UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 214

September Term, 2016

GARRIN DAVIS

v.

STATE OF MARYLAND

Meredith,
Reed,
Davis, Arrie W.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Davis, J.

Filed: May 8, 2017

Appellant, Garrin Davis, was convicted of possession of a controlled dangerous substance and possession of a firearm with a disqualifying conviction and several related firearm offenses in the Circuit Court for Baltimore City (Hong, J.) pursuant to a not guilty plea based on an agreed statement of facts. Appellant was sentenced to a period of five years' incarceration without the possibility of parole. Appellant filed the instant appeal in which he posits the following question for our review:

> Did the court err in denying appellant's motion to suppress evidence derived from an illegal Terry frisk?

FACTS AND LEGAL PROCEEDINGS

At his trial, on March 29, 2016, appellant moved to suppress evidence, including a firearm, which he asserted was obtained as a result of a stop and frisk during a traffic stop on November 16, 2015 in the 300 block of North Schroeder Street in Baltimore City. Appellant was the right rear passenger in the vehicle which Detective Brian Salmo and Sergeant Kenneth Ivory had stopped. The court also viewed a contemporaneous body camera video worn by Detective Brandon Avery. Detective McDuffy, who frisked appellant, did not testify.

Detective Avery is seen on the video sitting in the right front passenger seat of the police car with the emergency lights activated. Also evident from the footage is the fact that the vehicle tags had expired, confirming the testimony of Sergeant Ivory. Sergeant Ivory approached the passenger side of the vehicle and turned on the audio function of the camera. A second police car is visible blocking appellant's car from the front and at least six officers surround the stopped vehicle, whereupon four officers shine "very . . . high

light, high beam" flashlights into the vehicle. Appellant was seated in the right rear of the vehicle, his right hand clearly visible, holding a blue object that is later discovered to be a cell phone. Appellant's hand drops down for two seconds, whereupon Sergeant Ivory leans toward the opposite window and says, "Let me see your hands." Appellant responds by raising his hands and Detective Salmon approaches the vehicle and "says keep your hands up" as he opens appellant's side door, whereupon appellant leans slightly to his right as Detective Salmon opens the door, his hands above his shoulders.

As appellant puts his hands behind his head and looks at "various officers" as they speak and lowers his chin to his chest, Detective Salmon asks appellant if there are weapons in the car and appellant responds, "No," whereupon the front passenger says "I've got my ID" and appellant responds, "I've got my ID, too." At this point, Detective Salmon ordered appellant to step out of the car and appellant complies, dropping his hands in order to exit the car. He immediately raises his hands back behind his head, however, as he is alighting from the vehicle. Detective McDuffy immediately frisks him with his right hand and indicates that he has discovered a handgun by saying "hot lunch."

Detective Salmon asserts, in his police report, that he saw appellant reach into his waistband, but later acknowledged that the report was false and contradicted by the body camera video. Detective Salmon testified that appellant "complied with everything [he] asked him to do" and explained the frisk of appellant as follows:

> [Sgt. Ivory] told [Mr. Davis] to put his hands up. So then I approached and I saw [Mr. Davis] flinch. He quickly motioned with his hands and I told him to keep his hands up again. And then we ordered everybody to step out of the vehicle to conduct

a pat-down for weapons.

(Alterations in original).

Although this statement indicates Detective Salmon's intent to frisk all passengers, he also testified that his suspicion of appellant was based on the fact that appellant "turn[ed] his head [and] his elbow drops" when Detective Salmon opened the door and addressed him and that "numerous times he looked down towards his front waistband." Detective Salmon also described appellant as "tense" and "very nervous."

Sergeant Ivory testified, "I walked up . . . on the passenger side and [Mr. Davis] was going a motion . . . as if he was trying to stuff something down into his dip area." Sergeant Ivory acknowledged that he did not, in fact, approach the car on the passenger side, but on the driver's side, opposite appellant. Nor could Sergeant Ivory remember whether he was in the front or rear vehicle. Nevertheless, Sergeant Ivory stated that, "when I walked up, [Mr. Davis] wasn't paying attention to me and when I got to . . . that first window and looked over, he was stuffing something down to his dip area." Although appellant's lap cannot be seen at this time in the video, Detective Avery is closer to appellant and he cannot be seen moving or stuffing anything into his waistband in the two seconds that his hand is not visibly raised. On cross examination, Sergeant Ivory added that he could see appellant "doing movements" through the "back window." Sergeant Ivory did not relay his observations to the other officers. The Sergeant noted that it was not likely that appellant reached into his waistband a second time because, if he had reached into his waistband, the detectives "would have yelled he's reaching, he's reaching."

The court ruled as follows:

THE COURT: Thank you. I suspect that this is the wave of the future, these body cams. However, there's certain limitations to these videos by just splicing scene by scene. It doesn't give the court or the juries or the attorneys or the witnesses exactly what is going on in the officer's mind. It may supplement what their testimony is, but two people could look at the same picture and both have a different interpretation based on that person's perspective.

In this case, the only two witnesses in this suppression motion was [sic] Detective Brian Salmon who has been a police officer for approximately five years, has been in the OIS, Operation Intelligence Section for two years, which is specifically targeted for drug and gun enforcement and Sergeant Kenneth Ivory who has been a Baltimore City police officer for approximately 17 years and has been part of OIS cease fire unit since 2013. Detective Salmon has had academy training and an additional eight hour specific course training on armed person's characteristics performed by a former D.C. police officer giving him instructions on security—checks, bulges, a look—the different types of looking that people that are armed and dangerous may convey to police officers.

And Sergeant Kenneth Ivory also then testified that he has participated in hundreds, hundreds of cases with police—I mean handguns or weapons and he has had his training both in person and part of the academy. Detective Brian Salmon says he has personally been involved in at least ten handgun arrests, but his unit has participated in over 50 handgun cases last year. So multiply that by two for his experience. It's over 100—approximately a hundred handgun cases. And Sergeant Ivory hundreds over his 17 years.

They testified that on November 16th, 2015**,** at approximately 7:40p.m., Detective Brian Salmon said that they were on a Western District initiative which even though there was not an elaboration as to what the Western District initiative was, it probably is to get guns off the streets anyway. So at this juncture they are observing a vehicle in the 300 block of North Schroeder Street. Detective Salmon said it was stopped for expired registration tag or the tag was missing. And Sergeant Ivory said he observed as the car passed the front headlight out, but also expired tags. So then that vehicle was stopped for a traffic stop.

Under *State v. Williams,* which is a 2007 case, the Court of Appeals of Maryland held that the appropriate test for an initial traffic stop is reasonable suspicion that a traffic law had been violated. So we have both the testimony of Detective Salmon and Sergeant Ivory that that vehicle that the defendant was in was validly stopped

for a traffic stop for expired tags and a headlight out.

In terms then of testimony, from the court's perspective I thought that, from the video that Sergeant Ivory was approaching the vehicle ahead of the people on the right passenger side. So his testimony is that he—from even approaching it from the back of the vehicle, he noticed this defendant making movements and that when he then got almost to the equivalent of the left passenger seat, he saw the defendant stuff something in his front dip area. So he was focusing on that defendant and you can see that that flashlight is first coming in on the defendant and you can hear in the video Sergeant Kenneth Ivory saying, yo, [sic] let me see your hands and then the defendant kind of puts his hands up, but at some point—because of the darkness of this video, I'm not sure if the defendant didn't keep his hands all the way up because then you see Detective Brian Salmon say, keep your hands up. And so that's twice that instruction to the defendant, keep your hands up. Detective Salmon says he observes this defendant then keep looking down at his waist, he's tense, he's very nervous, he keeps looking down. His hands drop down a little bit and—that's why he said keep your hands up. And then finally he says, step out of the car.

He sees the defendant flinch a couple times. He asks the defendant if he has any weapons. He says the defendant says no. But I—I can't really hear all that going on until the officer actually directed me because it's—the video, some voices come out very clearly and some are lower. So then as the defendant steps out of the vehicle, you can see Detective Brian Salmon hold his arms because**,** he says**,** for officer safety. He believed that he probably had a weapon and he wanted to make sure that, you know—no quick movements if there is a weapon actually in his dip area. And then you see a hand and that is Detective McDuffy who goes to the defendant's front waistband area where he had been looking down and recovered a firearm. I guess which was loaded and Ruger SR9, nine millimeter with a live round in the chamber and ten live rounds in the magazine.

Now in terms of cases, in *Michigan* [*v.*] *Long* 463 U.S. 1032, 1983[,] David Long was convicted of possession of marijuana found by police in the passenger compartment and trunk of an automobile that he was driving. The police search[ed] the passenger compartment because they had reason to believe the vehicle contained weapons potentially dangerous to officers. Police argued search [sic] was conducted to protect officers and any nearby citizens. In *Long*—based on *Long*, if a vehicle is validly stopped and if there is reasonable suspicion the driver or passenger is presently armed and dangerous, police may frisk, not only the person, but also may frisk the area of immediate control by searching the area from which a weapon could be obtained. This area is the same area as the lung [sic], reach and grasp area associated with search incident to a lawful arrest, but it also goes and includes closed

containers and the trunk.

> Therefore, on this particular case, based on the totality of the circumstances, the continued order for this defendant to keep your hands up after the officer observed him make movements at the stop and put something into his front waistband area, the continued tense and very nervous attitude of the defendant, the fact that he continued to look down at his waistband and based on the totality of the circumstances I do find, based on the furtive conduct of the defendant, the continued looking and—of the waistband, that this—the officers had reasonable articulable suspicion that this defendant may be armed and dangerous and may have been hiding contraband or weapons. And therefore, based under the *Terry* stop for prior to [sic] arrest on a car and the passengers in that vehicle, I find that that was a valid stop and search. I deny your motion at this time.
>
> Thank you.

DISCUSSION

Appellant contends that the trial court erred in finding that there was a reasonable articulable suspicion supporting the frisk. Specifically, appellant argues that the trial court erred in finding that he made "furtive" movements, that he was nervous or that he put "something into his front waistband," particularly when, according to appellant, these indicia "were not depicted in the [police] body camera video of the incident." Alternatively, appellant argues, if the court did not err in finding that appellant "made movements and stuffed something into his waistband," the frisk was illegal nonetheless, because "there was no reason to believe that [appellant] was armed or dangerous.

The State responds by first pointing out that appellant's brief "does not offer a separate statement of facts; rather, he proffers that the relevant facts are 'discussed in detail' in the Argument portion of his brief" and asserts that a "separate Statement of Facts is mandatory." The State does not ask us to dismiss the matter. The State then responds that

appellant's argument is based on "perceived inconsistencies in his presentation of the record," but that the lower court's findings, although "not as favorable to [appellant] as his own expression of the facts on appeal—were not clearly erroneous." Citing *Sellman v. State*, 449 Md. 526 (2016), the State argues that "furtive actions and the appearance of possibly having a weapon are precisely the type of indicators that will justify a stop and frisk." The State maintains that the trial court did not err in finding that appellant made "furtive" movements and appeared to "stuff something down his waistband," all of which, in conjunction with his nervous demeanor, supported the officers' reasonable suspicion that he was armed and dangerous, thereby justifying the frisk of his person for a weapon.

Standard of Review

> When reviewing the denial of a motion to suppress, this Court looks solely at the record of the suppression hearing, extending great deference to the factual findings of the suppression judge with respect to determinations regarding witness credibility. Such determinations will not be disturbed unless clearly erroneous. All facts must be viewed in the light most favorable to the prevailing party on the motion.

McCain v. State, 194 Md. App. 252, 267 (2010) (citations omitted).

Analysis

The Fourth Amendment of the United States Constitution, made applicable to the states *via* the Fourteenth Amendment, guarantees 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" without a warrant. U.S. CONST. amend. IV. "The warrant requirement is 'subject . . . to a few specifically established and well-delineated exceptions.'" *Olson v.*

State, 208 Md. App. 309, 335 (2012) (citing *Katz v. U.S.*, 389 U.S. 347, 357 (1967)).

One such exception is the *Terry* stop and frisk, as articulated by the Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 27 (1968), where the Court held that

> there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.

As this Court recently reiterated in *Ames v. State*, 231 Md. App. 662, 671–72 (2017),

> [t]he *Terry* stop and the *Terry* frisk, of course, serve quite distinct purposes. The stop is crime-related, its purpose being to prevent or to detect crime. The reasonable articulable suspicion for a stop must be framed in terms of that purpose. The frisk, by diametric contrast, is not intended to be an investigative tool at all. Its express purpose and animating concern is the safeguarding of the life and limb of the stopping officer.
>
> * * *
>
> 'Even if the stop had been legitimate, that would not imply the legitimacy of the frisk. As a distinct intrusion, the frisk requires its own independent justification.'

(quoting *Alfred v. State*, 61 Md. App. 647, 664 (1985)).

In the instant case, the parties do not dispute the legality of the initial traffic stop, *i.e.*, there was a headlight out and expired tags. Therefore, our focus is upon the lower court's finding that the police officers had a reasonable articulable suspicion that appellant was armed and dangerous.

Recently, the Court of Appeals, in *Sellman*, *supra*, reiterated the objective nature of the test in determining the legality of an officer's reasonable suspicion for conducting

a *Terry* frisk and that

> the test is 'the totality of the circumstances,' viewed through the eyes of a reasonable, prudent, police officer. The test is objective: the validity of the stop or the frisk is not determined by the subjective or articulated reasons of the officer; rather, the validity of the stop or frisk is determined by whether the record discloses articulable objective facts to support the stop or frisk. Reasonable suspicion requires an officer to have specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion . . . . In other words, the officer has reason to believe that an individual is armed and dangerous if a reasonably prudent person, under the circumstances, would have felt that he was in danger, based on reasonable inferences from particularized facts in light of the officer's experience.

449 Md. at 542 (citations omitted).

The Court also noted that deference should be afforded to an experienced police officer in evaluating the facts within the totality of the circumstances.

> Such deference allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person. To be sure, [a] factor that, by itself, may be entirely neutral and innocent, can, when viewed in combination with other circumstances, raise a legitimate suspicion in the mind of an experienced officer.

Id. at 543.

Although the *Sellman* Court cautioned that "unexceptional nervousness" alone does not support a reasonable suspicion that the accused is armed and dangerous, the Court noted that, in conjunction with other indicia, nervousness may support a *Terry* frisk. *Id.* at 554–55. *See also Matoumba v. State*, 162 Md. App. 39, 47–50 (2005) (holding that "nervousness" is a contributing factor when evaluating the totality of the circumstances for reasonable suspicion). Finally, the Court, in determining that the frisk was not supported

by the record, noted that "the officers did not explain why, based on their observations of Sellman, he was suspected of criminal activity." *Sellman*, 449 Md. at 546.

In the instant case, we are tasked with examining whether the trial court was clearly erroneous by denying appellant's motion to suppress evidence of the handgun recovered from his person during the *Terry* frisk. We are unpersuaded that the trial court's decision was clearly erroneous. We explain.

As the finder of fact, the trial court systematically worked through the facts as presented during the suppression hearing. Appellant was validly stopped by police for a traffic violation. The stop occurred in a high crime area, *i.e.*, 300 block of North Schroeder Street on the Westside of Baltimore City. Appellant was observed by police with an object in his hand as they approached the vehicle, which later was determined to be a cell phone. Sergeant Ivory testified that he witnessed appellant "doing movements" and "stuffing something down to his dip area" in his pants that the officer believed was "characteristic of an armed person." The Sergeant ordered appellant's hands raised so as to be visible. Appellant's hands briefly dropped out of sight and Detective Salmon witnessed appellant "motion[] with his hands" so he also ordered appellant to raise his hands. Both Sergeant Ivory and Detective Salmon testified that appellant appeared "nervous" and "tense" and that he looked "down at his waist," or as appellant himself characterizes it, put his "chin to his chest" and "look[ed] down." Detective Salmon testified that appellant's actions suggested "he might have something illegal" and the detective ordered him to get out of the car. Appellant's hands briefly dropped again out of sight as he exited the vehicle and

Detective Salmon held appellant's hands together, in the air, and then appellant was frisked.

In addition to the facts, the trial court also reviewed the experience and expertise of the testifying police officers.

> [T]he only two witnesses in this suppression motion [were] Detective Brian Salmon who has been a police officer for approximately five years, has been in the OIS, Operation Intelligence Section for two years, which is specifically targeted for drug and gun enforcement and Sergeant Kenneth Ivory who has been a Baltimore City police officer for approximately 17 years and has been part of OIS cease fire unit since 2013. Detective Salmon has had academy training and an additional eight hour specific course training on armed person's characteristics performed by a former D.C. police officer giving him instructions on security—checks, bulges, a look—the different types of looking that people that are armed and dangerous may convey to police officers.

As the *Sellman* Court discussed, *supra*, a trial court gives deference to a police officer's experience and training: "To be sure, [a] factor that, by itself, may be entirely neutral and innocent, can, when viewed in combination with other circumstances, raise a legitimate suspicion in the mind of an experienced officer."

In viewing the facts, as presented by testimony and footage from the police body cameras, along with the police officers' experience, the trial court found that, under the totality of the circumstances, the police had a reasonable articulable suspicion that appellant was armed and dangerous and, therefore, the frisk for weapons was valid.

Appellant argues that the trial court was clearly erroneous in its determination that appellant made movements, *i.e.*, "furtive" and "stuffing something" into his waistband, and erred in its factual determination that he appeared nervous during the traffic stop. We

disagree. As the fact finder, the trial court listened to the testimony, observed the physical evidence and found it credible that appellant made movements and appeared nervous. There is nothing from the record or in appellant's argument that adequately refutes this determination or illustrates that the trial court's reasoning was clearly erroneous. Although appellant asserts that body camera footage from Detective Avery was closer to him than Sergeant Ivory, as the State points out, the Sergeant was at the vehicle, observing appellant with a flashlight before Detective Avery was present. Furthermore, appellant argues that Sergeant Ivory's less than perfect recall of events, namely confusion over which police cruiser he rode in and from which side of the stopped vehicle he approached, should render the trial court's factual findings erroneous. We disagree. The court's reliance was upon different portions of Sergeant Ivory's testimony and appellant does not assert that that testimony was faulty. Ultimately, the trial court found Sergeant Ivory's testimony credible and, along with other testimony and camera footage, made the factual determination that appellant did make movements, stuffed something down his pants and appeared nervous.

Appellant then argues that, if the trial court did not err in its factual determinations, that it erred because "there was no reason to believe" that he was armed and dangerous. Again, we disagree. The police officers testified to "case-specific" details that, along with their years of experience, permitted them to make a rational inference that appellant was armed and dangerous. Accordingly, the trial court found that the evidence, as presented during the suppression hearing, would allow an objectively reasonable and prudent person to believe that appellant was in possession of a weapon and, therefore, that a limited

intrusion upon his Fourth Amendment right was warranted.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.