Circuit Court for Carroll County
Case No. C-06-CR-21-745

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 200

September Term, 2022

NEAL MACKENZIE BABSTOCK

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Friedman,

JJ.

Opinion by Nazarian, J.

Filed: June 7, 2023

*At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

** This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

On June 24, 2021, a state trooper stopped the vehicle in which Neal Babstock was riding as the front seat passenger. After officers searched the vehicle, the trooper asked Mr. Babstock to turn around to be searched, and he fled. The Circuit Court for Carroll County denied Mr. Babstock's motion to suppress evidence that he fled and actively resisted being handcuffed. The same day, Mr. Babstock was tried on an agreed statement of facts and convicted of resisting arrest (not of any drug-related crimes). Mr. Babstock argues on appeal that at the time the trooper directed him to turn around to be searched, the trooper lacked probable cause to search his person or probable cause to arrest him. We agree and reverse.

I. BACKGROUND

On June 24, 2021, Trooper First Class Brian Reilly was monitoring traffic on Route 140 in Carroll County when he stopped a gold Acura for having an expired registration. The vehicle pulled into a gas station. One of the car's three occupants was Mr. Babstock, who was sitting in the front passenger seat. Trooper First Class Shawn Brown and Corporal Christopher Mattingly arrived at the scene later.

After a K-9 scan of the vehicle alerted positive, the officers searched the vehicle. The two other passengers were searched and arrested, but when Mr. Babstock was asked to turn around to be searched, he fled the scene. He later was apprehended and arrested and charged with resisting arrest. He filed a motion to suppress evidence of his flight as the fruit of an unlawful arrest. At the suppression hearing, the exclusive source of the record

we consider here, *see State v. Johnson*, 458 Md. 519, 532 (2018), Trooper Reilly, Trooper Brown, and Corporal Mattingly each testified; Mr. Babstock didn't.

A. Trooper Reilly's Testimony.

Trooper Reilly testified that he instituted the initial traffic stop and asked the occupants where the vehicle was traveling from. He said that everyone delayed in responding, but the driver stated eventually that "they were coming from a friend's house in Reisterstown." Trooper Reilly observed that the driver "had deteriorated teeth" and the rear-seat passenger "had open sores in her arms," both of which, according to his experience and training, indicated controlled dangerous substances ("CDS") use and activity.

Trooper Reilly thought he "had enough criminal indicators to indicate there was activity afoot in the car," so he requested a K-9 unit to respond to the scene, and that's when Trooper Brown arrived. Trooper Reilly conducted the business needs of the traffic stop while Trooper Brown had a conversation with all the occupants. Trooper Brown relayed his observations to Trooper Reilly, including his observation that "Mr. Babstock had a freshly lit cigarette, indicating nervous behavior."

While officers removed the occupants from the vehicle to conduct a K-9 scan, Corporal Mattingly arrived at the scene. Trooper Reilly stated that he ran the passengers' information while Trooper Brown conducted the K-9 scan of the vehicle. Mr. Babstock gave a false name (Neal Johnson) and date of birth, which Trooper Reilly described as "to pretty much to avoid his identity." While Trooper Reilly searched the vehicle, Mr.

Babstock apologized for providing a fake name, said that he did it because he was nervous, and gave Trooper Brown his correct name.

Trooper Reilly advised the occupants that the K-9 unit indicated a "positive alert," and asked whether there was anything they needed to know. Mr. Babstock replied that he had "[s]moked weed." Trooper Reilly then proceeded to *Mirandize* them. Trooper Reilly conducted a search of the vehicle that revealed, in the driver's compartment, a coin purse (within another purse) that contained a hypodermic syringe, which the driver of the vehicle claimed was hers. The search also revealed a separate "generic purse" in the rear seat of the vehicle that contained another hypodermic syringe and "a bottom of a metal soda can" that belonged to the rear-seat passenger. Trooper Reilly also learned that Trooper Brown "recognized Mr. Babstock through priors and CDS activity," and that Mr. Babstock had a suspended driver's license. The troopers searched the driver and the rear-seat passenger, found "a crack pipe" and "one vial of crack cocaine" on the driver's person, and ultimately placed them both under arrest.

Trooper Reilly testified that Mr. Babstock was facing the gas pumps and "[i]t was determined that Mr. Babstock was under arrest as well," but that Mr. Babstock had not yet been advised that he was under arrest. Trooper Brown then asked Trooper Reilly if Trooper Reilly had searched Mr. Babstock yet. Trooper Reilly responded, "No, I did not." Mr. Babstock questioned Trooper Brown about why they were searching him. Trooper Reilly told Mr. Babstock to turn and "that's when Mr. Babstock fled from the scene," although he was apprehended quickly.

According to Trooper Reilly, officers "established a nexus to [Mr.] Babstock to the vehicle" which included "the items in the purse [as] one of the many factors." Trooper Reilly testified that the "totality of the factors" established a "nexus" that gave officers probable cause to arrest Mr. Babstock for the CDS found in the vehicle (though claimed by the other two occupants): (1) Mr. Babstock smoking three cigarettes during the fifty minute encounter because it "was a nervous indicator"; (2) the three occupants traveling to and from "a known . . . drug source location," *i.e.*, Reisterstown; (3) the positive K-9 alert; (4) the CDS activity known by Trooper Brown within three months, which also involved Mr. Babstock with the rear-seat passenger in the same vehicle; and (5) Mr. Babstock's having given a false name.

B. Trooper Brown's Testimony.

Trooper Brown arrived at the scene with the K-9 unit. Upon arriving, he made contact with Trooper Reilly, who communicated "criminal behaviors . . . he had observed," and then made contact with the occupants of the vehicle and "immediately recognized" Mr. Babstock and the rear-seat passenger from a prior CDS investigation. Trooper Brown "observed [Mr. Babstock] to have a fresh lit cigarette," which he testified "is often indicative of nervous behavior or an attempt to create a masking agent to try and distract the dog whenever he conducts a scan." He also saw the driver's deteriorated teeth, as well as the rear-seat passenger's deteriorated health and "sunken in appearance," both of which he characterized as "consistent with CDS use."

Then, according to Trooper Brown, the officers asked the occupants to exit the vehicle and Trooper Brown conducted a K-9 scan of the vehicle. The dog "displayed a distinct and noticeable behavior change" when he reached the front passenger side door, and he "repeatedly put his nose to the door handle." According to Trooper Brown's training, this response signaled a positive alert to the presence of the odor of CDS. Once the dog alerted positive in that location, Trooper Brown stopped and did not continue the scan because, he said, "It gives probable cause for the vehicle." Trooper Brown stayed with the occupants while Trooper Reilly conducted the vehicle search. At some point, approximately twenty minutes into the search, Mr. Babstock informed Trooper Brown that he had given a fictitious name, and that he did it because he was nervous. Trooper Brown notified Trooper Reilly, who conducted a radio check of the real name that revealed "nothing noteworthy."

Once the search of the vehicle and of the two female passengers was completed, Trooper Brown testified that he asked Trooper Reilly whether Mr. Babstock had been searched:

> This question was raised due to significant factors which I observed which tied [Mr. Babstock] to the vehicle, which included my recognition of him through a prior drug investigation where a small distribution amount of CDS had been recovered.
>
> Through his continued nervous behavior throughout, oftentimes what we'll see is that once the drugs were located, there'll usually be a change in their behavior where they'll become less nervous. His nervousness remained throughout the entirety of the search.
>
> He initially smoked two more cigarettes throughout the course

> of the search, which I recognized through my training to be a pacification. So it's kind of an outlet for their stress in order to relieve that as well.
>
> Additionally, there was the K-9 scan on the front passenger's side door handle, which is indicative of odor on that door handle. And through my training, I have seen on several occasions where somebody handling CDS, that odor will actually transfer from their hands to a physical object.
>
> And that odor was present on his door handle where the dog alerted positively. Additionally, I have the contrast in his behavior from our first interaction on April 9th to this interaction.
>
> On this interaction [Mr. Babstock] was giving a false name as opposed to the first interaction where, you know, a physical—I'm sorry, a distribution size amount of drugs were located on the female passenger's person but not on his person.
>
> So there's an elevated sense of, I'm sorry, nervousness on his behalf on this case as opposed to my first interaction with him. So significant difference in his behavior.
>
> * * *
>
> Additionally, towards the end, I noticed a bulge in his front pocket as well.

Trooper Brown did not ask Mr. Babstock about the bulge in his front pocket or tell Trooper Reilly about it because "[i]t didn't appear to be a weapon," and didn't reference the bulge in his police report.

When it came the time to search Mr. Babstock, Trooper Reilly "requested that [Mr. Babstock] step over for a search, and he became verbally apprehensive and wanted to know why he was being searched," at which point "[h]e was told that there was drug paraphernalia located within the vehicle and despite the fact that the other female occupants claimed ownership of it, it was still in an area where it could've been accessed by any of the occupants." When Trooper Reilly "again asked him to step over to the front of the

vehicle" to be searched, Mr. Babstock fled. Trooper Brown, Trooper Reilly, and Corporal Mattingly chased him, caught him, and placed him under arrest.

C. Corporal Mattingly's Testimony.

Corporal Mattingly also assisted Trooper Reilly with the traffic stop. When he arrived, Trooper Reilly was beginning to search the vehicle while Trooper Brown stood with the three occupants. Corporal Mattingly searched the driver's compartment or seat area and he located a purse with a used hypodermic syringe inside. Corporal Mattingly recognized the rear-seat passenger from a traffic stop a few months earlier, which resulted in her arrest for an outstanding warrant. Although Corporal Mattingly testified that the rear-seat passenger was with another person—a male—during the previous interaction, he was not sure it was Mr. Babstock. Corporal Mattingly placed the rear-seat passenger in handcuffs because she had an open arrest warrant through the Carroll County Sheriff's Office. As he did this, he saw Mr. Babstock run toward Route 140 with Trooper Reilly following him. Corporal Mattingly told the two other passengers to sit down on the ground by the patrol vehicle, then went to assist Trooper Reilly.

D. Arguments.

At the conclusion of the testimony, the defense argued that at the time Mr. Babstock was asked to turn around to be searched, the troopers lacked probable cause to search *or* arrest him,[1] and that "the running away when they have no reason to believe he has

[1] The court agreed with Mr. Babstock that "the quantum of probable cause for a search [of a person] is the same as the quantum of probable cause for arrest."

anything" does not "rise[] to that level of probable cause to arrest." Mr. Babstock argued specifically that he "cannot be allowed or presumed to know what is in other women's purses in the car." He contended that he was "allowed to leave the scene" at the point he was asked to be searched because the vehicle and his co-defendants had been searched and officers "d[id]n't have anything that ties him to any of the drugs."

The State distinguished *Wallace*,[2] arguing that there was more than just a positive K-9 scan of the vehicle to tie Mr. Babstock to the contraband, that officers had "probable cause to arrest him throughout the entirety of that incident based on the indicators that were testified to," including the bulge, Mr. Babstock's nervousness, and his presence at a prior drug investigation involving one of the other vehicle occupants. The State contended as well that "[Mr. Babstock] was not under arrest until he was physically restrained after he ran across 140 and was resisting arrest," citing the fact that Trooper Reilly only told Mr. Babstock "to turn." Nevertheless, the State argued that there was "probable cause to arrest

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[2] In *State v. Wallace*, 372 Md. 137, 156 (2002), the Supreme Court of Maryland (then known as the Court of Appeals)* held a "canine sniff of the vehicle alone did not amount to probable cause to then search each of the passengers" of the vehicle.

* At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See also* Md. Rule 1-101.1(a) ("From and after December 14, 2022, any reference in these Rules or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland . . . .").

[Mr. Babstock] at that time, which was only greatly furthered when he ran away across 140 when he was not free to leave at that time."

E. Circuit Court's Ruling.

The court denied Mr. Babstock's motion to suppress, finding that there was, under the totality of the circumstances, probable cause to search Mr. Babstock at the time that the trooper asked him to turn around to be searched:

> [T]here is no question that [Trooper Reilly] had reasonable, articulable suspicion to effect the traffic stop, which was made in the parking lot of the 7-Eleven.
>
> And then upon approaching the vehicle and making certain observations about the deteriorated condition of the driver's teeth and open sores on the passenger, he believed he had reasonable, articulable suspicion to go beyond the initial purpose, business purpose as they say, of the traffic stop.
>
> Requested a K-9. Trooper Brown arrived. There is no argument today that there was an inordinate delay in the K-9 arriving at the scene. The K-9 immediately alerted a positive. Trooper Brown testified that the dog alerted positive to the passenger's side door handle.
>
> [Mr. Babstock] was seated, at least prior to the K-9 search, he had been seated in the front passenger seat of the vehicle. . . .
>
> A search of the driver compartment inside the vehicle and inside a purse and inside a change purse were found CDS paraphernalia. At that point, of course, . . . the suspects are outside of the vehicle.
>
> And upon further investigation, the driver admitted to having drugs on her person. The female passenger admitted responsibility for other matters found in—other contraband found in the vehicle and also had an open warrant.
>
> So, at that point certainly, the point at which the K-9 search occurred, the occupants were out of the vehicle. No one was handcuffed, but it is clear they weren't free to leave.
>
> At that point, I concluded that that was an investigatory stop being conducted by law enforcement for the purpose of

investigating suspected criminal activity involving drugs.

So I agree that and no one disputes that [Mr. Babstock] and the other two individuals were not free to leave the scene, but that is not the equivalent of saying that they were under arrest at that point.

At the point at which the search was conducted—the K-9 alerted positive and the search of the vehicle was conducted, I find that that was still and ongoing investigative search under the Fourth Amendment.

Then of course, at some point, Trooper Brown, believing that probable cause existed to search [Mr. Babstock], asked Trooper Reilly in [Mr. Babstock]'s presence whether [Mr. Babstock] had been searched, at which point [Mr. Babstock] took off and ran across 140.

Whether he took off after Trooper Reilly had completed his entire instruction to turn and put his hands on the vehicle, that he was going to be searched or not, it is clear that [Mr. Babstock] knew that he was going to be searched.

In fact, Trooper Brown testified that [Mr. Babstock] did not consent to the search. He objected to being searched and questioned the legal basis for the officers' authority to search . . . .

So the question is whether the officers had probable cause to search Mr. Babstock, the Defendant, at that time, at the time that Trooper Brown asked whether he had been searched and Trooper Reilly was about to search Mr. Babstock.

The probable cause articulated by Trooper Brown, which was a more inclusive list than that provided by Trooper Reilly, included Trooper Brown's prior encounter with [Mr. Babstock] a couple of months before—he said he thought it was April 9th—at which CDS was found and [Mr. Babstock] was also at that time, on the prior occasion, with . . . the [other female] passenger in this vehicle.

That [Mr. Babstock] continued his nervous behavior throughout the stop. That [Mr. Babstock] smoked a total of three cigarettes.

No one certainly contends that smoking cigarettes in and of itself is probable cause to search or arrest someone, but it is part of the totality of the circumstances articulated by Trooper

Brown.

The positive alert on the vehicle, not just alert on the vehicle but on the passenger door handle, which is where [Mr. Babstock] had been seated, the side of the vehicle that [Mr. Babstock] had been seated.

And critically from the Court's perspective, [Mr. Babstock] having given a false name to police because, as Trooper Brown testified, . . . [Mr. Babstock] admitted to giving a false name because he was nervous.

He testified to a noticeable change in [Mr. Babstock's] behavior. This is Trooper Brown. He testified to a pretty, I think he used the term distributable size or quantity of drugs found on the female passenger [during his first encounter with Mr. Babstock two months prior].

And then finally, Trooper Brown testified to a bulge in the left front pocket of [Mr. Babstock] that Trooper Brown observed. Add to that that [Mr. Babstock], upon being advised that he was going to be searched, fled across the street.

[Counsel for Mr. Babstock] and I are going to have to disagree about whether or not Mr. Babstock or any other individual under similar circumstances had the right to flee, but my position is that an individual who is a subject of a[n] investigative stop, a Terry stop, doesn't have the right to flee the Terry stop.

And so the fleeing by Mr. Babstock just enhanced the probable cause, enhanced the suspicion on the part of the officers when [Mr. Babstock] fled and added to the probable cause.

I think that the officers had probable cause to search [Mr. Babstock] at the time that they . . . asked him to submit to a search and put his hands on the car. But once he fled and ran across the highway, that just added to their probable cause to search him.

And then of course, once he is arrested. Clearly I find that he was arrested at the time that he was, I think Trooper said he jumped on top of Mr.—but when he was taken into custody in the median, then of course there was a search incident to arrest at that point.

So, I do find that . . . this is distinguishable . . . from the *Wallace* case. Certainly on its own, the positive K-9 alert or even [Mr.

> Babstock]'s proximity in the vehicle or being a passenger in the vehicle where drugs are found is not in and of itself probable cause to search the individual.
>
> There has to be independent probable cause to justify a search and arrest of the passenger or any other occupant.
>
> But in this case, I find that there was—the officers had probable cause under the totality of the circumstances, so I am going to respectfully deny the motion to suppress.

(Emphasis added.)

Later that day, Mr. Babstock was tried upon a not guilty agreed statement of facts and found guilty of resisting arrest. He filed this timely appeal.

II. DISCUSSION

Mr. Babstock argues on appeal that the circuit court erred in denying Mr. Babstock's motion to suppress.[3] The evidence Mr. Babstock seeks to suppress, as the motions court held correctly, turns on whether there was probable cause to search Mr. Babstock "at the time that [officers] . . . asked him to submit to a search and put his hands on the car." Mr. Babstock argues that there was no probable cause to search him, and therefore, the evidence of his subsequent actions—his flight from the officers, and thus his resistance to an arrest they lacked authority to consummate—should be suppressed and his conviction for resisting arrest reversed. The State responds that Mr. Babstock has not established that he was arrested at the time that the trooper asked him to turn around to be searched, and that even if he was arrested, the suppression court determined properly that there was probable

[3] Mr. Babstock's Question Presented in his brief stated, "Did the lower court err in denying Mr. Babstock's Motion to Suppress?" The State's Question Presented in its brief states, "Did the suppression court properly deny [Mr.] Babstock's motion to suppress?"

cause to search him incident to arrest. We agree with Mr. Babstock that the State failed to present evidence at the suppression hearing to rebut the presumption that the warrantless search was unreasonable, and we reverse his conviction for resisting arrest.

A. Standard of Review.

When reviewing a trial court's ruling on a motion to suppress, we review its findings of fact for clear error. *Norman v. State*, 453 Md. 373, 386 (2017) (*citing Varriale v. State*, 444 Md. 400, 410 (2015)). Our review of a motion to suppress "is 'limited to the record developed at the suppression hearing.'" *Pacheco v. State*, 465 Md. 311, 319 (2019) (*quoting Moats v. State*, 455 Md. 682, 694 (2017)). "'We view the evidence and inferences that may be drawn therefrom in the light most favorable to the party who prevails on the motion,'" *Johnson*, 458 Md. at 532 (*quoting Raynor v. State*, 440 Md. 71, 81 (2014)), in this instance the State. We accept the suppression court's factual findings unless they are clearly erroneous, "but we review *de novo* the court's application of the law to its findings of fact." *Pacheco*, 465 Md. at 319 (2019) (cleaned up). And ultimately, we undertake our own "independent constitutional evaluation" of a constitutional challenge to a search or seizure. *Id.* (*quoting Grant v. State*, 449 Md. 1, 15 (2016)).

B. The Evidence Of Mr. Babstock's Flight Should Have Been Suppressed.

The Fourth Amendment protects individuals against unreasonable searches and

seizures. U.S. Const. amend. IV.[4] In general, law enforcement officials must obtain a warrant based on probable cause before conducting a search or seizure. *Grant*, 449 Md. at 16–17 (*citing Katz v. United States*, 389 U.S. 347, 356–57 (1967)). Warrantless searches are presumed unreasonable, so "[w]hen a police officer conducts a warrantless search or seizure, the State bears the burden of overcoming the presumption of unreasonableness." *Thornton v. State*, 465 Md. 122, 141 (2019).

1. The Warrantless Search of Mr. Babstock Began When He Was Asked To Turn Around To Be Searched.

At the highest level of abstraction, Mr. Babstock was convicted of resisting arrest, a crime he could only have committed if law enforcement had the right to arrest him at the time he resisted. Since the officers never had a warrant to arrest him, we must walk through the details of the troopers' encounter with Mr. Babstock and the other passengers to determine what authority, if any, the officers had to detain, search, or seize him at the relevant times. The parties agree that the only justification the State offers for the search is that the officers had the right to search him incident to a lawful arrest,[5] and so the first question we must answer is when the search began: before or after Mr. Babstock took

[4] Article 26 of the Maryland Declaration of Rights also protects Marylanders against unreasonable searches and seizures. The Supreme Court of Maryland has held generally that the protections of the two provisions are co-extensive. *E.g.*, *Gahan v. State*, 290 Md. 310, 319–22 (1981). But Mr. Babstock has not made an argument based on Article 26, so our decision is based on the federal provision only.

[5] And to be sure, the record doesn't support any other exception to the warrant requirement, *e.g.*, consent, plain view, exigent circumstances, or stop-and-frisk searches, among others. *See Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993) (stating there are "'only . . . a few specifically established and well delineated exceptions'" to the warrant requirement (*quoting Thompson v. Louisiana*, 469 U.S. 17, 19–20 (1984)).

flight? The State argues that "when the officer told him to turn around to be searched . . . he was not actually searched, nor was he actually taken into custody," and thus that his flight could contribute to a finding of probable cause. We disagree.

The motions court denied Mr. Babstock's motion to suppress because it found that Mr. Babstock was not free to leave, and that Trooper Reilly had probable cause to search his person:

> So I agree that and no one disputes that [Mr. Babstock] and the other two individuals were not free to leave the scene, but that is not the equivalent of saying that they were under arrest at that point.
>
> * * *
>
> I think that the officers had probable cause to search [Mr. Babstock] at the time that they . . . asked him to submit to a search and put his hands on the car. But once he fled and ran across the highway, that just added to their probable cause to search him.

We agree with the motions court that a search incident to arrest of Mr. Babstock began when he was asked to turn around to be searched, before Mr. Babstock questioned why he needed to be searched, and more importantly, *before* he fled the scene. An arrest is the "'detention of a known or suspected offender for the purpose of prosecuting him for a crime.'" *Longshore v. State*, 399 Md. 486, 502 (2007) (*quoting Bouldin v. State*, 276 Md. 511, 516 (1976)). A detention normally occurs where "'there is a touching by the arrestor or when the arrestee is told that he is under arrest and submits.'" *Id.* at 502 (*quoting Bouldin*, 276 Md. at 516). But there are "no bright lines to determine when an investigatory stop . . . becomes an arrest and is elevated to the point that probable cause is required." *Id.*

at 516 (citation omitted).

"As with 'seizures,' an officer can initiate a [search] before physically touching a person." *Doornbos v. City of Chicago*, 868 F.3d 572, 581 (7th Cir. 2017). A search begins "when a reasonable person would have believed that the search was being initiated." *Id.* Here, the circuit court found that Mr. Babstock knew he was going to be searched. The circuit court also agreed implicitly that the search of Mr. Babstock's person started when he was asked to turn around to be searched:

> So the question is whether the officers had probable cause to search Mr. Babstock, the Defendant, . . . at the time that Trooper Brown asked whether he had been searched and Trooper Reilly was about to search Mr. Babstock.

The record developed at the suppression hearing reveals that the search of Mr. Babstock began when Trooper Reilly told Mr. Babstock, "All right. Turn."

2. The Warrantless Search Of Mr. Babstock Was Not Supported By Probable Cause.

The next critical question is whether the troopers had probable cause to search Mr. Babstock's person at that time—*before* Mr. Babstock fled the scene. If the officers lacked probable cause to search him incident to arrest, any actions Mr. Babstock took after the illegal search should have been suppressed. *See Thornton*, 465 Md. at 150 (holding that under the exclusionary rule, evidence obtained after an individual's Fourth Amendment rights were violated is inadmissible because that evidence is considered "fruit of the poisonous tree," or evidence that was derived because of illegal conduct).

With regard to arrests, a police officer can arrest an accused without a warrant if the officer has probable cause to believe that a crime has been or is being committed by an

alleged offender in the officer's presence. *Woods v. State*, 315 Md. 591, 611–12 (1989); *Nilson v. State*, 272 Md. 179, 184 (1974). To establish probable cause, the officers must be able to point to specific and articulable facts that, under the totality of the circumstances, support a reasonable belief that Mr. Babstock had committed or was committing a crime:

> "Probable cause . . . is a nontechnical conception of a reasonable ground for belief of guilt. *Doering v. State*, 313 Md. 384, 403 (1988); *Edwardsen v. State*, 243 Md. 131, 136 (1966). A finding of probable cause requires less evidence than is necessary to sustain a conviction, but more evidence than would merely arouse suspicion. *Woods v. State*, 315 Md. 591, 611 (1989); *Sterling v. State*, 248 Md. 240, 245 (1967); *Edwardsen*, 243 Md. at 136. Our determination of whether probable cause exists requires a nontechnical, common sense evaluation of the totality of the circumstances in a given situation in light of the facts found to be credible by the trial judge. *State v. Lemmon*, 318 Md. 365, 379 (1990); *Doering*, 313 Md. at 403–04. Probable cause exists where the facts and circumstances taken as a whole would lead a reasonably cautious person to believe that a felony had been or is being committed by the person arrested. *Woods*, 315 Md. at 611; *Stevenson v. State*, 287 Md. 504, 521 (1980); *Duffy v. State*, 243 Md. 425, 432. Therefore, to justify a warrantless arrest the police must point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warranted the intrusion. *Lemmon*, 318 Md. at 380."

State v. Wallace, 372 Md. 137, 148 (2002) (*quoting Collins v. State*, 322 Md. 675, 680 (1991)). And to determine whether an officer had probable cause to search, "'the reviewing court necessarily must relate the information known to the officer to the elements of the offense that the officer believed was being or had been committed.'" *Id.* at 148–49 (*quoting DiPino v. Davis*, 354 Md. 18, 32 (1999)).

a. There must have been a nexus between Mr. Babstock and the CDS found in the vehicle.

Trooper Reilly relied on the "nexus" between Mr. Babstock to the contraband found in the vehicle as the basis for probable cause to arrest Mr. Babstock (and thus to initiate a search). But probable cause to search the vehicle doesn't by itself create probable cause to search the person of the individual passengers; an officer must have *separate* probable cause to conduct a warrantless search of the person of an *occupant* of a vehicle. *See Wallace*, 372 Md. at 149; *Maryland v. Pringle*, 540 U.S. 366, 368 (2003); *Sellman v. State*, 449 Md. 526, 557 (2016). Whether the presence of CDS in a vehicle establishes a nexus between a particular passenger and the contraband depends on the factual circumstances of the case. *Norman*, 452 Md. at 413 (explaining that an officer must focus on the circumstances, or lack thereof, that involve the defendant specifically when determining whether they "may intrude on the sanctity of a defendant's person based on the belief that the defendant possessed drugs in a vehicle with multiple occupants"); *compare Wallace*, 372 Md. at 160 (2002) (holding that the absence of a nexus precluded a finding of probable cause), *and Livingston v. State*, 317 Md. 408, 564 (1989) (same), *with Johnson v. State*, 142 Md. App. 172, 196 (2002) (finding a slight nexus was enough to establish probable cause).

In *Wallace*, the officer initiated a traffic stop of a vehicle for speeding and running a red light; the vehicle contained five occupants and the defendant was one of the three back seat passengers. 372 Md. at 141. After a narcotics dog alerted to the presence of drugs in the vehicle, the officer searched multiple occupants, including the defendant. *Id.* at 142.

The Court held that the officer lacked probable cause to conduct a warrantless search of every occupant of a vehicle where a narcotics dog merely alerted to the presence of drugs in the vehicle. *Id* at 155–56. The Court explained that to establish probable cause to search a passenger, "some link between the passenger and the crime must exist or probable cause generally will not be found," and there was no probable cause that was "specific to" the defendant to provide "other indications of particularized suspicion of contraband on that person . . . ." *Id.* at 156 n.6.

Similarly, in *Livingston*, the defendant was the back seat passenger and one of three occupants of a car stopped for speeding. 317 Md. at 409. The officer saw two marijuana seeds located on the right front floorboard of the car. *Id.* The officer arrested each of the car's occupants, and during a search incident to the arrest of the defendant, the officer discovered cocaine and marijuana in his pocket. *Id.* The Court held that merely sitting in the back seat of a vehicle with CDS does not demonstrate to an officer that a passenger possessed any knowledge of the contraband, and so the officer lacked probable cause to arrest the defendant. *Id.* at 415–16.

By contrast, in *Johnson*, the defendant was the front seat passenger and one of two occupants of a car. 142 Md. App. at 188. After the officer stopped the car for a traffic infraction, he detected a strong smell of marijuana and also observed a marijuana bud on the gearshift cover between the driver and the defendant. *Id.* This Court recognized an adequate connection between the suspected contraband, which was in "plain view," and the defendant, who was "within arm's reach" of the marijuana bud, and held that that was

enough to establish probable cause for the defendant's arrest and subsequent search incident. *Id.* at 200.

Trooper Reilly initiated a lawful traffic stop of the vehicle for having an expired registration. Mr. Babstock was the front passenger. A search of the vehicle revealed evidence of drug activity, including syringes and a bottom of a metal soda can; and only after the other passengers (not Mr. Babstock) took ownership of the items, those passengers were searched and arrested. The other passengers did have "knowledge of, and exercised dominion and control over" the items found in the vehicle, *cf. Pringle*, 540 U.S. at 368–69 (officers had probable cause because no passengers took ownership of evidence found in vehicle). Mr. Babstock didn't.

As Mr. Babstock contends, the probable cause to search his person came from associations the officers drew between him and the other occupants of the vehicle rather than a specific, individualized link between the evidence and Mr. Babstock. *See Wallace*, 372 Md. at 156 (explaining that "some link between the passenger and the crime must exist or probable cause generally will not be found"). A K-9 scan did alert positively to the vehicle, but under *Wallace* and *Livingston*, that alone cannot establish probable cause to search Mr. Babstock. And unlike in *Johnson*, CDS were neither in plain view (they were inside purses belonging to the female passengers), nor within Mr. Babstock's knowledge, dominion, or control, even drawing reasonable inferences in the State's favor.

b. The additional factors cited by the State did not give rise to probable cause.

This takes us to the additional factors the troopers used to justify the warrantless

search that, the State argues, indicated a "particularized suspicion of contraband" on Mr. Babstock's person, and thus probable cause to arrest and search him. *Wallace*, 372 Md. at 146 n.6. The officers testified about Mr. Babstock's "nervous behavior," that Trooper Brown recognized Mr. Babstock through a previous drug investigation with one of the female passengers, and about Mr. Babstock's initial use of a false name.

Although in probable cause determinations, "'the experience and special knowledge of police officers who are [attempting to establish probable cause] are among the facts which may be considered,'" *Longshore*, 399 Md. at 534 (*quoting Wood v. State*, 185 Md. 280, 286 (1945)), "[t]he observations of the police . . . must be based on something factual." *Id.* But once the drugs were objectively and conclusively attributed to the other passengers, the troopers couldn't point to any "specific and articulable facts" to establish probable cause. *Wallace*, 372 Md. at 148. The other factors were just "hunches" based on Mr. Babstock's behavior. *See Norman*, 452 Md. at 429 ("Unparticularized suspicion or a mere hunch is not sufficient." (cleaned up)).

Much of the evidence the State uses to establish probable cause boils down to nervousness: testimony that Mr. Babstock smoked three cigarettes within the fifty-minute encounter; the fact that he provided a false name because he was nervous (a fact the court deemed "critical[]"); and the observation that he seemed more nervous this time compared to a previous encounter. But the Supreme Court has "warned against according too much weight to the State's routine claim that garden variety nervousness accurately indicated complicity in criminal activity." *Sellman*, 449 Md. at 554 (cleaned up); *Ferris v. State*, 355

Md. 356, 389 (1999). Put another way, it's impossible to distinguish regular nervousness from criminal nervousness with any sort of discernment or precision:

> There is no earthly way that a police officer can distinguish the nervousness of an ordinary citizen under such circumstance from the nervousness of a criminal who traffics in narcotics. An individual's physiological reaction to a proposed intrusion into his or her privacy cannot establish probable cause or even grounds to suspect. Permitting a citizen's nervousness to be the basis for a finding of probable cause would confer upon the police a degree of discretion not grounded in police expertise, and, moreover, would be totally insusceptible to judicial review.

Whitehead v. State, 116 Md. App. 497, 505 (1997) (footnote omitted). In this case, the officers' observations don't allow a reasonable inference that Mr. Babstock's smoking departed from his usual patterns (*i.e.*, that he doesn't smoke three cigarettes in fifty minutes when he isn't nervous), or that he smokes when he is nervous for reasons other than hiding a guilty conscience. Indeed, the record contains nothing comparing Mr. Babstock's smoking habits on the day in question with his smoking on other days. *See also Ferris*, 335 Md. at 389 (being "fidgety" to questioning about smoking drugs was "too ordinary" and "not indicative of criminal activity"); *Sellman*, 449 Md. at 548 (giving a false name without an individualized link connecting defendant to a specific drug crime didn't establish probable cause).

Similarly, there was no evidence at the suppression hearing revealing that Mr. Babstock had a prior drug arrest record, only that he was present at the drug arrest of the rear vehicle passenger two-and-a-half months earlier. And the Supreme Court has cautioned that "'to be satisfied based upon a person's status [of having a prior drug arrest

record], rather than an individualized assessment of the circumstances, would undermine the purpose for requiring officers to justify their reasons for searching a particular individual.'" *Longshore*, 399 Md. at 534–35 (*quoting State v. Nieves*, 383 Md. 573, 597 (2004)). In *Longshore*, for example, the Court held that the officer did not have probable cause to place the defendant under arrest where he appeared to be "extremely nervous" and the police were aware of the defendant's prior drug arrests but where they were neither a flight risk nor dangerous. *Id.* at 518. The Court explained that a prior criminal record, nervous behavior, and inconsistent results from a drug dog merely provided reasonable suspicion to conduct further investigation, not a basis for probable cause. *Id.* at 535.

It's true that an officer recognizing a defendant from a previous encounter can contribute to probable cause where the defendant also exhibits other suspicious behavior. *Compare Fontaine v. State*, 135 Md. App. 471, 482 (2000) (arresting officers, who recognized the defendant from a previous encounter, had "at least reasonable suspicion to perform a strip search" because they noticed the defendant making suspicious movements, such as "fidgeting and attempting to stick something down his pants"), *with Nieves*, 383 Md. at 598 (officers did not have probable cause to search the defendant because the record lacked "indicia of suspicious movements and attempts to conceal weapons or contraband"). Trooper Reilly testified that Trooper Brown informed him that "the same vehicle was involved with Mr. Babstock and [the rear-seat passenger]," and the circuit court gave great weight to this fact. But this factor doesn't warrant much weight without contemporaneous "suspicious movements." And importantly, Trooper Brown and Trooper Reilly never

articulated *what crime* they suspected Mr. Babstock to have committed that required them to search Mr. Babstock's person after searching the vehicle and not finding anything that belonged to him.

Finally, the suppression court considered Mr. Babstock's flight as a factor in its probable cause analysis:

> And then finally, Trooper Brown testified to a bulge in the left front pocket of [Mr. Babstock] that Trooper Brown observed. Add to that that [Mr. Babstock], upon being advised that he was going to be searched, fled across the street.
>
> * * *
>
> And so the fleeing by Mr. Babstock just enhanced the probable cause, enhanced the suspicion on the part of the officers when the Defendant fled and added to the probable cause.

But flight can't "'enhance[] the probable cause'" when the initial search was illegal. *See Rodgers v. State*, 280 Md. 406, 410 (1977) (*quoting Sugarman v. State*, 173 Md. 52, 57 (1937) (holding that "one illegally arrested may use any reasonable means to effect his escape"); *Thornton*, 465 Md. at 160 (finding that where a petitioner's attempt to flee a situation created by the police was directly connected to and a result of an unlawful search, was non-violent and non-aggressive, and there was no evidence that the petitioner intended to cause harm to officers, the petitioner's flight did not dissipate the taint of officers' unlawful conduct, requiring exclusion of gun found on petitioners' possession). The search must be supported by "particularized suspicion *at its inception*." *Id.* at 142 (emphasis added). And because suspicion must exist from the inception, *id.*, Mr. Babstock's flight cannot justify the search retroactively.

The State needed "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warranted the intrusion." *Wallace*, 372 Md. at 148. Although this is a close case, under the totality of the circumstances, the State failed to present evidence sufficient to rebut the presumption that the warrantless search the trooper demanded was unreasonable at the time Mr. Babstock fled. And because that search was unreasonable under the Fourth Amendment, Mr. Babstock's actions should have been suppressed, and the conviction of resisting arrest, which is based entirely on the evidence from him fleeing, must be reversed.

JUDGMENT OF THE CIRCUIT COURT FOR CARROLL COUNTY REVERSED. APPELLEE TO PAY COSTS.