

JJ.

Opinion by Wilner, J.

Filed: March 7, 2016

*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.

The Appellant was convicted by a jury in the Circuit Court for Baltimore City of possession of a firearm after having previously been convicted of a disqualifying crime and of wearing, carrying, or transporting a handgun. Upon those convictions, he was sentenced to ten years in prison, with all but a mandatory five years suspended. He raises two issues in this appeal: (1) whether the court erred in denying his motion to suppress the handgun found on him at the time of his arrest; and (2) whether a *voir dire* question posed to the jury panel was proper. We shall affirm the judgment of the Circuit Court.

Motion to Suppress

In reviewing a trial court's decision to grant or deny a motion to suppress evidence, we ordinarily limit our review to the record made at the hearing on the motion. We view the evidence in a light most favorable to the prevailing party, in this case the State, and accept the trial court's findings of fact unless we find them to be clearly erroneous. *Sinclair v. State*, 444 Md. 16, 27 (2015).

Two Baltimore City police officers testified at the suppression hearing -- Lieutenant Stephen Nalewajko and Detective Courtney Wright. Nalewajko said that, around 9:45 p.m. on March 9, 2013, he and a fellow officer – Major Reitz – were "proactively patrolling" the 700 block of Cherry Hill Road, which Nalewajko knew to be a high crime narcotic area. Nalewajko was paying particular attention to a carry-out shop known as Wing Hing, a place where members of the Hillside Gang routinely congregated and sold drugs and where, several years earlier, the former owner of the store had been killed.

The detective noticed a group of about ten people he knew to be gang members loitering in and near the doorway to the store and three persons inside the store. One of those persons was appellant, whom Nalewajko did not know. The other two were Antonio Rivers, whom he knew to be a "shooter" for the gang and Gerald Hinton, who was the leader of the gang. The group on the outside had no food with them and seemed to have no purpose there except to block the door. As Nalewajko and Seitz approached them, intending to go into the store to speak with Rivers and Hinton, the group began to disperse.

Nalewajko could see appellant in the store, pacing back and forth and looking out the front window. He described appellant as "very nervous and fidgety." As the officers entered the store to talk with Rivers and Hinton, appellant "hurriedly scurried" around Nalewajko and started to go out of the door. As he moved around Nalewajko, appellant had his hands by his side, but, just as he passed, Nalewajko could see him put his hand in front of his waistband, a motion Nalewajko recognized as a "security check." He described a security check as an effort to see if an unholstered handgun the person is carrying is properly secured. The detective said that was a common characteristic of an armed person, tapping an unholstered gun to make sure it is where the person wants it to be.

While this was happening, Detective Wright arrived and stopped appellant as he left the store. Wright observed what was happening inside the store. He saw appellant pacing back and forth, then moving around Nalewajko in order to exit the store, and reaching in his waistband, which Wright also took to be a security check. He gave a similar description

of what that was, to make sure that an unholstered gun is not moving around and not likely to fall out.

Wright immediately put his hand where appellant's hand was and felt a handle with the shape of a gun. He lifted appellant's sweatshirt to determine whether it was, in fact, a gun and, if so, to remove it from appellant. He discovered that the object **was** a gun and that the gun was loaded, at which point appellant was placed under arrest. The frisk and removal of the gun was contemporaneous with Wright's observation of the security check.

In this appeal, appellant treats what Detective Wright did as a *Terry* stop and frisk without the benefit of a reasonable articulable suspicion that any criminal activity was afoot.[1] The argument set forth in his brief is:

> "The police officer's observation of Mr. Stewart walking in front of the restaurant window, walking around the lieutenant to exit the restaurant, and putting his hand on his waistband area did not reasonably suggest, individually or in combination, that criminal activity was afoot. The officers, therefore, did not have reasonable articulable suspicion to stop and frisk Mr. Stewart."

That is not the argument presented to the trial court, however. At the suppression hearing, although defense counsel mentioned *Terry* and its requirement of reasonable articulable suspicion, her argument was that what occurred was not a *Terry* stop, but an arrest. She acknowledged that the officer "*could have* conducted a *Terry* stop" but that he

[1] Our *Terry* reference is to *Terry v. Ohio*, 392 U.S. 1 (1968).

didn't. (Emphasis added).[2] Her point, as best we understand it, was that a *Terry* stop, based on reasonable articulable suspicion, merely allows an officer to engage the person in conversation to develop further information but does not permit the officer actually to touch the person, even as a frisk. A frisk, in her view, cannot lawfully occur simultaneously with the stop; something has to intervene. Her argument was that, while Wright may have been able to stop appellant, he had no right to touch him, that the touching – feeling for the gun, pulling up the sweatshirt, and removing the gun – constituted a seizure, an arrest for which there was no probable cause.

Given this record, the State contends that appellant waived the argument presented in the appeal and that we should not address it. Tempting as it is to adopt the State's position, we shall not decide this appeal on the basis of waiver but shall affirm the ruling of the Circuit Court on the basis that what occurred was, indeed, a stop and frisk and that the Officer Wright had reasonable articulable suspicion to do what he did.

The analysis need not detain us long. In *Bailey v. State*, 412 Md. 349, 366-67 (2010), the Court of Appeals confirmed that the purpose of a *Terry* frisk "is to protect the police officer and bystanders from harm" and that pat-down frisks are proper when the officer "has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." The

[2] Defense counsel asserted at the hearing "And in this case, again, we don't even have a stop. There doesn't seem to be any question about that. There was no stop. They weren't – there was no intention to do a stop, no stop occurred. It was the immediate touching and searching of Mr. Stewart."

Bailey Court confirmed as well that an officer has reason to believe that an individual is armed and dangerous "if a reasonably prudent person, under the circumstances, would have felt that he was in danger, based on reasonable inferences from particular facts in light of the officer's experience."

A pat-down has been described as "a proper, minimally intrusive means of determining whether a suspect is armed." *Bailey*, 412 Md. at 369, quoting from *State v. Smith*, 345 Md. 460, 465 (1997). When the pat-down reveals a hard object that the police officer reasonably believes may be a weapon, the officer may further intrude upon the individual to the extent necessary to seize the suspected weapon. *Smith*, 345 Md. at 469. We know of no case supporting trial counsel's view that, if the circumstances legitimately produce a reasonable suspicion that a suspect may be armed, and may be reaching for a weapon, the officer must engage the suspect in conversation before conducting a frisk (and, indeed, appellant does not urge such a requirement in this appeal).

We have recited the circumstances that led to Officer Wright's decision to ascertain immediately just what it was appellant seemed to be reaching for in his waistband and need not repeat them. They clearly sufficed to give Officer Wright, based on his experience and the nature of the area and the kind of individuals who congregated at the location, reasonable articulable (and articulated) suspicion that appellate was armed, dangerous, and possibly about to become even more dangerous.

Voir Dire Question

During *voir dire* examination, the court asked whether "any member of the jury panel [held] strong views concerning the charge of handgun violation or related laws that would affect your ability to be fair and impartial in this case" and, if so, to stand. There was no objection to that question.[3] Four members of the panel stood up. None of them served on the jury. Three were struck by the court and one was excused because of a peremptory challenge. [4]

The question was improper in its form. The Court of Appeals has made clear that such compound questions that ask in one question (1) whether the prospective juror has strong feelings on an issue, and (2) if so, whether he or she can nonetheless be fair and impartial and render a verdict solely on the evidence and the court's instructions improperly leaves the ultimate determination of bias up to the juror rather than the court. *See Dingle v. State*, 361 Md. 1 (2000); *Pearson v. State*, 437 Md. 350 (2014).

[3] We note that, during a pretrial conference conducted two days before the trial, the trial judge advised the attorneys of the *voir dire* questions he intended to ask, including the one challenged in this case and asked if there would be any objections to those questions. Defense counsel said "no." The defense thus had two opportunities to object to the question now under attack.

[4] As noted in *Dingle v. State, supra*, 361 Md. 1, 4-5, n.5, the mere fact that some members of the panel are ultimately excused for cause is not relevant to whether there was error in the form of the question. Error, in this case, is conceded by the State. We mention the fact that, in response to the question asked, four persons stood and were subjected to further questioning simply because it occurred.

Not every error committed by a trial court warrants consideration on appeal. Md. Rule 8-131, indeed, makes clear that, ordinarily, this Court will not review or decide an issue that was not raised in or decided by the trial court. Acknowledging that no objection was made to the questions now being challenged and that the issue was neither raised in nor decided by the trial court, appellant insists that we review his unpreserved complaint under the "plain error" rule.[5] We discussed the circumstances in which plain error review is appropriate in *Robinson v. State*, 209 Md. App. 174, 202-04 (2012), *cert. denied*, 431 Md. 221 (2013), and *Correll v. State*, 215 Md. App. 483, 515 (2013).

In the end, even if the qualifying prerequisites for such review are met, the Court has discretion whether to excuse a clear waiver by non-action, and, in this case, we decline to do so. The error was an easy one to spot, especially when four jurors stood and were subjected to further questioning. Had counsel called the court's attention to the error, either at the preliminary conference or at trial, it easily could have been corrected.

JUDGMENT AFFIRMED;
APPELLANT TO PAY THE COSTS.

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[5] Appellant does not rely on, or even mention, Rule 8-131, but instead relies solely on Rule 4-325(e) which permits an appellate court to "take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object." Rule 4-325, on its face, applies to instructions given to a jury "at the conclusion of all the evidence and before closing arguments." When questioned on this point, appellate counsel argued that Rule 4-325(e) applies as well to *voir dire* questions but cited no case supporting that proposition. *See*, however, *Lansdowne v. State*, 287 Md. 232, 243 (1980), construing the predecessor Rule 757 as applying only to communications made after the close of evidence and not to preliminary remarks by the judge. Whether Rule 4-325 applies to *voir dire* questions, or not, the discretionary ability of an appellate court to review issues not raised or decided in the lower court, which is what appellant is asking us to do, is permissible under Rule 8-131.