UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1493

September Term, 2014

TRAVIS MASON

v.

STATE OF MARYLAND

Kehoe,
Leahy,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: July 12, 2016

After denying a motion to suppress evidence, the Circuit Court for Prince George's County, in a bench trial, convicted Travis Mason, appellant, of robbery with a deadly weapon and first degree burglary. Appellant, who was sentenced to fourteen years (consecutive to other sentences he was then serving, which totaled 35 years of executed time), challenges both convictions, arguing that the motion court erred in ruling that police did not make a de facto arrest without probable cause when they stopped appellant at gunpoint. Applying lessons from the "hard take-down" line of cases permitting police making an investigate stop to use arrest-level force in ensuring officer safety and preventing flight, we agree with the trial court that the initial detention was a stop for which police had reasonable suspicion based on 911 calls reporting "shots fired." Because that stop quickly ripened into a lawful arrest when police discovered a handgun, we shall affirm appellant's convictions.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant returns to this Court after remanded suppression proceedings. This case began with an indictment charging appellant with armed robbery and other offenses stemming from a home invasion robbery committed on September 7, 2010, in Prince George's County. Two men with guns assaulted a man outside his home, then forced him into the dwelling, where they assaulted an elderly female resident. While the victims were bound and threatened at gunpoint, the assailants stole televisions and other

property. They also attempted to obtain cash using one victim's ATM card, before fleeing in the other victim's Toyota Camry.

Hours after these crimes, at approximately 2:20 a.m. on September 8, appellant was arrested for unrelated reasons, in Montgomery County. As a result of that arrest, police obtained evidence incriminating appellant in the September 7 home invasion robbery. Before trial, appellant moved to suppress that evidence.

At the suppression hearing, the State presented testimony from three Montgomery County police officers who participated in appellant's arrest. At the time of that arrest, the officers were unaware of the invasion robbery earlier that night. They responded to a 911 call reporting "shots fired" at 11819 Ashbrook Court in the Fox Chapel neighborhood of Germantown. That address is a residential townhouse located a few blocks from a home invasion robbery that had taken place just two nights earlier, during which the resident was shot twice by four black males, approximately 19 to 20 years old, wearing dark clothing. The Ashbrook Court address was also within a half mile of at least three other robberies and shootings occurring within the previous two weeks, which were reportedly perpetrated in each instance by three or four young black and Hispanic males in their "late teens, early twenties, out late hours of night wearing dark clothing."

In response to those crimes, the Montgomery County Police Department had established a task force to patrol the area. When the "shots fired" dispatch was broadcast, two of those task force members were a quarter mile away. Officers Jeremy Wojdan and

John Chucoski responded in a police cruiser, turning onto Ashbrook Court just as the police dispatcher broadcast that the previous caller had called a second time to say that the first call was a joke. When such "recanting" or "cancellation" calls are made, it is standard police procedure to respond to the scene to ensure that the second call was not coerced. In accordance with that protocol, as well as their supervisor's direction for all units to proceed, the two officers continued, without lights or sirens, into the parking area in front of the residence from which the 911 calls were made. They arrived first on the scene at 2:20 a.m. Officer Jesse Dickinsheets arrived approximately one minute later.

Upon arrival, Officers Wojdan and Chucoski saw a group of five young men standing by the stoop "right in front of the house" from which the "shots fired" call was made. Although the street was dark, quiet, and otherwise unoccupied, a Toyota Camry was parked at the curb, with its headlights illuminating the group.[1] Two members of the group were Caucasian and the others African American.

While Officer Wojdan was retrieving his M-4 rifle from the rear of the cruiser, Officer Chucoski observed the group. He saw "somebody walk back and forth from the vehicle to the house where they were standing," a distance of about twenty feet. Officer Chucoski drew his pistol.

[1] After appellant was arrested, police learned that this vehicle belonged to one of the victims of the September 7, 2010 home invasion robbery.

With weapons pointed toward the group, the two uniformed officers approached from different sides. After they were spotted, one individual, later identified as Matthew Price, walked "towards the passenger side of the vehicle." Officer Chucoski detained Mr. Price, conducted a *Terry* frisk, and seated him on the curb.

After another officer took over Mr. Price's detention, Officer Chucoski proceeded to "deal[] with the three individuals on the front stoop." Focused "on not getting shot," Officer Chucoski frisked all three. Immediately thereafter, the officer observed a clear plastic container containing suspected marijuana, laying on the ground within a couple feet of where the group had been standing in front of the residence.

Meanwhile, appellant attempted to leave when he saw Officer Wojdan "moving forward towards" the group. After Mr. Price walked away, appellant headed "around the corner of the home." At the same time Officer Chucoski was engaged with Mr. Price and the individuals at the front stoop, Officer Wojdan pursued appellant. Identifying himself as a police officer, he ordered appellant to stop, to "come back" with his hands visible, and to "[g]et on the ground." Appellant continued walking "very fast," ignoring repeated orders. Officer Wojdan followed with his rifle pointed at appellant, "running" to catch up to him. Appellant eventually stopped and got down on the sidewalk. Officer Wojdan returned appellant to the residence, where he was seated on the curb near the white vehicle.

Once the detainees were seated on the curb, Officer Wojdan "stood there as a cover until the other officers arrived on the scene." Joining Officers Wojdan, Chucoski, and Dickinsheets were a canine officer, a sergeant, and another officer. None of the five detainees was handcuffed. "[A]s a safety measure," Officer Wojdan continued to stand by with his rifle and to "canvass the area for other suspects."

Officer Dickinsheets considered the detainees to be "[v]ery similar" to the assailants described in the other incidents under investigation by the task force. While they remained on the curb, he and the other officers conducted an investigation "to see what was going on with this call."

Officer Konkel went to the front door and began talking with residents of the townhouse about the 911 calls. At the same time, Officer Dickinsheets questioned the detainees about the report of gunfire and their activities outside that residence. They responded that "there's nothing really going on, they were just hanging out," denying that shots were fired.

In the course of that brief inquiry, Officer Konkel's flashlight "caught the reflection of [a] silver handgun laying underneath the car," just five yards away from where the detainees were seated on the curb. At that point, Officer Dickinsheets "yelled out gun" and "[e]verybody basically grabbed ahold of one of the suspects," who were "put to the ground and placed in handcuffs" because the officers "weren't sure where

other guns were hidden at that point." According to Officer Dickinsheets, the decision to put all five detainees in handcuffs was made after the gun was located.

At the police station, appellant made statements that incriminated him in the Prince George's County robberies on September 7, and supported a warrant search of his residence, where police recovered property stolen in that crime. Keys to the Toyota Camry, which was stolen in the robbery, were recovered from appellant's pocket. The circuit court denied appellant's motion to suppress that evidence, ruling that it was not the "poisoned fruit" of an unconstitutional seizure because appellant's initial detention was an investigatory stop supported by reasonable suspicion stemming from the 911 calls and appellant's flight.

Pursuant to a plea agreement preserving appellant's right to appeal the suppression court's decision, the State proceeded to a bench trial. Based on a "not guilty agreed statement of facts" relating to the September 7, 2010 home invasion robberies, the trial court found appellant guilty of robbery with a dangerous weapon and first-degree burglary.

In his prior appeal, appellant argued that the motions court erred in denying his trial counsel an opportunity to present argument on the suppression motion and in denying that motion on the merits. *See Mason v. State*, No. 1369, Sept. Term 2012 (Md. App.) (filed Aug. 6, 2013), slip op. at 1-2 (opinion by Timothy J. Martin, J., Specially Assigned). The State conceded that defense counsel should have been afforded an

opportunity to present closing argument. *Id.*, slip op. at 2-3. Without reviewing the suppression ruling or vacating appellant's convictions, we remanded with instructions to conduct a limited suppression hearing in which defense counsel was permitted to present closing argument. *Id.*, slip op. at 8-9. In doing so, we explained that appellant would be entitled to a new trial only "[i]f upon the plenary suppression hearing, when all proper procedures are followed, the motions judge finds that the seizure of the evidence complained of by Mason was unconstitutional and the seized goods should be suppressed[.]" *Id.*

On remand, defense counsel proffered the transcript from the prior suppression hearing as evidence supporting appellant's motion. In lieu of live argument, defense counsel incorporated by reference both the written argument from his appellate brief and the following argument, taken from the transcript of the first suppression hearing:

> [O]ur position is that the police, at the time that – . . . I don't think they had even reasonable articulable suspicion that a crime had occurred in light of the second call. Assuming they have even reasonable articulable suspicion that there was a crime, they did not have reasonable articulable suspicion that Mr. Mason was involved in any criminal activity and[] therefore, they had no reason to detain him. I would submit to the Court that original detention by the police was not a Terry type detention, but rather an arrest not supported by probable cause.
>
> Assuming it was a Terry type situation, I would submit that the police did not have reasonable articulable suspicion to believe that Mr. Mason was involved in any crime; and assuming they had reasonable articulable suspicion to support the notion that Mr. Mason may have been involved in some crime that may or may not have occurred, the length of the detention exceeded the scope of the time needed to investigate

> whatever crime they were investigating after they patted these individuals down, and none of them had a weapon.
>
> To the degree . . . the State's fall back position is that there's probable cause to arrest Mr. Mason for either the marijuana or the gun, we submit that the State and the police lack probable cause to support either of those arrests given that this was not in a car type situation where the gun or the marijuana were accessible. . . only to these individuals, but outside where they were accessible to any of the individuals.

In the first suppression hearing, the trial court ruled that the period "up until the time that the officers actually discovered the gun under the car, as well as the marijuana[,]" constituted an "investigative detention." "At that point in time," the court found, "there was probable cause to arrest the people for possibly being in direct possession of both." At the remanded suppression hearing, the motion court again rejected appellant's contention that he was under arrest before police developed probable cause based on discovery of the marijuana and gun. The court again denied the motion to suppress, explaining:

> The Court finds, based on the totality of the circumstances, that a call went out for shots fired. There was response to the call. The police responded to the scene. They conducted an investigative detention of five people in proximity to where the report was made. One of those persons included . . . the defendant. The investigative detention occurred up until that time, that the officers actually discovered a gun under the car as well as marijuana.
>
> At that point in time the Court finds that there is probable cause to arrest the people for possibility being in direct possession of both.
>
> So, the Motion to Suppress the stop and search and seizure is denied, and the Motion to Suppress the statement as a fruit of the poisonous tree is also denied.

This timely appeal followed.

DISCUSSION

Appellant contends that the motion court erred in failing to suppress the evidence obtained after he was subjected to a police seizure that required Fourth Amendment justification. He concedes that based on the 911 calls, police had reasonable suspicion for an initial investigative detention or "*Terry* stop," and that based on the discovery of the gun, police developed probable cause for an arrest. Appellant argues, however, that the initial detention was not a stop, but a de facto arrest because an officer "approached him with his rifle drawn and had him get on the ground." Because police did not develop probable cause to arrest appellant until later, when the gun was discovered, appellant contends that the motions court should have suppressed all of the evidence obtained after that point. Alternatively, appellant asserts that even if the initial detention was not an arrest, but a permissible form of *Terry* stop known as a "hard take-down," then "[p]olice exceeded the duration of a valid stop by keeping appellant seized for nearly ten minutes before finding a gun underneath a nearby car." Moreover, appellant maintains, "[p]olice did not have probable cause to arrest Mr. Mason after discovering a small amount of marijuana on the ground near someone with a pocket turned inside-out." After examining the applicable law, we shall address each contention in turn.

Fourth Amendment Standards Governing Police Detentions

"The Fourth Amendment to the United States Constitution, which is applied to the states through the Due Process Clause of the Fourteenth Amendment, protects against unreasonable searches and seizures." *Barnes v. State*, 437 Md. 375, 390 (2014). There are two types of non-consensual detentions that require a showing of Fourth Amendment reasonableness. "[A]n arrest – whether formal or de facto – requir[es] the police to have probable cause to believe that the arrestee has been involved in criminal activity[.]" *Id.* In contrast, a *Terry* stop, which is a temporary and more limited detention of the person that typically occurs on the street and is conducted for an investigatory purpose, must be "based on the officer's reasonable suspicion that criminal activity is afoot." *Id. See Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884 (1968).

When a defendant moves to suppress evidence on the ground it is the "poisoned fruit" of an unlawful arrest without probable cause, and the State counters that the detention was a *Terry* stop for which there was reasonable suspicion,

> [a]n appellate court looks only to the evidence that was presented at the suppression hearing. The reviewing court views the evidence in the light most favorable to the prevailing party and defers to the motions court with respect to its first level factual findings. The ultimate determination of whether there was a constitutional violation, however, is an independent determination that is made by the appellate court alone, applying the law to the facts found in each particular case.

Belote v. State, 411 Md. 104, 120 (2009). *See Elliott v. State*, 417 Md. 413, 428 (2010); *Longshore v. State*, 399 Md. 486, 498 (2007).

"In considering whether an investigatory stop is in actuality an arrest requiring probable cause, courts consider the totality of the circumstances[,]" so that "no one factor is dispositive." *In re David S.*, 367 Md. 523, 535 (2002) (internal quotation marks omitted). An arrest is "the taking, seizing, or detaining of the person of another (1) by touching or putting hands on him; (2) or 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[.]" *Bouldin v. State*, 276 Md. 511, 515-16 (1976). "It is said that four elements must ordinarily coalesce to constitute a legal arrest: (1) an intent to arrest; (2) under a real or pretended authority; (3) accompanied by a seizure or detention of the person; and (4) which is understood by the person arrested." *Bailey v. State*, 412 Md. 349, 370 (2010) (citations omitted).

Accordingly, "Maryland courts, before finding that an 'arrest' has occurred, will look to an officer's intent, as evidenced by his objective conduct in the form of his actions and words, and even his subjective state of mind, to determine whether that officer intended to take the arrestee into custody and subject the arrestee to his or her actual control and will." *Belote*, 411 Md. at 129. An officer's use of physical force to detain a suspect frequently constitutes "objective conduct demonstrating the officer's intent to make an arrest." *Bailey*, 412 Md. at 371. Nevertheless, courts have recognized that a contextually reasonable use of force during an investigatory stop does not automatically elevate that detention into a de facto arrest, because "the permissible scope

of a *Terry* stop has expanded" to "allow[] police officers to neutralize dangerous suspects during an investigative detention using measures of force such as placing of handcuffs on suspects, drawing weapons, and other forms of force typically used during an arrest." *Longshore*, 399 Md. at 509.

These principles govern cases involving a "hard take-down," which is a forcible detention typically accomplished with some combination of firearms, handcuffing, and forcing suspects into a prone position. *See id.* at 509-14; *see generally In re David S.,* 367 Md. at 535-39 (reviewing hard take-down cases in which "display of weapons," handcuffing, and ordering suspects to lie on the ground "did not *per se* elevate a seizure to one requiring probable cause"). The Court of Appeals has explained that

> [i]n determining whether a *Terry* stop is elevated to a *de facto* arrest, courts will consider many factors. "Generally, a display of force by a police officer, such as putting a person in handcuffs, is considered an arrest." This Court has, however, recognized certain **limited circumstances when the use of force will be considered reasonable as part of an investigative detention: where the use of force is used to protect officer safety or to prevent a suspect's flight.** The burden is on the State to prove that such special circumstances existed in order to justify the officer's use of force in an investigative detention.

Elliott, 417 Md. at 428-29 (emphasis added; footnote and citations omitted). Thus, "even if the officers' physical actions are equivalent to an arrest, the show of force is not considered to be an arrest if the actions were justified by officer safety or permissible to prevent the flight of a suspect." *Bailey*, 412 Md. at 372 n.8. When evaluating whether the use of force to effect a stop was reasonable, we must consider "the totality of the

circumstances, as they appeared to the officers at the time," keeping in mind that "when police officers are acting in swiftly developing situations, reviewing courts should not indulge in unrealistic second-guessing of the officer." *In re David S.*, 367 Md. at 540.

In *Cotton v. State*, 386 Md. 249 (2005), cited in *Elliott* as an example of when a hard take-down was "sanctioned . . . precisely because one of the special circumstances listed above was present – reasonable suspicion of danger,"*Elliott*, 417 Md. at 429-30, a bystander present during the execution of a no-knock warrant was handcuffed, held under guard, and prophylactically given *Miranda* warnings. The Court of Appeals held this was a reasonable use of force during the investigative stop because it was designed to secure the premises until police could assess what, if any, threats were present. Pertinent to this appeal, the Court held that in executing the warrant at "a premises known to be an open-air drug market where the police are likely to encounter people who may well be dangerous, they are entitled, for their own safety and that of other persons, to take command of the situation and, except for persons who clearly are unconnected with any criminal activity and who clearly present no potential danger, essentially immobilize everyone until, acting with reasonable expedition, they know what they are confronting[.]" *Cotton*, 386 Md. at 258-59.

A hard take-down has been held to be "a legitimate *Terry* stop, not tantamount to an arrest," in comparable instances where police have articulated reasonable grounds to believe that the accused was armed and/or a flight risk. *See, e.g., In re David S.*, 367 Md.

at 539-40 ("The officers, with their weapons drawn, forced respondent to the ground and placed him in handcuffs. This conduct was not unreasonable because the officers reasonably could have suspected that respondent posed a threat to their safety"); *Lee v. State*, 311 Md. 642, 664-66 (1988) (police displaying shotguns and ordering suspects to lie on the ground did not convert a *Terry* stop into an arrest requiring probable cause); *Chase v. State*, 224 Md. App. 631, 648-50 (2015) (After conducting a suspected drug transaction and making furtive movements in his vehicle, the accused and his companion were not placed under de facto arrest when they were removed from the vehicle, prophylactically read *Miranda* rights, and handcuffed, "based on a concern for 'the safety of everyone involved' and "to make sure they didn't have any weapons."); *Williams v. State*, 212 Md. App. 396, 421 (2013) (use of police vehicles to prevent accused from leaving his vehicle did not elevate investigative stop to a de facto arrest); *Trott v. State*, 138 Md. App. 89, 118 (2001) ("the handcuffing of appellant was justifiable as a protective and flight preventive measure . . . and did not transform that stop into an arrest.").

Conversely, when the State fails to establish a threat to police officers or the public, the use of such force has been held to constitute a de facto arrest. *See, e.g., Elliott,* 417 Md. at 431 ("There was . . . no indication that Elliott posed a flight or safety risk in order to justify a hard take-down, which supports the holding that Elliott was arrested when he was initially detained."); *Bailey*, 412 Md. at 373-74 ("Grabbing the petitioner's

wrists when he was not suspected of being armed and dangerous, then conducting a search and removing the vial from his pocket, and, finally, taking him into custody as the initial action leading up to a criminal prosecution, constituted a de facto arrest."); *Longshore*, 399 Md. at 515 ("Because Longshore was neither a flight nor safety risk, there was no justification for placing Longshore in handcuffs. This was, therefore, no mere detention; it was, in fact, an arrest.").

Appellant's Challenges

Appellant argues that "Officer Wojdan placed [him] under arrest without the requisite probable cause when he approached him with his rifle drawn and had him get on the ground." Pointing out that the initial 911 report of shots fired had been "recanted" and that appellant complied with the order to stop and thereafter "did not resist the officer in any way," appellant contends that "any suspected flight could not justify the heavy-handed police behavior, as Officer Wojdan began the encounter with his rifle drawn, before appellant made any movements."

We are not persuaded that the fact that the officers exited their cruiser with weapons drawn establishes that the ensuing detention was an arrest. That precaution measure reasonably ensured the safety of both the responding officers and the public, while an investigation into the "shots fired" report was underway. Given the nature of the 911 calls, the recent shootings and home invasions nearby, the presence of five individuals in front of the address from which the 911calls were made, the attempted

flight of appellant upon seeing uniformed police officers, the officers arriving first on the scene acted reasonably by displaying their weapons to protect themselves and others against the possibility of an armed threat by a group that outnumbered them.

Moreover, Officer Wojdan had ample reason to continue wielding his weapon as he pursued appellant, who failed to obey multiple commands to stop. Likewise, his continued display of the weapon was justified during the time he stood guard over appellant and his companions, while other officers conducted the investigation.

In our view, this encounter exemplifies why police may use arrest-level force to ensure safety and prevent flight during an investigative stop. The officers' use of force, from drawing weapons as protection, to issuing verbal commands to stop, to pursuing appellant at gunpoint, to forcing appellant down to the ground, to seating appellant on the curb with his companions under armed guard, reflects the threat to officers and the public from a group of five possibly armed individuals who were attempting to flee in different directions. Rather than a show of force designed to take appellant into custody for future prosecution, these measures were a show of force designed to protect officers and the public, and to prevent flight while they investigated whether appellant and his companions were involved in the reported criminal activity.

Appellant further contends that his detention exceeded the limits of a *Terry* stop and that the discovery of marijuana failed to provide probable cause for his arrest. Neither argument is supported by the record or the law.

We acknowledge there was conflicting evidence about events surrounding discovery of the marijuana and gun. Officer Wojdan estimated that "about ten minutes" elapsed from the time he arrived to the time that the weapon was discovered and that appellant was handcuffed and arrested as a result of that discovery. Officer Dickinsheets testified that none of the suspects were handcuffed until he discovered the gun and estimated that the entire detention, before that discovery, lasted only five to seven minutes. Officer Chucoski claimed that he discovered the marijuana within "minutes" of frisking the three individuals at the front stoop, and that "[b]ecause of the marijuana on the ground, we placed the five individuals under arrest and searched their persons." But Officer Chucoski also acknowledged that before any of the detainees were handcuffed or taken into custody, "Officer Dickinsheets . . . yelled out that he observed a weapon[.]"

Whether the elapsed time of the *Terry* stop was five minutes or ten, however, police acted reasonably in continuing their investigation throughout that period. Although an investigatory stop must be "limited in duration and purpose and can only last as long as it takes a police officer to confirm or to dispel his suspicions," *see Swift v. State*, 393 Md. 139, 150 (2006), this stop undisputedly remained in progress while officers investigated the report that shots had been fired. As detailed above, after detaining all five individuals to ensure the officers' safety and prevent flight, the officers promptly began to investigate the "shots fired" report, by interviewing the detainees,

contacting residents of the Ashbrook Court home, canvassing for shell casings, and arranging for a canine search.

Moreover, whether the discovery of marijuana, by itself, provided probable cause to arrest appellant is immaterial because appellant was not placed under arrest until after both the marijuana and the gun had been discovered. Thus, even if police did not have probable cause to arrest appellant based on the marijuana discovery, once the gun was spotted, they had probable cause to arrest him based on that discovery. Appellant does not contend otherwise. Because appellant's detention was an investigative stop that continued until discovery of the gun provided probable cause to arrest him, the lower court did not err in denying appellant's motion to suppress.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.