Circuit Court for Washington County
Case No. C-21CR-18-000150

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2114

September Term, 2018

MICHAEL BOWENS

v.

STATE OF MARYLAND

Arthur,
Gould,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Gould, J.

Filed: March 16, 2020

After a traffic stop in which he assaulted a police officer, Appellant Michael Bowens was charged with second-degree assault, possession of a regulated firearm after having been convicted of a disqualifying crime, possession of marijuana, and other related counts. He moved to suppress the admission of a handgun that was found on him during the stop and also to suppress a statement he made to a police officer after his arrest. The Circuit Court for Washington County denied his motion.

Mr. Bowens entered a not guilty plea on an agreed statement of facts and was convicted of second-degree assault and illegal possession of a firearm after having been convicted of a disqualifying crime. The State nolle prossed the remaining charges. Mr. Bowens was sentenced to five years' imprisonment for the illegal possession of marijuana and a consecutive ten years' imprisonment for the second-degree assault, with all but three years suspended, for a total of eight years of active incarceration.

Mr. Bowens now argues that the court erred in denying his motion to suppress and that his sentence was illegal. We disagree and affirm.

BACKGROUND FACTS AND PROCEEDINGS

At approximately 3:10 a.m. on January 16, 2018, Officer Steven Lucas of the Hagerstown Police Department was on patrol in a marked police car near the area of Salem Avenue and Burhans Boulevard. The area was considered a high crime area, and there had been a shooting in the area as well as multiple robberies of a nearby 7-Eleven. As he was travelling eastbound on Salem Avenue, Officer Lucas observed a Honda vehicle traveling in the opposite direction. There were no other cars on the road at that time. Officer Lucas

decided to check the car's registration and learned that the registration was associated with a different make of vehicle.

Officer Lucas turned around and started to follow the Honda in order to verify that the registration was correct. The Honda accelerated away from him. Officer Lucas sped up to 45 miles per hour in a 25 mile per hour zone to match the pace of the Honda he was following.

The Honda then made an abrupt left turn onto Winter Street without slowing down. Officer Lucas followed, decelerated to 30 to 40 miles per hour, and lost sight of the Honda for two to three seconds. He saw the Honda again after it had made a right turn onto Forest Street and parked. Officer Lucas then, for the first time, activated the car's overhead lights. At that point, he realized that he had earlier transposed two digits when recording the vehicle registration.

Officer Lucas exited his patrol car and approached the driver's side of the Honda. There were two occupants of the vehicle: the driver and the front seat passenger, Mr. Bowens. It was about 19 or 20 degrees outside, yet the windows of the car were down. An odor of marijuana wafted from the vehicle.

Officer Lucas obtained identifying information from both the driver and Mr. Bowens and called for another officer to assist him. He ran both men's names through his vehicle's local law enforcement database and entered their names into a "call sheet" for the dispatcher to run another check. Through the database, Officer Lucas was alerted to "caution codes" for Mr. Bowens, indicating that he was "affiliated" or involved with one

or several local gangs, or that he may have been implicated in resisting arrest, use or sale of a controlled dangerous substance, or possession of a weapon.

Around this time, Officer Justin Vogel arrived on the scene. Officer Lucas returned to the driver and informed him he was going to search his vehicle because of the odor of marijuana. At Officer Lucas' request, the driver stepped out of the vehicle, and Officer Lucas patted him down. During that frisk, Officer Lucas felt a small stack of folded money in the driver's front right pocket and he said he had about $1,100 in his pocket. Officer Lucas confirmed that the driver was unarmed, and then asked him to wait behind the Honda with Officer Langley Dean, another police officer who had arrived on the scene.

Officer Lucas then went to the passenger side of the Honda and spoke with Mr. Bowens through the open window. Officer Lucas asked him if he had any weapons on him and Mr. Bowens stated that he did not. Officer Lucas asked Mr. Bowens to step out of the vehicle and patted him down on the outside of his clothes. Officer Lucas felt an object in the front right pants pocket of Mr. Bowens' pants that had the outline of a small caliber handgun.

Officer Lucas began to bring Mr. Bowens' hands around his back to place him in handcuffs before Mr. Bowens could reach into his pants pocket. Mr. Bowens turned and pushed Officer Lucas in the chest with his forearm. Officer Lucas and Officer Vogel grabbed Mr. Bowens and began struggling with him, eventually winding up on the ground. According to Officer Lucas, Mr. Bowens was reaching towards his torso and to the "area of his pants where the gun was located." Mr. Bowens was eventually subdued and taken

into custody. The police removed from Mr. Bowens' front right pants pocket a loaded handgun.

The police officers took Mr. Bowens into custody, and the Honda was searched. The police seized a "softball size plastic bag on the passenger side floor" containing between 11 and 13 grams of marijuana, as well as $323 from the driver's side door. Mr. Bowens' person was fully searched, and police recovered $853 cash, a phone, and other personal items.

Mr. Bowens was transported to the Washington County Detention Center. There, Officer Lucas asked Mr. Bowens whether he "intended to answer any questions" related to the incident. Mr. Bowens responded that he had been on his way to his girlfriend's house and took along the handgun for protection because there were going to be some people there whom he did not know.[1,2]

MOTION TO SUPPRESS

Mr. Bowens filed a motion to suppress the firearm as well as the statement he made to Officer Lucas about his possession of the handgun. The court held a hearing on July 31, 2017. Both Officer Lucas and Officer Vogel testified.

[1] Mr. Bowens also asked Officer Lucas if he "got his weed," but that statement is not the subject of this appeal.

[2] The officers' testimony was corroborated by body camera recordings from Officers Lucas, Vogel, and Dean that were included on a CD, labeled "Bowens body cam," which was admitted as State's Exhibit 1, and filed with the record on appeal. The court viewed the video from Officers Lucas' and Vogel's cameras in court but declined to watch the body cam obtained from Officer Dean.

Officer Lucas

Officer Lucas testified that based on his training, knowledge, and experience, he had "'a reasonable, articulable suspicion' the Mr. Bowens could be armed." Officer Lucas based his suspicion on:

> the driver's apparent attempt to elude police contact. The path that the vehicle took up to the point where it parked. The manner in which the vehicle took the turns up to that point. The fact that the driver had a large amount of [] cash on him. . . . [that the cash] could be indicative of controlled dangerous substance being present . . . the fact that there was a strong odor of fresh marijuana coming from the vehicle and the involvements and affiliations of the driver and passenger after they were both checked. . . . Being in the area for the reasons that I mentioned and the fact that it was 3:10 in the morning and no other vehicles [were] out.

Officer Lucas conceded on cross-examination that certain of those observations were applicable only to the driver of the vehicle.

Regarding the statement that Mr. Bowens made at the detention center, Officer Lucas testified as follows:

> Q. Okay. Uh, when you were at the, uh, the Washington County Detention Center did you attempt to speak to Mr. Bowens about the incident?
>
> A. I asked him if he intended to answer any questions about it.
>
> Q. All right. And, at that point, uh, were -- what were you expecting when you asked him if he wanted to answer any questions about the incident?
>
> A. A yes or no answer.
>
> Q. All right. Were you expecting him to, uh, immediately begin speaking about what happened?
>
> A. No, it was a yes or no question.
>
> Q. All right. What was your intention had he have said yes that he did want, want to speak about the incident?

A. To obtain, uh, appropriate paperwork. To Mirandize him, have him sign that paperwork, review his Miranda rights and explain the process of the questioning.

Q. Uh, so when you, uh, asked him if he wanted to speak, what was his response?

A. His response to that question was, he shrugged and said that he was on his way to his girlfriend's house.

Q. And did he state why -- as part of that statement did he state why he -- or that he had a handgun?

A. He said there might be some people there that he didn't know or that he wasn't comfortable with and that he took a handgun for his protection.

Q. What did you say once he made that statement?

A. I told him that if we were going to discuss the incident any further I have to Mirandize him and follow that process.

Q. And what was his response to you advising him that you were going to Mirandize him?

A. Uh, he said -- Mr. Bowens said that he did not have anything else to say.

Officer Vogel

Officer Vogel testified that he arrived at the scene of the stop within two to three minutes after he received the call. Officer Vogel observed Officer Lucas' pat-down of Mr. Bowens and that his pat-down stopped, which indicated that Officer Lucas had found something. Officer Vogel testified that when Officer Lucas went to detain Mr. Bowens, Mr. Bowens shoved Officer Lucas, and a struggle ensued. Officer Vogel also testified that, after Mr. Bowens was in handcuffs, he removed the gun from Mr. Bowens' pants and it had a loaded magazine.

The Court's Ruling

The Firearm

The court first recognized that the stop occurred in the early morning hours in a high crime area, and that a high crime rate is a factor to consider when determining if a police officer's articulated suspicion that the defendant was armed and dangerous was reasonable**.** The court also found that initial stop was justified because the Honda was speeding, going between 40 to 50 miles per hour in a 25 mile per hour zone. The court then discussed Officer Lucas' observation that the windows of the car were down even though it was 19 or 20 degrees outside and that Officer Lucas smelled fresh marijuana in the vehicle.

The court then continued:

> At that point he gets, uh, apparently identification from both gentlemen. Mr. Bowens has a Maryland identification card. And sure enough bells and whistles start to go off on his police computer because, uh, it shows affiliated in one warning. Which according to Officer Lucas means gang affiliation. And caution in another warning, which according to Officer Lucas means either prior arrests, prior police contacts and/or possibility of weapons. It could be any of those things. It could be one of those things.
>
> Honestly, I don't put a lot of credence in today's proceeding into those warnings. Data can be entered incorrectly. There can, there can be -- he ultimately said there was a warrant alert for [the driver]. Turned out to be a deactivated warrant. Um, evidence gets, I mean data gets entered incorrectly a lot of times.
>
> Why Mr. Bowens showed these gang affiliations and cautions eludes me. Um, if in fact he is gang associated and there's evidence of that, that might add to reasonable articulable suspicion because there's case law that says gang affiliation is admissible to show motive and other nefarious activities, um, in a trial. But a caution light that shows affiliation or a caution light that shows possible prior police contacts in and of itself, while I'm sure it would give the officer a reasonable reason to be a little more cautious or to tread lightly or to inquire maybe a little more thoroughly, I don't think those lights add to the reasonable articulable suspicion.

I do think and it's -- a little bit reluctantly, being in a crime does and that's based on the appellate law that I've seen that indicates being in a high crime area, uh, in a late night situation. Especially both can add to reasonable articulable suspicion.

The court denied the motion to suppress the handgun, stating:

Again, what I have at this point then is at the time of the frisk is the smell of marijuana and the high crime area and late at night.

***

I do find that there was reasonable articulable suspicion based on the smell of marijuana combined with late at night in a high crime where there had been two armed robberies of a 7-Eleven which was right along that route on Salem Avenue. And a shooting on Salem Avenue within the prior month or two, again in downtown Hagerstown which is known, unfortunately for heroin, for cocaine use. Um, the, there's certainly reason that the police need to be on their guard.

And for, by the way since the last few years I've been a judge increased violence from handguns. All of which would add to the awareness and heightened sensitivities of someone like Officer Lucas when he's conducting this investigation and stop on the night of January 16th.

So with there being the reasonable articulable suspicion I find the frisk was appropriate. . . .

The court went on:

And the alternative if I'm wrong with that, one factor would be enough to nudge it over the line there's Hicks that, that clearly holds that, um, even if a frisk is unlawful there's no right or privilege on the part of the defendant to resist it by using force against the officer. So, here's force used against the officer which gives the officer probable cause to arrest Mr. Bowens for the assault there would have been a search incident to arrest. Inevitably the handgun would have been discovered under that route and therefore, um, that handgun or any other evidence seized from Mr. Bowens' person, including any cash that might have been seized from his person is not suppressed.

Mr. Bowens' Statement

The court then addressed Mr. Bowens' statement and ruled:

> I don't find that Officer Lucas's question, did Mr. Bowens intend to answer questions to be reasonably likely to induce an incriminating response. I, I agree with Officer Lucas's testimony it was a yes or no question. At that point there was a spontaneous utterance of incriminating information from Mr. Bowens. It was not in response to -- it was, it was a custodial situation. But it was not an interrogation in that it was designed to elicit an incriminating response. It was do you intend to answer questions? And if the answer had been yes, well okay then, we'll get you this Miranda form. Hagerstown Police has the form for it and we'll check you, one, two, three, four. Do you understand all these factors? And then we'll ask the questions.
>
> Considering that it was preliminary to that. Considering it was only an inquiry whether or not Mr. Bowens intended to answer questions, I don't find it was reasonably intended by Officer Lucas to induce a response. And therefore I do find that Mr. Bowens' statements about taking the gun[] to his girlfriend's because of an uncomfortable situation or an inquiry about the weed aren't suppressed either.

MR. BOWENS' SENTENCING

At the plea hearing, the State informed the court as follows:

> It's . . . my understanding Mr. Bowens, as a result of that hearing, will be tendering a not guilty agreed statement of facts as to Count 1, second degree assault and Count 5, illegal possession of a regulated [firearm] under Public Safety Article 5-133(e) after being convicted of a disqualifying event. Uh, those, uh, sentences carry respective 10 and 5 years [respectively]. The State will [be] recommending a period of active incarceration of 10 years. Defense is free to argue for less if they so choose.

The court then informed Mr. Bowens that, "[i]f this plea agreement is accepted[,] the State, apparently, is going to [nolle pros] the other multiple charges against you. They're going to seek, actually, to sentence you to ten years in the Division of Correction.

Your attorney is free to argue for less." Then the court and Mr. Bowens had this exchange:

> THE COURT: Okay. Um, let's see, the maximum penalty for the second degree assault can be ten years. The maximum penalty for the regulated firearm can be five years. Under this plea agreement if I do find you guilty under the agreed facts the maximum sentence could be in 15 years in the Division of Correction. But I have bound myself to suspend at least five of it. Meaning the State could still successfully ask me to impose the ten years. Your attorney is free to argue for less. Do you understand the maximums you're facing?
>
> DEFENDANT BOWENS: Yes, sir.

After confirming that Mr. Bowens had discussed the agreement with counsel and that he understood it, the court accepted the agreement, finding that Mr. Bowens entered into the plea agreement "freely, intelligently and voluntarily" with "the advice of counsel." The court then heard a statement of facts and found him guilty of second-degree assault and possession of a regulated firearm after having been convicted of a disqualifying crime.

After hearing additional information about Mr. Bowens' criminal history, defense counsel argued regarding Mr. Bowens' sentencing:

> DEFENSE COUNSEL: So, I would ask the Court not to sentence him to the ten years that the State is asking for. We'd ask the Court to sentence him to a shorter timeframe understanding that, first of all, not to also say that the State's offer was not a generous offer knowing that it's horrible offenses. But I suspect in receiving whatever sentence he receives from the Court he will also receive a ten year consecutive sentence or somewhere around those lines. I'd be shocked if I was wrong. I don't mean it like that.
>
> So, I would -- I would ask the Court to consider on the firearms offense, I would ask the Court to sentence him to three years on the firearms offense, um, with the balance of that suspended. So that would just be the three and then suspend the two. And then on the assault, because I believe there was contact, but I want the Court to also recall the context in which this contact occurred. I, I would ask the Court to sentence him to a three year sentence on the assault and to suspend the balance. Suspend seven years

> which would essentially give the Court the ability to place -- if I'm doing my math right, nine years.

The court recounted the underlying facts of the case, including Mr. Bowens' prior firearm convictions, and sentenced him to five years, none suspended, for possession of a regulated firearm, with a consecutive ten years, with seven years suspended, for second-degree assault, for a total active incarceration of eight years' imprisonment.

Mr. Bowens timely appealed.

DISCUSSION

Mr. Bowens asks us to address the following questions:

> 1. Did the court err in denying the motion to suppress the firearm?
>
> 2. Did the court err in denying the motion to suppress Mr. Bowens' statement?
>
> 3. Is Mr. Bowens' sentence illegal to the extent that it exceeded the ten-year sentence recommended by the State pursuant to the plea agreement?

For the following reasons, we answer each question in the negative and affirm.

STANDARD OF REVIEW – MOTION TO SUPPRESS

"When reviewing a hearing judge's ruling on a motion to suppress evidence under the Fourth Amendment, we consider only the facts generated by the record of the suppression hearing." Thornton v. State, 465 Md. 122, 139 (2019) (quotation omitted). "We review the evidence and the inferences drawn therefrom in the light most favorable to the prevailing party." Id.

We recognize that the "[hearing] court is in the best position to resolve questions of fact and to evaluate the credibility of witnesses." Swift v. State, 393 Md. 139, 154 (2006).

Accordingly, we defer to the hearing court's findings of fact unless they are clearly erroneous. Bailey v. State, 412 Md. 349, 362 (2010) (citation omitted). "[W]e review the hearing judge's legal conclusions *de novo*, making our own independent constitutional evaluation as to whether the officer's encounter with the defendant was lawful." Sizer v. State, 456 Md. 350, 362 (2017).

MOTION TO SUPPRESS THE FIREARM

The Frisk

Mr. Bowens contends that the court erred in denying his motion to suppress the firearm because the police officer did not have a reasonable articulable suspicion that justified patting him down during the traffic stop.[3] The State counters that the frisk was justified.[4]

A police officer may stop and briefly detain a person if the officer has a reasonable suspicion supported by articulable facts that criminal activity may be afoot. See Terry v. Ohio, 392 U.S. 1, 30 (1968). "The Supreme Court has described reasonable suspicion as 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'" Holt v. State, 435 Md. 443, 459 (2013) (quoting Illinois v. Wardlow,

[3] Mr. Bowens does not challenge either the legality of the traffic stop for speeding or that the smell of marijuana gave the police officers probable cause to search the vehicle. In addition, Mr. Bowens does not dispute that the police can order a passenger out of a vehicle during a lawful stop. See Maryland v. Wilson, 519 U.S. 408, 415 (1997).

[4] The State, for the first time, also advances an inevitable discovery argument, which we decline to consider on appeal. See Elliott v. State, 417 Md. 413, 437 (2010) (internal citation omitted) ("[A]bsent evidence relating to inevitable discovery, the doctrine should not be applied sua sponte because an appellate court's determination of the issue would be based on speculation rather than historical facts that can be verified or impeached").

528 U.S. 119, 128 (2000)). "[I]f an officer has reasonable, articulable suspicion that the suspect was armed, the officer could frisk the individual for weapons." Reid v. State, 428 Md. 289, 297 (2012).

"We do not parse an officer's overall concern and base a judgment on whether its individual components, standing alone, will suffice." McDowell v. State, 407 Md. 327, 337 (2009) (citations omitted). Rather a reviewing court "must look at the 'totality of the circumstances'" to determine "whether the detaining officer had a 'particularized and objective basis' for suspecting legal wrongdoing." United States v. Arvizu, 534 U.S. 266, 273 (2002). The "validity of the stop or frisk is determined by whether the record discloses articulable objective facts to support the stop or frisk." Sellman v. State, 449 Md. 526, 542 (2016) (citation omitted).

Here, Officer Lucas testified that his suspicion that Mr. Bowens might be armed was based on several facts, including:

- The smell of fresh marijuana in the car;
- The time was 3:10 in the morning;
- The area was associated with a high volume of crime; and
- The search in the police database indicated that Mr. Bowens was "affiliated."

The circuit court denied the motion to suppress and concluded that Officer Lucas articulated reasonable suspicion to frisk Mr. Bowens because of "the smell of marijuana and the high crime area and late at night." We examine each of these factors.

The Odor of Marijuana in the Vehicle

"[T]here can be no serious dispute that there is an intimate relationship between violence and drugs." Webster v. State, 221 Md. App. 100, 114 (2015) (citations omitted). As stated by the Court of Appeals, "where an odor of marijuana emanates from a vehicle with multiple occupants, a law enforcement officer may frisk, *i.e.*, pat down, an occupant of the vehicle *if an additional circumstance or circumstances give rise to reasonable articulable suspicion* that the occupant is armed and dangerous." Norman v. State, 452 Md. 373, 379 (2017) (emphasis added).

The Time of the Traffic Stop

Courts have held that the time when a frisk takes place can be an additional relevant consideration justifying a frisk. See e.g., Williams v. State, 212 Md. App. 396, 410 (2013) (observing that a number of factors, including "the time of day of the stop" and "the total lack of vehicular and pedestrian traffic in that area," can contribute to a reasonable suspicion); United States v. Harley, 682 F.2d 398, 402 (2d Cir. 1982) ("The nature of the crime under investigation, the degree of suspicion, the location of the stop, the time of day, the reaction of the suspect to the approach of police are all facts which bear on the issue of reasonableness").

A High Crime Neighborhood

Similarly, courts have held that the fact that the frisk occurred in a high crime area is an important factor to consider. See, e.g., Wardlow, 528 U.S. at 124 (citation omitted) ("that the stop occurred in a 'high crime area' [is] among the relevant contextual considerations in a Terry analysis"); Chase v. State, 224 Md. App. 631, 644 (2015) ("In a

totality of the circumstances analysis, the nature of the area is important in our consideration"), aff'd, 449 Md. 283 (2016).

The Police Computer Database

The police computer database showed "caution codes" for Mr. Bowens, indicating that he was "affiliated"—meaning that he was involved with one or several local gangs, or had a history of resisting arrest, use or sale of a controlled dangerous substance, or possession of a weapon.

The Totality of the Circumstances

Citing Norman and Sellman, Mr. Bowens downplays the significance of the marijuana odor emanating from the car and the location of the stop in a high crime area. In Norman, however, the only basis for the frisk was the odor of marijuana, which the Court alone found was insufficient. 452 Md. at 411-12. And in Sellman, the Court determined that a late-night frisk in a high crime area was unlawful, but the decision was influenced by the "absence of any testimony from the officers providing individualized, objective reasonable suspicion" about the defendant. 449 Md. at 545. Both cases are distinguishable.

Here, Officer Lucas suspected that Mr. Bowens was armed and dangerous based on multiple factors—the odor of fresh marijuana, that it was late at night, that it was a high crime area, and that the police database showed that Mr. Bowens was "affiliated." Although one or more factors alone may not justify a frisk, when considered together they do, and unlike in Sellman, the facts are sufficiently particularized to Mr. Bowens.

Mr. Bowens also contends that "it is not clear what significance [the designation as 'affiliated'] has on the reasonableness of an officer's suspicion that a person is armed and dangerous," focusing on the fact that the term "affiliated" is imprecise and could have meant only that he had been involved with a non-violent crime. Mr. Bowens misses the point: that there may be an innocuous interpretation of "affiliated" is irrelevant if the designation could have implied a connection to organized criminal activity or other dangerous activity which, in conjunction with the other extant circumstances, contributed to a reasonable suspicion that Mr. Bowens was armed and dangerous.

We also disagree with Mr. Bowens' characterization of the court's discounting of the significance of the cautionary codes as a "factual finding." The court did not find anything wrong with the codes; instead, it simply concluded that the codes were not factors in its own analysis. But that doesn't preclude us from attributing significance to the cautionary codes as one of the factors Officer Lucas considered when he decided to frisk Mr. Bowens. Accordingly, we find that the circuit court was not clearly erroneous in denying Mr. Bowens' motion to suppress.[5]

[5] In his testimony at the suppression hearing, the prosecutor asked Officer Lucas if he had a "reasonable, articulable suspicion that [Mr. Bowens] could be armed," and Officer Lucas answered "[y]es." We draw attention to this as a reminder that the relevant question is not on whether the officer thinks he has a reasonable articulable suspicion, but whether he could articulate the basis for a reasonable suspicion at that time. See Thornton, 465 Md. at 147 (internal quotations omitted) ("To articulate reasonable suspicion, an officer must explain how the observed conduct, when viewed in the context of all the other circumstances known to the officer, was indicative of criminal activity.").

The Court's Ruling Based on Hicks

The court ruled, in the alternative, based on Hicks v. State, 189 Md. App. 112 (2009), that "even if a frisk is unlawful there's no right or privilege on the part of the defendant to resist it by using force against the officer. So, here's force used against the officer which gives the officer probable cause to arrest Mr. Bowens for the assault there would have been a search incident to arrest."

In Hicks, two Prince George's County police officers approached a vehicle parked at a gas station after observing what appeared to be a hand-to-hand drug transaction. 189 Md. App. at 115-17. After Mr. Hicks was ordered out of the vehicle and told to place his hands over his head, he responded, "I ain't done nothing," took a swing at one of the officers, and attempted to flee. Id. at 117. Mr. Hicks was subdued and searched, and a handgun was found. Id. at 117-18.

We held the court did not err in denying the motion to suppress the handgun based on its conclusion that the police officers "reasonably suspected that criminal activity may have been afoot and that this suspicion was sufficient to support the investigatory detention of" the defendant. Id. at 122. We also held that there is "no privilege to resist either an unlawful *Terry* stop . . . or an unlawful frisk." Id. at 125 (internal citations omitted). Accordingly, as a separate basis, we held that the arrest and frisk of Mr. Hicks that uncovered the handgun after his assault on the police officer was justified. Id. at 125.

Mr. Bowens argues that Hicks does not apply here because the frisk was unlawful and because the handgun was discovered as a result of the pat-down. Mr. Bowens also

contends that Hicks does not mean that "he also loses the right to exclusion of evidence previously obtained in violation of his Fourth Amendment rights."

Mr. Bowens' attempt to distance himself from Hicks is unavailing. As in Hicks, Officer Lucas articulated a reasonable suspicion that justified the frisk. And, like Mr. Hicks, Mr. Bowens committed a new crime that alone justified the frisk—he assaulted Officer Lucas. See also Belote v. State, 411 Md. 104, 113 (2009) ("the fact of a custodial arrest alone is sufficient to permit the police to search the arrestee"); Barrett v. State, 234 Md. App. 653, 664 (2017) (quotation omitted) ("[o]nce lawfully arrested, police may search the person of the arrestee as well as the area within the control of the arrestee to remove any weapons or evidence that could be concealed or destroyed").[6] Therefore, as in Hicks, Mr. Bowens' assault on Officer Lucas provided an independent basis for the frisk.

MOTION TO SUPPRESS MR. BOWENS' STATEMENT

Mr. Bowens moved to suppress the statement he made at the Washington County Detention Center in response to Officer Lucas' question whether he "intended to answer any questions" related to the incident. Mr. Bowens told Officer Lucas that he had been on his way to his girlfriend's house and took along the handgun for protection because there were going to be people there whom he did not know. The circuit court denied the motion to suppress, finding that Officer Lucas was only trying to obtain a "yes" or "no" answer, and that Mr. Bowens was not being interrogated when he made the statement.

[6] Mr. Bowens contends that United States v. Gaines, 668 F.3d 170 (4th Cir. 2012), supports his argument. Gaines is distinguishable because in that case, the assault on the police officer took place after the firearm was discovered. Id. at 172.

Mr. Bowens argues that the statement should have been suppressed because when he made the statement, he was subjected to a custodial interrogation and had not been advised of his rights under Miranda v. Arizona, 384 U.S. 436 (1966).

Miranda warnings address the "basic concern that the 'compulsion inherent in custodial surroundings' may endanger an individual's fifth amendment right to be free from compelled self-incrimination." Whitfield v. State, 287 Md 124, 130-31 (1980) (quotation omitted). "Miranda warnings are not required in the absence of interrogation." Hoerauf v. State, 178 Md. App. 292, 308 (2008). Not every question asked of a suspect in custody constitutes an interrogation. Prioleau v. State, 411 Md. 629, 639 (2009). As stated by the Supreme Court:

> "[T]he Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Id. at 646 (quoting Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980)).

Whether a conversation is an interrogation is "a mixed question of fact and law," and "is usually fact-dependent." Phillips v. State, 425 Md. 210, 218 (2012). The context in which the incriminating statement was made is critical:

> Assessment of the likelihood that an otherwise routine question will evoke an incriminating response requires consideration of the totality of the circumstances in each case, with consideration given to the context in which the question is asked. The fact that the *answer* to a booking question assists the prosecution in proving its case is not determinative of whether a standard booking *question*, when posed, was *likely* to elicit an incriminating response. A benign question in one case may amount to 'interrogation,' for

> which *Miranda* warnings are required, in another case. Therefore, 'courts should carefully scrutinize the factual setting of each encounter of this type,' . . . keeping in mind that the critical inquiry is whether the police officer, based on the totality of the circumstances, knew or should have known that the question was reasonably likely to elicit an incriminating response.

Fenner v. State, 381 Md. 1, 10 (2004) (quoting Hughes v. State, 346 Md. 80, 95-96 (1997)). (emphasis supplied).

A review of other similar cases can provide guidance for determining when a conversation or question crosses over into an interrogation for Miranda purposes. In Fenner, for example, the defendant gave an incriminating statement when, at a bail hearing, the court asked him, "[i]s there anything you'd like to tell me about yourself, sir?" 381 Md. at 7. The Court of Appeals found that because the question was essentially a routine booking question, it was not "reasonably likely to elicit an inculpatory response from [the]" defendant. Id. at 10. Therefore, in that context, there was no Miranda violation.

Our decision in Hoerauf provides another example of an incriminating statement that we held was not in violation of Miranda. 178 Md. App. 292. There, the detective asked the appellant "whether [he] 'wanted to talk to" him. Id. The appellant responded only with a "yes," and was promptly given his Miranda warnings. Id. The defendant was not questioned until after he received his Miranda warnings, acknowledged that he understood those rights, and indicated that he was willing to talk. Id. We held that the question posed "was not 'reasonably likely to elicit an incriminating response,' nor did it do so." Id. Accordingly, we concluded that the detective did not violate Miranda.

In Prioleau, police officers conducting covert surveillance of a block noticed a car pull up to the curb, and saw the defendant get out and jog to a house. 411 Md. at 633. The

officers then saw the defendant throw a plastic bag that contained vials onto the front steps of the house.[7] Id. The defendant walked away and another man retrieved the bag and distributed its contents to several individuals who followed him. Id. The defendant then returned and walked with the second man as he continued to distribute the contents of the bag. Id. The defendant returned, entered the house, and emerged with another bag of suspected cocaine, and gave the bag to the second man, who proceeded to distribute the vials. Id. The police officers alerted another officer that they believed they was observing "narcotics activity." Id. at 634. The officer arrived, saw the second man hand a vial to an unknown person, and arrested him. Id. The defendant was then arrested. Id. He was moved to the front of the house. Id. One officer then said to him, "What's up, Maurice?," and the defendant responded by blurting out "I'm not going in that house. I've never been in that house." Id. The officer noted that the defendant appeared "very agitated and nervous" when he spoke. Id.

The Court, considering the totality of the circumstances, determined that the defendant's response should not be suppressed. Id. at 645. The Court found that the officer's statement was more like a salutation rather than a question and that it was not reasonable to view it "as designed to elicit an incriminating response." Id. (quotation omitted).

Turning now to the facts of this case, there is no dispute that Mr. Bowens was in custody when he made this statement because he had been arrested, handcuffed, and

[7] The vials were later found to contain cocaine. Id.

transported to the Washington County Detention Center. Similarly, there is no dispute that he had not been given his Miranda warnings. The issue, therefore, is whether Mr. Bowens was being interrogated at the time he made the statement.

And it's a close call. Officer Lucas' question required only a simple "yes" or "no" answer, and we don't question Officer Lucas's sincerity when he testified that he had expected only a "yes" or "no" answer, or that had Mr. Bowens answered "yes," he would have read Mr. Bowens his Miranda rights before questioning him further. However, the Miranda warnings are designed to permit a defendant to make an informed decision about whether to speak, and here, the specific words used in Officer Lucas' question—"do you intend to answer questions?"—called for Mr. Bowens to make an uninformed decision because he had not been given his Miranda warnings, which allows for an informed decision by explaining the risks associated with answering questions and provides assurances that he can't be penalized by remaining silent. In addition, the phrasing of Officer Lucas' question could have possibly conveyed the message that an interrogation had just begun, and Officer Lucas wanted to know whether he was going to cooperate.

Human nature is such that people want to be, and be seen as, cooperative and helpful, and people often offer more than what is asked when answering a question, particularly a "yes" or "no" question. Officer Lucas clearly knows this, as he did the same thing on multiple occasions when he testified at the suppression hearing.[8]

[8] The best example of providing more information to a "yes" or "no" question was when he testified about the statement at issue here:

At bottom, however, our decision turns on the standard of review under which we assess the circuit court's denial of a motion to suppress. As stated above, we apply a clearly erroneous standard of review to the circuit court's factual findings and we view the "evidence and the inferences drawn therefrom in the light most favorable to the" State. Thornton, 465 Md. at 139. Applying this deferential standard, we cannot say that the circuit court's decision was unsupported by the evidence before it, especially in light of the decisions in Fenner, Hoerauf, and Prioleau.

In addition, even if the circuit court had erred, it would have been harmless error. As the Court of Appeals has stated:

> [W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed "harmless" and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict.

Hutchinson v. State, 406 Md. 219, 227 (2008) (quoting Dorsey v. State, 276 Md. 638, 659 (1976)). And, "[a] court's failure to suppress a statement obtained in violation of *Miranda* can constitute harmless error." Logan v. State, 164 Md. App. 1, 49 (2005).

The evidence against Mr. Bowens consisted of, in addition to his one statement at the detention center, the gun, his assault of a police officer, cash found on him, and the

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> Q: " . . . when you were at the . . . Washington County Detention Center did you attempt to speak to Mr. Bowens about the incident?
>
> A: "I asked him if he intended to answer any questions about it."

marijuana found under his car seat. Mr. Bowens opted for a bench trial, and when the court announced its decision, it did not even mention his statement.

Moreover, Mr. Bowens made his statement *after* the police officers knew he possessed a gun. His statement merely explained *why* he had the gun, which was not an element of the crimes to which he was found guilty. As such, we are convinced beyond a reasonable doubt that there was "no reasonable possibility" that the statement contributed to Mr. Bowens' guilty verdict. See State v. Stringfellow, 425 Md. 461, 474 (2012); Frobouck v. State, 212 Md. App. 262, 284 (2013).

ILLEGAL SENTENCE

At his sentencing, the State noted that the two charges that were included in the not guilty agreed statement of facts, second-degree assault and illegal possession of a handgun, carried sentences of ten years and five years, respectfully. The State further stated that it would be "recommending a period of active incarceration of 10 years. Defense is free to argue for less if they so choose." Mr. Bowens' defense counsel in fact did argue for less active incarceration, requesting that the court sentence Mr. Bowens to a total of fifteen years with nine suspended. Mr. Bowens was sentenced to five years' imprisonment for the illegal possession of marijuana and a consecutive ten years' imprisonment for the second-degree assault, with all but three years suspended, for a total of eight years of active incarceration.

Mr. Bowens now contends that his sentence is illegal. Mr. Bowens claims that the trial court exceeded the terms of his plea agreement with the State and that he "was entitled to a maximum total sentence not exceeding ten years." We disagree.

Standard of Review

"A substantively illegal sentence is subject to correction at any time." State v. Crawley, 455 Md. 52, 66 (2017) (citing Md. Rule 4-345(a)). We review an illegal sentence without deference. Id.

Analysis

As stated by the Court of Appeals in Cuffley v. State, 416 Md. 568, 581 (2010), "the terms of a plea agreement are to be construed according to the reasonable understanding of the defendant when he pled guilty." (internal quotation omitted). "The test for determining what the defendant reasonably understood at the time of the plea is an objective one. It depends not on what the defendant actually understood the agreement to mean, but rather, on what a reasonable lay person in the defendant's position and unaware of the niceties of sentencing law would have understood the agreement to mean, based on the record developed at the plea proceeding." Id. at 582.

In Cuffley, the agreement between the parties was for a sentence within the guidelines of four to eight years and the court imposed a sentence of "15 years at the Department of Correction, all but six years suspended, consecutive to the sentence imposed by [the judge who presided over the probation violation]." Id. at 574. The Court found that, based on the inconsistency between the terms of the agreement and the sentence

imposed, "a reasonable lay person in Petitioner's position would not understand that the court could impose the sentence it did."[9] Id. at 585.

Mr. Bowens contends that, as in Cuffley, "[a] lay person in [his] position would not have 'reasonably understood,' . . . that he could have received a total sentence in excess of ten years." To the contrary, the sentence that Mr. Bowens received is consistent with every statement about his sentencing made at the hearing.

This case more closely aligns with the Court of Appeals' decision in Ray v. State, 454 Md. 563 (2017). There, the defendant pleaded not guilty with an agreed statement of facts to charges of conspiracy to commit theft and making a false statement to the police. Id. at 566-67. The written plea agreement, which the defendant signed and was read into the record, included the following term: "Cap of four years on any executed incarceration." Id. at 568-69. The defendant also signed an "advice of rights form," which outlined the elements of each offense and stated that the maximum penalty for the offense was "10 years + 6 months." Id. at 567. The court sentenced the defendant to a term of ten years' imprisonment, with all but four years suspended, on the conspiracy conviction and a concurrent term of six months' imprisonment on the conviction of making a false statement. Id. at 569.

The defendant challenged the sentence as illegal, claiming that "a reasonable lay person in his position[] would have understood the agreement was limited to a maximum total sentence of four years, not suspended time . . . in addition to a four-year term of incarceration." Id. at 569-70. The Court disagreed, holding that the "plain language of the

[9] The Court also found that "regardless of whether the sentencing term is clear or ambiguous, the court breached the agreement by imposing a sentence that exceeded a total of eight years' incarceration." Id. at 586.

disputed provision in [Ray's] agreement [of a] '[c]ap of four years on any executed incarceration,' was clear and unambiguous," id. at 580, and that the terms made "no reference whatsoever to any suspended sentence and, indeed, distinguished themselves from it." Id. at 578 (quotation omitted). The Court observed that it would be "unreasonable to interpret [that language] as prohibiting a *total* sentence beyond the cap specifically imposed on *executed* incarceration." Id. at 578 (emphasis in original).

So too here: the plain language of parties' agreement is clear and unambiguous, and the details of the agreement were made explicitly clear to Mr. Bowens. Here, the court stated:

> . . . let's see, the maximum penalty for the second degree assault can be ten years. The maximum penalty for the regulated firearm can be five years. Under this plea agreement if I do find you guilty under the agreed facts the maximum sentence could be in 15 years in the Division of Correction. But I have bound myself to suspend at least five of it. Meaning the State could still successfully ask me to impose the ten years. Your attorney is free to argue for less.

The court required that Mr. Bowens specifically confirm that he acknowledged "the maximums [he was] facing," and he did. In addition, the State specifically discussed the possible maximum sentences, stating, "those . . . sentences carry respective 10 and 5 years [respectively]." Finally, Mr. Bowens' defense counsel discussed the maximum sentences when she requested suspended sentences on Mr. Bowens' behalf.

The parties agreed that the State would not ask for more than ten years of active incarceration, and the State complied. The court ultimately sentenced Mr. Bowens to eight

years of active incarceration, which was consistent with the parties' agreement.[10] Mr. Bowens is attempting to create ambiguity where none exists. The sentence was not illegal.

JUDGMENTS AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[10] Mr. Bowens additionally cites to Matthews v. State, 424 Md. 503 (2012), where the Court held that the sentence was illegal. In Matthews, the Court could not find that the defendant "'reasonably understood'. . . the maximum agreed-upon sentence," because the record of the plea agreement was ambiguous. Id. at 511. The Court concluded that the defendant was "entitled to have the plea agreement enforced, based on the terms as he reasonably understood them to be." Id. at 525. Here, Mr. Bowens received the precise sentence to which he had agreed and there was no ambiguity. Thus, his reliance on Matthews is misplaced.