Circuit Court for Anne Arundel County
Case No. C-02-JV-19-506

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2061

September Term, 2019

IN RE: D.S.

Fader, C.J.
Beachley,
Woodward Patrick L.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: January 21, 2021

After seventeen-year-old D.S., appellant, encountered police outside a barbershop in a strip mall, a search of his person yielded 26 vials of crack cocaine. The Circuit Court for Anne Arundel County, sitting as a juvenile court, denied D.S.'s motion to suppress that evidence, rejecting his argument that police obtained the evidence pursuant to an unconstitutional stop and search.

In this appeal, D.S. challenges that ruling and the resulting adjudication that he was involved in conduct that, if performed by an adult, would constitute criminal possession of cocaine with intent to distribute, and possession of paraphernalia. In doing so, D.S. implores us to adopt a "reasonable Black teenager" standard in evaluating whether officers seized him within the meaning of the Fourth Amendment. In D.S.'s view, a reasonable Black teenager would not have felt free to leave under the circumstances of this case.

We need not adopt D.S.'s "reasonable Black teenager" standard to conclude that no reasonable person would have felt free to leave based on the totality of the circumstances. Accordingly, we hold that D.S. was subjected to an unlawful seizure, and that the evidence seized pursuant to that seizure must be suppressed as fruit of the poisonous tree. Accordingly, we reverse the decision of the suppression court, and vacate D.S.'s adjudication.

BACKGROUND

Our summary of the record focuses on the suppression hearing conducted as part of the exceptions and disposition hearing on November 25, 2019. *See Thornton v. State*, 465 Md. 122, 139 (2019) (noting that, in reviewing a court's ruling on a motion to suppress, "we consider only the facts generated by the record of the suppression hearing" (citing

Sizer v. State, 456 Md. 350, 362 (2017))). The State only presented testimony from one of the four detectives present during the encounter with D.S.

Around noon on August 7, 2019, Anne Arundel County Detective Glenn Wright was on "regular patrol" in the Brooklyn Park area, driving "an unmarked grey Chevrolet Caprice" with Detective Smith.[1] Both were dressed in "BDU pants,[2] a t-shirt, and a tac vest with Police and [a] badge on it." Each carried a service weapon and a taser, which were visible outside their clothing.

As part of their assignment to the Northern District Tactical Patrol Unit, the two detectives "directly deal[t] with community complaints" regarding "quality of life issues" such as "theft from autos, burglaries, robberies, CDS complaints, and so on." According to Detective Wright, members of this unit do not receive calls for service, but instead "proactively patrol looking for various violations such as trespassing, loitering, traffic violations." As of August 7, 2019, Detective Wright had been assigned to this unit for "a couple of months." That day, two other detectives assigned to the unit were also out patrolling the same vicinity, dressed in the same attire and carrying the same weapons.

Detectives Wright and Smith went to the Brooklyn Park Shopping Plaza, which is "one of the larger shopping centers in the area" with "[a]ssorted different shopping stores[,]" "food places[,]" and "a barbershop." Typically, "[t]here are more calls for

[1] The record does not reveal Detective Smith's first name.

[2] "BDU" is an acronym for "Battle Dress Uniforms" which commonly feature "'baggy cargo pants,' modeled after current-issue United States military uniforms." *Jones v. State*, 425 Md. 1, 9 n.2 (2012).

service there and complaints there." Previously, Detective Wright had been to the "strip mall" for "[d]ifferent complaints" including "robberies, shoplifting, loitering, CDS complaints, anything and everything." In terms of experience, Detective Wright had conducted "50 to 100" drug investigations at the Brooklyn Park Shopping Plaza during his seven years on patrol and two years with the Tactical Unit. There were "posted signs" stating that "loitering" was not allowed at the shopping plaza.

As Detectives Wright and Smith "drove through" the shopping center, they "observed a subject that [they] recognized as Anthony Godbolt standing out loitering in the area after being told that he was no longer allowed at that shopping center." According to Detective Wright, "[w]e had told him unless he was conducting business not to be standing out front of businesses due to CDS complaints we've had with him in the past." Detective Wright explained that he had received information from confidential sources that Mr. Godbolt "distributes" drugs and testified that "[w]e have done now multiple search warrants on his home and have locked him up for distribution."

When Detective Wright first "pulled into the shopping center and saw Mr. Godbolt" "just standing in front of the barbershop," D.S., whom Detective Wright did not know, was with Mr. Godbolt. Detectives Wright and Smith "parked [their] vehicle and went to approach" Mr. Godbolt. The other patrol team in their unit arrived "[l]ess than a minute" later because "[t]hey generally follow behind" as the two units "patrol together." The two officers in that vehicle parked "two car lengths away" then immediately exited their vehicle to join Detectives Wright and Smith.

On direct examination, Detective Wright testified that when Mr. Godbolt and D.S. "were in front of the barbershop, we were probably the next door over. It's a strip mall type of location." Although the detectives did not have lights or sirens visible on their unmarked vehicle, Mr. Godbolt and D.S. "immediately entered the barbershop located there." The detectives did not order them to stop.

As the two entered the barbershop, the four detectives "continued walking towards it." When the detectives "got to the front door of the barbershop[,]" D.S. and Mr. Godbolt "were both being escorted out by an employee who [they] later found out was the owner of the shop." The owner "was physically moving them out of the store and telling them to leave." Mr. Godbolt and D.S. were only in the shop for "[a] few seconds."

Once outside the barbershop, Detective Wright began speaking to Mr. Godbolt, but not D.S., who stood directly to Mr. Godbolt's left. The four officers were standing "[a] couple of feet" away from D.S. as the encounter unfolded:

[PROSECUTOR]:	If you can set up the scene for me a little bit here. Where was everyone standing?
[DETECTIVE WRIGHT]:	So right in front of the barbershop. So the barbershop's door is located to the right side of the business -- the front right. And then it's windows. So there in front of the windows.
[PROSECUTOR]:	When you spoke with Mr. Godbolt, what happened?
[DETECTIVE WRIGHT]:	During the course of the conversation I asked him for permission to search his person.

[PROSECUTOR]:	Did you address any questions to [D.S.] at this point?
[DETECTIVE WRIGHT]:	No.
[PROSECUTOR]:	What happened when you asked Mr. Godbolt if you could search his person?
[DETECTIVE WRIGHT]:	He consented.
[PROSECUTOR]:	What, if anything, occurred with [D.S.] at that point?
[DETECTIVE WRIGHT]:	At that point I heard him say, you can check my pockets.
[PROSECUTOR]:	At this point in time was [D.S.] detained in any way?
[DETECTIVE WRIGHT]:	No.
[PROSECUTOR]:	Had you addressed any questions to him?
[DETECTIVE WRIGHT]:	I had not, no.
[PROSECUTOR]:	Had you spoken to him in any way?
[DETECTIVE WRIGHT]:	I had not, no.
[PROSECUTOR]:	Had you blocked his passage?
[DETECTIVE WRIGHT]:	I had not, no. . . .
[PROSECUTOR]:	If [D.S.] tried to leave at that point what would have happened?
[DETECTIVE WRIGHT]:	We probably would have figured out if the owner from the shop wanted to charge for trespassing or anything. But probably we'd just let him go.
[PROSECUTOR]:	When [D.S.] said, you can check my pockets, what did you do?

[DETECTIVE WRIGHT]:	After I was done searching Mr. Godbolt I proceeded to check [D.S.'s] pockets. . . .
[PROSECUTOR]:	. . . . What happened? When you checked his pockets what did you find?
[DETECTIVE WRIGHT]:	There was nothing in his pockets but I detected a bulge inconsistent with normal human anatomy in the inside of the pocket closer to his skin.
[PROSECUTOR]:	When you say closer to his skin where do you mean?
[DETECTIVE WRIGHT]:	It was in the crease between his groin and thigh.
[PROSECUTOR]:	And when you say a bulge, what did it feel like?
[DETECTIVE WRIGHT]:	It felt like a plastic bag containing several smaller objects.
[PROSECUTOR]:	Did you ask [D.S.] anything at this point?
[DETECTIVE WRIGHT]:	I asked him what that object was.
[PROSECUTOR]:	And what, if anything, did he say?
[DETECTIVE WRIGHT]:	He said that he was getting a hard-on. . . .
[PROSECUTOR]:	And did this feel like what he declared it to be?
[DETECTIVE WRIGHT]:	No.
[PROSECUTOR]:	What happened next?
[DETECTIVE WRIGHT]:	I asked him to turn around, face the window, and spread his legs so I could better search that area.
[PROSECUTOR]:	And why did you do that?

[DETECTIVE WRIGHT]:	Just to get a better feel on the area because from what I could just feel through the pockets I knew it was something that wasn't supposed to be there.
[PROSECUTOR]:	Did you have any -- based on your knowledge, training, and experience did you have any idea what it may be?
[DETECTIVE WRIGHT]:	I believed it to be CDS, yes.
[PROSECUTOR]:	And why did you believe that?
[DETECTIVE WRIGHT]:	Through my training, knowledge, and experience I know that dealers and users of CDS will typically conceal their CDS in the groin area in order to avoid detection from law enforcement.

As Detective Wright "tried to search the area" where he felt the suspected CDS, D.S. began "moving around and wouldn't comply with just staying still so that" the search could be completed. Detective Wright testified that, at the point when D.S. obstructed his ability to complete the search, D.S. "was detained." D.S. was then handcuffed and taken to the detectives' "vehicle in order to block him from the view of the general public." They "were able to open his pants and expose the area and located what [Detective Wright] had felt[,]" which was "26 vials or pop-tops of crack cocaine." On cross-examination, defense counsel elicited that Detective Wright was "just doing proactive patrol and loitering is one of" the issues they were investigating. According to the detective, the reason for the encounter was that "[w]e saw them loitering."

In challenging D.S.'s motion to suppress, the State argued that the encounter between the detectives and D.S. was a mere accosting wherein D.S. was free to leave at

any time. Thus, in the State's view, D.S.'s Fourth Amendment protections were not implicated. D.S. disagreed, arguing that the totality of the circumstances demonstrated that he was not free to leave, and that the detectives lacked reasonable articulable suspicion to conduct an investigative stop.[3]

The juvenile court denied the motion to suppress. In doing so, the court stated,

> I believe what happened here was purely a consensual search that did not implicate the Fourth Amendment in any way. . . . I think that just because there were four officers there and they may have tactical vests on and may have had weapons and they may have created an arc about these two individuals, there was nothing to indicate that that rose to the level of some kind of coercion that a reasonable person would believe they were not free to go. They directed no questioning or interest, from the testimony I heard, in this respondent at all until this respondent gratuitously offered a search of his pockets. We don't even reach the question of whether this was some kind of coercive stop that coerced the consent. The officers didn't even ask the question, may we search you. It was a gratuitous, spontaneous offer on the part of the respondent. And I think that also is distinguishable from the other cases cited.

Simply put, the suppression court found that the interaction between D.S. and the detectives was a consensual encounter that did not give rise to Fourth Amendment protections, and that D.S. voluntarily consented to a search of his person.

STANDARD OF REVIEW

When reviewing the denial of a motion to suppress, we are limited to the suppression hearing record. *See Scott v. State*, 247 Md. App. 114, 128 (2020). We view such evidence, and any inferences fairly deducible from it, in the light most favorable to the prevailing

[3] Defense counsel also argued that Detective Wright exceeded the scope of the search to which D.S. consented. Although the thrust of D.S.'s motion to suppress was that Detective Wright improperly manipulated objects beyond the scope of D.S.'s consent, we need not reach that issue on appeal because we shall hold that D.S. was unlawfully seized.

party, in this case the State. *See Thornton*, 465 Md. at 139. Applying pertinent precedent and principles to the evidence presented at the suppression hearing, we make our own "independent constitutional evaluation" of the encounter. *See Pacheco v. State*, 465 Md. 311, 319 (2019) (quoting *Grant v. State*, 449 Md. 1, 15 (2016)).

DISCUSSION

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures, directing that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause[.]" U.S. CONST. amend. IV. "[W]arrantless searches and seizures are presumptively unreasonable, and, thus, violative of the Fourth Amendment." *See Thornton*, 465 Md. at 141. Evidence seized by police in violation of the Fourth Amendment generally is not admissible as substantive evidence. *Id*. at 141 (citing *Bailey v. State*, 412 Md. 349, 363 (2010)).

In *Swift v. State*, 393 Md. 139, 149 (2006), the Court of Appeals noted that the Fourth Amendment does not apply to every interaction between law enforcement and a citizen. 393 Md. at 149. Instead, the Court explained the three tiers of interaction between a citizen and law enforcement. *Id*. The first, and most intrusive encounter, is an "arrest," and requires probable cause to believe that a person committed or is committing a crime. *Id*. at 150.

The second type of encounter, known as either a "*Terry*[4] stop" or an "investigatory

[4] The name "*Terry* stop" comes from the seminal Supreme Court case *Terry v. Ohio*, 392 U.S. 1 (1968).

stop," is less intrusive than a custodial arrest, and must be supported by reasonable articulable suspicion that the person committed or is about to commit a crime. *Id*. A person is seized pursuant to a *Terry* stop "when, in view of all the circumstances surrounding the incident, by means of physical force or show of authority a reasonable person would have believed that he was not free to leave or is compelled to respond to questions." *Id*.

The third and least intrusive encounter is sometimes referred to as a "consensual encounter." *Id*. at 151. This occurs where the police simply approach a person and engage in conversation, "and the person is free not to answer and walk away." *Id*. (citing *Florida v. Royer*, 460 U.S. 491, 497 (1983)). The consensual encounter is also referred to as an "accosting." *Mack v. State*, 237 Md. App. 488, 494 (2018). Whereas an arrest and a *Terry* stop implicate the Fourth Amendment's protections, a mere accosting does not. *Swift*, 393 Md. at 150-51.

D.S. argues that the juvenile court incorrectly construed his encounter as a mere accosting because a reasonable Black teenager would not have felt free to walk away under the circumstances. In asserting that the encounter was an unlawful *Terry* stop, D.S. claims that the detectives lacked reasonable articulable suspicion that he had or was about to commit a crime. Finally, D.S. argues that, due to this Fourth Amendment violation, he could not voluntarily consent to the search of his person, and the evidence seized from him should have been suppressed as fruit of the poisonous tree.

We agree with D.S. that his encounter with the detectives was a *Terry* stop rather than a mere accosting. We also hold that the evidence was insufficient to demonstrate that the detectives had reasonable articulable suspicion to justify the *Terry* stop. Finally, we

hold that, because there was insufficient attenuation, D.S. could not voluntarily consent to the search of his person, and the evidence seized should have been suppressed as fruit of the poisonous tree. Accordingly, we reverse.

I. THE CIRCUMSTANCES HERE DID NOT CONSTITUTE AN ACCOSTING

Whether a particular encounter between an individual and a police officer qualifies as a *Terry* stop or a mere accosting depends on whether, "taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" *Florida v. Bostick*, 501 U.S. 429, 437 (1991) (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988)); *see also Scott*, 247 Md. App. at 131 n.23.

The Court of Appeals has identified the following "[f]actors that might indicate a seizure" or *Terry* stop:

> a threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person, the use of language or tone of voice indicating that compliance with the officer's request might be compelled, approaching the citizen in a nonpublic place, and blocking the citizen's path.

Swift, 393 Md. at 150 (citing *Chesternut*, 486 U.S. at 575). Other factors include:

> the time and place of the encounter, the number of officers present and whether they were uniformed, whether the police . . . isolated [the person] from others, whether the person was informed that he or she was free to leave, whether the police indicated that the person was suspected of a crime, whether the police retained the person's documents, and whether the police exhibited threatening behavior or physical contact that would suggest to a reasonable person that he or she was not free to leave.

Ferris v. State, 355 Md. 356, 377 (1999).

At the outset, we reject D.S.'s invitation to apply a "reasonable Black teenager" standard to determine whether the interaction constituted a *Terry* stop. We agree that in determining whether a reasonable person in D.S.'s circumstances would feel free to walk away from police officers or otherwise refuse to respond to their inquiries, courts may consider, as one of the particularized factors surrounding that encounter, both the individual's age and his perceptions about race-related risks in interacting with those police officers. *Cf. United States v. Mendenhall*, 446 U.S. 544, 558 (1980) (observing that where defense "argued that the incident would reasonably have appeared coercive" to the detainee, a Black female, because she "may have felt unusually threatened by the officers, who were white males[,]" such "factors were not irrelevant, neither were they decisive" given "the totality of the evidence"); *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) ("In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances–both the characteristics of the accused[,]" including his "youth" and "the details of the interrogation").

The record, however, is completely devoid of any facts to support the advocated inference that D.S., as a Black teenager, felt less free to leave in these circumstances than would another teenager. D.S. did not testify at the hearing. Nor was any other evidence or argument presented to the juvenile court in an effort to establish that in these circumstances a reasonable seventeen-year-old Black male would not have felt free to terminate this police encounter. Notwithstanding D.S.'s failure to argue this point at the suppression hearing, we conclude that a reasonable person in D.S.'s circumstances, regardless of his race, would not have felt free to "go about his business."

The evidence shows that police made a targeted approach of both D.S. and Mr. Godbolt. The encounter took place around noon on the sidewalk of a shopping center. When D.S. and his companion were standing outside a barbershop that was open for business, four detectives arrived, just moments apart, in two separate vehicles. They parked, exited their cars, and walked toward D.S and Mr. Godbolt. All four wore identical "tactical" attire, featuring BDU pants, military-style vests marked "Police," badges, and visible guns and tasers.

As the officers approached, D.S. and Mr. Godbolt apparently sought to avoid an encounter with them by entering the barbershop. Moments later, when the two exited the shop, the four detectives had positioned themselves in an arc, so that D.S. and Mr. Godbolt were facing the detectives with their backs against the barbershop window. Detective Wright indicated that all four officers were standing "a couple of feet" away from D.S. and Mr. Godbolt. Detective Wright began to question Mr. Godbolt, eventually asking for and obtaining his consent to search his pockets. D.S. then volunteered to have his own pockets searched.

To be sure, some of the factors relevant to determining whether a reasonable person would have felt free to leave are either inapplicable, or favorable to the State. For example, there was no evidence that the officers used language or tone, let alone threatening behavior, to compel compliance, and the encounter took place around noontime in a public setting. And when asked if he had blocked D.S.'s passage, Detective Wright responded, "I had not, no." Nevertheless, considering all of these facts in a light most favorable to the State, we conclude that a reasonable person would have not felt free to leave. *Thornton*,

465 Md. at 139. The evidence shows that four uniformed and armed police detectives formed an arc around Mr. Godbolt and D.S. as they exited the barbershop. That the four officers outnumbered D.S. and Mr. Godbolt contributed to the coerciveness of the encounter. *Ferris*, 355 Md. at 377. Furthermore, in forming the arc, Detective Wright verified that all four officers were in close proximity to D.S. and Mr. Godbolt, forcing them into a face-to-face encounter. *Cf. Swift*, 393 Md. at 156-57 (holding that the Fourth Amendment was triggered because police encounter with pedestrian "was in the nature of constructive restraint" based on the time of the encounter, the officer's conduct during and after his approach, and "the blocking of [the pedestrian's] path"). Although Detective Wright testified that he had not blocked D.S.'s path, there is no dispute that four officers formed a tight arc around D.S. and Mr. Godbolt, using the barbershop wall to close the arc. We further note that the officers failed to inform D.S. that he was free to leave, a factor which we consider in our assessment of the totality of the circumstances. *Ferris*, 355 Md. at 377.

Given this unmistakable show of authority and the accompanying failure to advise D.S. that he was free to go, our independent constitutional appraisal leads us to conclude that no reasonable person in D.S.'s position would have felt free to walk away. As the Court of Appeals has recognized, the "threatening presence of several officers" who are "blocking the citizen's path" are factors that strongly indicate that an encounter was not consensual, but a seizure for which there must be adequate constitutional predicate. *See Swift*, 393 Md. at 150. Indeed, this Court has previously noted that an officer's blocking of a person's egress suggests more than a mere consensual encounter. *Pyon v. State*, 222

Md. App. 412, 448 (2015). In *Pyon*, where a police officer parked her cruiser cater-corner to the defendant's vehicle, partially blocking its egress, we stated that this act "[said] something to a reasonable person about his freedom to leave. If that freedom to leave was not obliterated, it was at least compromised." *Id*. And as our neighbors in the District of Columbia have noted, "an encounter in which a visibly armed police officer in full uniform and tactical vest emerges without warning from a police cruiser to interrupt a person going about his private business is not an encounter between equals." *Jones v. United States*, 154 A.3d 591, 595 (D.C. 2017). When the encounter involves four such officers engaging two people at a shopping center in a manner that effectively blocks their path, the interaction is patently unequal.

We conclude that where four officers dressed in tactical attire exit their vehicles, immediately approach and take a stance within a few feet of two individuals, forming an arc around them so as to effectively trap them against the front side of a barbershop, a reasonable person in D.S.'s position would not feel free to leave. The interaction between D.S. and the police was more than a mere accosting; the interaction was a *Terry* stop. Accordingly, we must now determine whether the detectives possessed reasonable articulable suspicion to justify detaining D.S.

II. THE RECORD FAILS TO DEMONSTRATE REASONABLE ARTICULABLE SUSPICION TO JUSTIFY THE STOP

At the outset, we note that at the suppression hearing, the State did not proceed on the theory that the detectives had reasonable articulable suspicion to justify their detention of D.S. Indeed, the prosecutor explicitly told the suppression court, "So in terms of the

Fourth Amendment, Your Honor, we did have a voluntary encounter that doesn't implicate the Fourth Amendment. [D.S.] was free to walk away at any point. A voluntary -- frankly out of the blue, he voluntarily consent[ed] to be searched." That the State did not proceed on a theory of lawful detention is notable because, if the State were wrong on its accosting theory, it still would have had the burden of proving that the detectives had reasonable articulable suspicion to justify any seizure of D.S. *Id.* at 349 (noting that where the State proceeds with a warrantless investigation, it bears the burden of overcoming a presumption of invalidity); *see also In re Jeremy P.*, 197 Md. App. 1, 15 (2011) (noting that the State bears the burden of "articulating reasonable suspicion that the suspect was involved in criminal activity"). Because we have rejected the State's claim that this was a mere accosting, we must determine whether, on this record, the detectives had reasonable articulable suspicion to otherwise justify detaining D.S.[5]

This Court has stated that "[t]he key to linking any potentially suspicious factor . . . to the possibility of criminal activity by a suspect lies in the hands of the officer who made the *Terry* stop." *In re Jeremy P.*, 197 Md. App. at 15. In *Jeremy P.*, for example, this Court held that "[m]ere conclusory statements by the officer that what he saw made him believe the defendant had a weapon are not enough to satisfy the State's burden of

[5] Despite not proceeding on this theory before the suppression court, the State correctly notes that, "where the record in a case adequately demonstrates that the decision of the trial court was correct, although on a ground not relied upon by the trial court and perhaps not even raised by the parties, an appellate court will affirm." *Robeson v. State*, 285 Md. 498, 502 (1979). The State faces an uphill battle, however, because it bore the burden of showing reasonable articulable suspicion, but never attempted to do so.

articulating reasonable suspicion that the suspect was involved in criminal activity." *Id.* (citing *Ransome v. State*, 373 Md. 99, 110-11 (2003)).

> [T]he officer's account of the stop must include specific ***facts*** from which the court can make a meaningful evaluation of whether the officer's suspicion was objectively reasonable under the totality of the circumstances. As our colleagues in the District of Columbia recently explained,
>
> > even though not a demanding standard, to be "reasonable" the suspicion must be based on facts that would have led another officer to have a similar suspicion. Moreover, to be "articulable," there must be specific evidence—not merely conclusions—that led the officer to suspect criminal activity in a particular circumstance. These two requirements are not only the minimal safeguard of a person's constitutionally protected freedom to go about without coercion or seizure, but also are necessary for meaningful judicial evaluation of police action. We, therefore, look closely at the evidence presented and the trial court's assessment of that evidence, understanding that each case must be evaluated on its own merits, and that "case matching" is of limited utility under a totality of the circumstances analysis.

Id. (quoting *Singleton v. United States*, 998 A.2d 295, 300-01 (D.C. 2010).

The State relies on three factors to show that the detectives had reasonable articulable suspicion to justify the *Terry* stop: (1) Detective Wright's "knowledge of criminal activity at the shopping center"; (2) D.S.'s accompaniment of Mr. Godbolt, whom Detective Wright knew "was an unwelcome presence at the shopping plaza"; and (3) Detective Wright's observation of "D.S. and [Mr.] Godbolt being immediately kicked out of the barbershop after entering," which provided the officers "reasonable suspicion to believe that they were trespassing." The three factors cited by the State as grounds for reasonable suspicion are not persuasive, individually or collectively.

With respect to generalized criminal activity at the shopping center, Detective Wright testified that he initiated the encounter while on "proactive patrol" at the strip mall, where there had been numerous service calls for CDS and other criminal activity. Although patrolling police officers may consider the prevalence of crime in a particular location, we require a detaining officer to articulate *specific* facts justifying the stop of a specific person in a specific location. *Cf., e.g.*, *Ransome*, 373 Md. at 111 ("If the police can stop and frisk any man found on the street at night in a high-crime area merely because he has a bulge in his pocket, stops to look at an unmarked car containing three un-uniformed men, and then, when those men alight suddenly from the car and approach the citizen, acts nervously, there would, indeed, be little Fourth Amendment protection left for those men who live in or have occasion to visit high-crime areas."). The awareness of generalized criminal activity at that location is simply inadequate.

Regarding D.S.'s accompaniment of Mr. Godbolt, we recognize that the latter was the target of the stop because Detective Wright knew he "was an unwelcome presence at the shopping plaza" based on his previous CDS activity and prior notice not to "loiter" on the premises when not patronizing businesses. Yet D.S. did not abandon his Fourth Amendment rights simply by associating with Mr. Godbolt. Although police were entitled to consider that D.S. entered the barbershop with Mr. Godbolt, and to infer that D.S., too, sought to avoid the approaching detectives, they still had to have reasonable suspicion to believe that D.S. was involved in criminal activity. *Cf. State v. Holt*, 206 Md. App. 539, 559-60 (2012), *aff'd*, 435 Md. 443 (2013) ("A person may not be reasonably suspected of criminal behavior based solely on the person's association with a known criminal, but the

fact that a person does associate with a known criminal can be taken into account as part of the totality of the circumstances in determining the existence of reasonable suspicion.").

The reasonable articulable suspicion standard requires the State to articulate a "particularized and objective basis for suspecting the particular person stopped of criminal activity." *Sizer*, 450 Md. at 364 (quoting *Stokes v. State*, 362 Md. 407, 415 (2001)). That suspicion must be based on "a 'common sense, nontechnical conception that considers factual and practical aspects of daily life and how reasonable and prudent people act.'" *Id. at* 365 (citing *Bost v. State*, 406 Md. 341, 356 (2008)). It "does not allow [a] law enforcement official to simply assert that innocent conduct was suspicious to him or her." *Id.* (quoting *Crosby v. State*, 408 Md. 490, 508 (2009)). Here, Detective Wright's repeatedly articulated reason for approaching Mr. Godbolt and D.S. was that he was investigating them for "loitering." As D.S. points out, however, merely standing outside a barbershop that is open for business, does not qualify as "loitering" or "trespassing" so as to trigger reasonable suspicion that D.S. was engaged in criminal activity. *See* Anne Arundel County Code § 9-1-703(a)(4) (defining loitering as refusing to leave a "commercial establishment that is open for business . . . after having been requested to do so by the owner"); Md. Code (2002, 2012 Repl. Vol.), § 6-402(a) of the Criminal Law Article ("A person may not enter or trespass on property that is posted conspicuously against trespass by . . . signs placed where they reasonably may be seen"); CL § 6-403(a) (prohibiting entry of private property "after having been notified by the owner . . . not to do so"). Even if Detective Wright knew that Mr. Godbolt had been advised not to enter the barbershop or to be on the shopping center premises unless he was patronizing another

of its businesses, there was no evidence indicating that police considered *D.S.'s* presence on the property similarly problematic.

As the Supreme Court has observed, "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." *City of Chicago v. Morales*, 527 U.S. 41, 53 (1999). This reflects that "an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is 'a part of our heritage,' or the right to move 'to whatsoever place one's own inclination may direct' identified in Blackstone's Commentaries." *Id.* at 54 (citing 1 W. Blackstone, *Commentaries on the Laws of England* 130 (1765)).

Finally, evidence that the barbershop owner subsequently "escorted" both D.S. and Mr. Godbolt out of the shop did not support a reasonable articulable suspicion that D.S. was violating CL § 6-403 by entering private property after having been notified not to do so. The State's argument ignores the fact that the detectives had no information regarding whether *D.S.* had previously been asked not to enter that business. Thus, the record fails to support the State's assertion that Detective Wright believed that D.S. had been unlawfully loitering. In any event, D.S.'s quick exit indicated that he was complying with the loitering statute by leaving the business when asked to do so.

Although we acknowledge the legitimate community concerns justifying investigative measures as part of "proactive patrol" duties, in this instance, the detectives put the constitutional cart before the horse by deploying a coordinated show of authority to restrain D.S. while attempting to develop grounds for their suspicion that his companion,

and perhaps D.S., were involved in criminal activity. Our Fourth Amendment jurisprudence requires that the reason must precede the suspicion, so that to be constitutionally reasonable, suspicion must be predicated on facts observed before the stop.

We agree with D.S. that the State did not establish that police had reasonable articulable suspicion to detain him. As Detective Wright tacitly conceded, D.S. was caught up in the stop because the task force was targeting his companion based on their knowledge of Mr. Godbolt's prior criminal drug activity and his unwelcome presence at the shopping center.

Although we have no difficulty with the general proposition that the detectives were entitled to approach D.S. and Mr. Godbolt in an attempt to engage them in consensual conversation, we hold that the circumstances here did not amount to a mere accosting of D.S., and the police did not have reasonable suspicion to justify their stop of D.S. where Detective Wright made no observation other than that he was standing with Mr. Godbolt outside a barbershop that was open for business and that he may have attempted to avoid an encounter with the four approaching uniformed and armed police officers.

III. D.S.'S CONSENT TO SEARCH WAS NOT VOLUNTARY

Finally, we turn to the voluntariness of D.S.'s consent to be searched. D.S. correctly notes that, "[i]f the consent were sought and given during a period of unconstitutional detention . . . that factor alone, absent attenuation between the initial taint and the presumptively poisoned fruit, would be dispositive that the consent was not voluntary." *Charity v. State*, 132 Md. App. 598, 634 (2000) (citing *Wong Sun v. United States*, 371 U.S. 471 (1963); *see also Graham v. State*, 146 Md. App. 327, 351 (2002) ("If, on the other

hand, the appellant was being subjected to unlawful restraint, the ostensible consent would be the tainted fruit of that Fourth Amendment violation."). Having established that the detectives unlawfully seized D.S. by restraining him without reasonable articulable suspicion, we hold that there was no attenuation between that constitutional violation and D.S.'s consent to be searched. Accordingly, all evidence seized pursuant to that "consent" search should have been suppressed as fruit of the poisonous tree.

In *Graham*, this Court noted several factors that are relevant in determining whether a consent to be searched was tainted by the constitutional violation, or whether other circumstances attenuated the taint of that violation:

> In determining whether the consent was . . . "obtained by exploitation of an illegal arrest," account must be taken of *the proximity of the consent to the arrest, whether the seizure brought about police observation of the particular object which they sought consent to search*, whether the illegal seizure was "flagrant police misconduct," *whether the consent was volunteered rather than requested by the detaining officers*, *whether the arrestee was made fully aware of the fact that he could decline to consent* and thus prevent an immediate search [of his person], *whether there has been a significant intervening event* such as presentation of the arrestee to a judicial officer, and whether the police purpose underlying the illegality was to obtain the consent.

146 Md. App. at 372 (quoting Wayne R. LaFave, *Search and Seizure* 660-662 (3d ed. 1996)). As with the lawfulness of the seizure, the State bears the burden "to prove that the appellant freely and voluntarily consented to the frisk of his person." *Id*. at 370 (citing *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)).[6]

[6] Because the State proceeded on a theory that the encounter was a mere accosting in the juvenile court, it presented no evidence or argument regarding attenuation. The State's appellate brief is similarly devoid of any argument on this point.

The only two factors that weigh in favor of attenuation here are the fact that "consent was volunteered rather than requested by the detaining officers," and that there was no "flagrant police misconduct." *Id.* (emphasis removed). Nevertheless, all other factors concerning attenuation either weigh against attenuation or are neutral. The proximity of the consent to the unlawful detention was practically immediate—a factor indicating no attenuation. Similarly, D.S. was never "made fully aware of the fact that he could decline to consent." *Id.* Additionally, there was no "significant intervening event" between the timing of the unlawful seizure and D.S.'s volunteering of consent. *Id.*

These factors lead us to conclude that there was no attenuation and that D.S.'s consent was tainted by the constitutional violation. Because the purported consent in this case was tainted by the unlawful detention, the evidence seized therefrom should have been suppressed as fruit of the poisonous tree. Consequently, we must reverse and vacate the court's adjudication of D.S. for possession with intent to distribute cocaine and possession of paraphernalia.[7]

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, SITTING AS A JUVENILE COURT, REVERSED. ADJUDICATION FOR POSSESSION OF COCAINE WITH INTENT TO DISTRIBUTE AND POSSESSION OF PARAPHERNALIA VACATED. COSTS TO BE PAID BY ANNE ARUNDEL COUNTY.

[7] Given our decision, we do not address D.S.'s alternative argument that Detective Wright exceeded the scope of his consent to search his pockets.