Circuit Court for Baltimore City
Case No. 119184006

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2417

September Term, 2019

MARKIE JEROME COLE

v.

STATE OF MARYLAND

Kehoe,
Gould,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: July 12, 2021

* 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.

Appellant, Markie Jerome Cole, was charged in the Circuit Court for Baltimore City with possession of a regulated firearm by a person previously convicted of a disqualifying crime. Defense counsel filed pretrial motions, in which she requested that the court (i) compel disclosure of the identity of the confidential informant whose tip had led to appellant's arrest and (ii) suppress the firearm seized by the police as the fruit of an unlawful search. Following a hearing, the court denied both motions. Thereafter, appellant entered a conditional guilty plea, reserving the right to appeal the court's denial of the motions. The court sentenced appellant to five years' incarceration without the possibility of parole. Appellant timely appealed the denial of the two motions and presents the following two questions for our review:

> 1. Did the court err in not requiring disclosure of the confidential informant's identity?
>
> 2. Was it error to deny the motion to suppress the evidence seized, after [the] police made a warrantless arrest and search of [a]ppellant, without probable cause?

For reasons that we will explain, we will remand this case to the circuit court for further proceedings without affirmance or reversal.

BACKGROUND

At about 10:53 on the evening of June 10, 2019, a paid confidential informant told Detective Joshua Cornelius that a male armed with a handgun was located in the 2200 block of Barclay Street. The informant provided the suspect's race and described him as wearing a black hat, a white shirt, gray pants, and carrying a satchel on his shoulder.

According to Detective Cornelius, the informant also provided a description of the suspect's height and build. At the motions hearing, however, the detective could not recall the physical description that the informant had provided. He was also unable to remember whether the informant had told him how he or she had acquired this information.

Detective Cornelius testified that, pursuant to Baltimore City Police Department protocols, the informant had been subjected to a comprehensive background check, which neither revealed any felony convictions, nor indicated that he or she had been convicted of a violent crime. Detective Cornelius told the court that he also had conducted his own "personal vetting" of the informant, which led him to conclude that he or she was reliable.

Detective Cornelius told the court that the informant and he had collaborated for approximately a year-and-a-half. During that period, Detective Cornelius averred, the informant had provided information on over 40 occasions, which led to the seizure of over 25 firearms, "numerous grams of various narcotics," and a significant quantity of cash. On none of those occasions did the detective find the informant's tips to have been unreliable. Detective Cornelius further testified that, of the four or five confidential informants with whom he had collaborated, this informant had been "the best" and had provided the most reliable information.

The detective did, however, acknowledge that approximately five percent of the informant's tips had not been actionable, either because they had been "stale," because the police had "gotten there too late," or because it had not been "the right time" to act on the

information. The informant was paid for each firearm recovered by the police as a result of one of his or her tips.

Upon receiving the tip, Detective Cornelius assembled what he called an "arrest team." On the evening of June 10th, members of that team, including Detective John Horne, Sergeant Maggio, and Detective Romeo, responded to the 2200 block of Barclay Street in an unmarked police vehicle.[1] According to Detective Cornelius, in the prior two years, there had been an increase in illegal narcotic activity, illegal possession of firearms, and gun violence in the Barclay Street neighborhood.

Sergeant Maggio, Detective Horne, and Detective Romeo arrived at the scene about twenty minutes after Detective Cornelius had received the tip. They observed one man standing on the sidewalk talking to another man who was sitting on the steps of a house. The man on the sidewalk, who turned out to be appellant, matched the description supplied by the informant and was wearing clothes matching those that the informant had described (a black hat, white shirt, gray pants, and a satchel on his shoulder). Detective Cornelius, in turn, testified that "there was no one else on the block that matched the [suspect's] description." The officers briefly observed the two men, and saw nothing that led them to believe that the either of the men was armed or otherwise engaging in illegal activities.

[1] The record does not provide the first names of either Sergeant Maggio or Detective Romeo.

Moreover, the officers did not see appellant "touching himself suspiciously" nor did they observe either a "bulge or any outline of a handgun[.]"

As they exited their vehicle, Sergeant Maggio and Detective Horne activated their body cameras. While approaching appellant, Detective Horne testified, that it appeared that he had been "looking at the [officers'] vehicle, wondering what they were going to do." Based on his observations, Detective Horne suspected that appellant was preparing to take flight. In anticipation thereof, Detective Horne ran toward appellant, intending to "detain him . . . and conduct a weapons pat down." He then "grabbed [appellant's] hand so he couldn't retrieve a firearm[.]" A "hard take-down" ensued. Thereafter, the detective testified, appellant appeared to reach for his waistband.

Moments after Detective Horne initiated the "hard-take down" of appellant, Detective Romeo aided him in "restrain[ing]" appellant, while Detective Cornelius "put [his] right arm around [appellant's] neck and collarbone area."[2] After he was subdued by the officers, appellant was placed in handcuffs. Detective Maggio's body camera recorded the events at issue. The footage, which the defense played for the court, captured the following exchange:

> MR. COLE: Hold on. Hold, yo. Hold --
>
> UNIDENTIFIED SPEAKER: Get your hand up. Get your hand --
>
> MR. COLE: Oh -- hold on. What's going on? What's going on?

[2] While he confirmed having "put [his] right arm around [appellant's] neck and collarbone area," Detective Cornelius denied having attempted "to choke someone out."

UNIDENTIFIED SPEAKER: Get your hand up.

MR. COLE: What … is this, man?

UNIDENTIFIED SPEAKER: Three more units, boss. This --

MR. COLE: Hold up, man, hold up. Who is this?

UNIDENTIFIED SPEAKER: He's reaching for it.

MR. COLE: Hold on, man.

UNIDENTIFIED SPEAKER: He's reaching for it. I saw the gun.

MR. COLE: Hold on. Hold on. Hold on.

UNIDENTIFIED SPEAKER: I got it.

MR. COLE: What the …?

UNIDENTIFIED SPEAKER: Don't move.

UNIDENTIFIED SPEAKER: Stand up.

UNIDENTIFIED SPEAKER: Watch your back.

UNIDENTIFIED SPEAKER: I got it.

The search of appellant's person revealed a .40-caliber Glock 22 secreted in his left pants pocket, as well as a clear plastic gel containing a white rock substance, a buprenorphine wrapper, and what appeared to be marijuana.

As we have related, appellant's trial counsel filed two pretrial motions. In the first, counsel asked the court to compel the State to disclose the identity of the confidential informant whose tip had led to appellant's arrest. The second motion was to suppress the firearm seized by the police as the fruit of an unlawful search. Following a hearing, the

court denied both motions. First, the trial court denied the motion to compel disclosure of the informant, ruling that the confidential informant was "much closer to being a mere tipster rather than someone who actively participated or actually witnessed the . . . transaction," and was unlikely to have "some form of relevant information . . . that would perhaps help in the defense" of appellant.

Second, the court denied the motion to suppress the evidence seized from appellant's person, ruling that: the "description" of the "individual" and his "geographical location" were not "vague"; the carrying of a "satchel" made the description "distinctive"; "[o]ne can infer from the level of detail" imparted that the "confidential informant had personal knowledge of that incident such that one could confidently predict that there would in fact be a handgun on this individual"; and there was "probable cause" to "stop, seize and search" appellant.

ANALYSIS

A. The informant's identity

Appellant argues that the trial court erred when it denied his motion to compel the disclosure of the informant's identity. He points out that, at the suppression hearing, the parties agreed that the informant's tip was the sole basis for the police to search appellant. He argues that the court applied the wrong legal standard in deciding whether disclosure was required, and that disclosure of the informant is required because the police relied solely on the informant's tip in seizing appellant. For its part, the State agrees that the trial court used the wrong legal standard in reaching its decision. The State further asserts that

the appropriate remedy is not to reverse the judgment but rather to remand the case for an additional hearing.

An appellate court is not bound by a party's concession of error on a legal issue. *Coley v. State*, 215 Md. App. 570, 572 n.2 (2013). Nor are we bound by a concession or stipulation on "a question of law requiring the application of facts." *Greenstreet v. State*, 392 Md. 652, 667 (2006). Although it is not at all clear to us that the trial court applied the wrong legal standard when it denied appellant's motion for disclosure of the identity of the confidential informant, we think that it is appropriate for us to remand the case for a fuller explanation of the court's reasoning and the factual basis for it.

Our decision is based on the fact that we review a trial court's decision to deny a motion for the disclosure of a confidential informant for abuse of discretion. *Elliott v. State*, 417 Md. 413, 446 (2010). In cases, such as the present one, where the basis for the trial court's discretionary decision is not altogether clear, a remand can be appropriate. *See Bodeau v. State*, 248 Md. App. 115, 154 (2020) ("Our task is to review the circuit court's exercise of [its] discretion for abuse—not to exercise that discretion on the circuit court's behalf.").

As a general rule, the State is not required to disclose the identity of a confidential informant in a criminal prosecution. *Edwards v. State*, 350 Md. 433, 440 (1998) (citing *Roviaro v. United States*, 353 U.S. 53, 59 (1957)). The privilege is not absolute and in appropriate circumstances, must yield to the constitutionally guaranteed right of a defendant to a fair trial. *Edwards*, 353 Md. at 441 n.2.

There are generally two contexts in which the State can be required to disclose the identity of a confidential informant. The first arises during the guilt-innocence part of the trial. In such cases, courts draw a distinction between a "mere tipster"—whose identity the State is typically not required to disclose—and an informant who was also a participant in criminal activity giving rise to the charges against the defendant and therefore may have direct knowledge of facts relevant to the defendant's culpability. In the latter category, disclosure is usually required. *Id.* at 442.

The second, and "more difficult" scenario, *Edwards*, 350 Md. at 444, arises when the accused's defense is that there was no legal justification for the police to conduct the search or seizure that resulted in the incriminating evidence. In such cases, the "participant/tipster distinction is not necessarily controlling." *Id.* The Court stated:

> We think the reasonable and proper rule after a careful consideration of all of the authorities, to be that in criminal cases where the probable cause for a defendant's arrest depends wholly, or in part, on information received from a non-participating informer, if the name of the informer is useful evidence to vindicate the innocence of the accused, lessens the risk of false testimony *or is essential to a proper disposition of the case,* disclosure should be compelled, or the evidence obtained by reason of the arrest and search suppressed. . . . If the accused asserts any substantial ground indicating that the identity of the informer is material to his defense *or the fair determination of the case on the issue of probable cause* the trial court should require the informant's name to be given (or the evidence suppressed) so that the informant may be summoned and interrogated if it be necessary to do so in order to determine whether or not the officer had probable cause to make the arrest.

Edwards, 350 Md. at 445–46 (quoting *Drouin v. State,* 222 Md. 271, 286 (1960) (emphasis added in *Edwards*)).

Elaborating on this theme, the Court explained that if "the finding of probable cause rest[s] on the informant's uncorroborated information," the informant should be disclosed. 350 Md. at 446 (*quoting with approval United States v. Tucker*, 380 F.2d 206, 212 (2d Cir. 1967)). However, the Court added that,

> in a "close case," or where the record is otherwise insufficient to permit the court to engage in the required balancing process, an *in camera* hearing may be necessary, to allow the court to interview the informant, determine what role his or her role was in the matter, and reach an informed judgment as to whether the informant's identity should be disclosed.

Id. at 446–47 (cleaned up) (citing *Warrick v. State*, 326 Md. 696, 708–09 (1992)). Maryland courts "have . . . identified three defenses which often require disclosure: entrapment, lack of knowledge, and mistaken identity." *Elliot v. State*, 417 Md. 413, 445 (2010) (citing *Brooks v. State*, 320 Md. 516, 523 (1990)).

The State asserts that this is a case where an *in camera* hearing is appropriate. It asks us to remand the case without affirmance or reversal pursuant to Md. Rule 8-604(d) for the court to conduct such a hearing as to whether the identity of the confidential informant should be disclosed. "The purpose of an *in camera* proceeding is to limit the extent of the disclosure of the informant's identity and information, thereby protecting the State's interest in avoiding unnecessary disclosure, while at the same time it will safeguard defendant's right[s.]" *Gibson v. State*, 331 Md. 16, 27 (1993) (cleaned up). "[W]here . . . the defendant has established that the confidential informant probably would give specific testimony helpful to the defense, . . . the defendant has met his burden and there is no need for an *in camera* hearing." *Id*. Absent such a showing, remanding a case for an *in camera*

hearing is generally warranted "[i]n a close case, or where the record is otherwise insufficient to permit the court to engage in the required balancing process[.]" *Edwards*, 350 Md. at 446; *see also Warrick*, 326 Md. at 713 (declining to grant the defendant a new trial where an *in camera* examination of a confidential informant would permit the State "to prove that the defendant was not prejudiced and that nondisclosure 'did not impact … the fairness of the trial.'" (citation omitted)).

The record in this case neither indicates that the informant's testimony would have been cumulative of the evidence presented, nor suggests that it would have benefitted the defense. Certainly, there was no suggestion that appellant asserted that he was entrapped, that he was not aware that he was carrying a handgun and other contraband, or that he was the victim of mistaken identity. *Elliot*, 417 Md. at 445. Absent a showing that the disclosure of informant's identity or testimony would have aided appellant's defense, reversal is unwarranted. We shall, therefore, remand this case to the circuit court without affirmance or reversal with instructions that it conduct an *in camera* examination of the informant to assess his or her reliability and the reliability of the informant's possible testimony.

B. The motion to suppress

Appellant further asserts that the court erroneously denied his motion to suppress the handgun that the police found on his person. He claims that the detention during which the search was conducted constituted a *de facto* arrest, which had not been supported by

probable cause. The State counters that the detention was, in fact, "a hard-takedown stop and frisk justified by reasonable suspicion generated by the informant's tip."[3] We agree.

The parties do not dispute that the informant's tip generated reasonable suspicion of criminal activity, but did not furnish probable cause to arrest. The narrow issue before us is whether appellant's seizure was a mere *Terry* stop, requiring only reasonable suspicion of illegal activity, or was elevated to the level of a *de facto* arrest, the effectuation of which required probable cause.

The Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, guarantees "[t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "When evidence is obtained in violation of the Fourth Amendment, it will ordinarily be inadmissible in a state criminal prosecution pursuant to the exclusionary rule." *Thornton v. State*, 465 Md. 122, 139 (2019) (citing *Bailey v. State*, 412 Md. 349, 363 (2010)).

"[T]he 'ultimate touchstone' of the Fourth Amendment is 'reasonableness,' which depends on a balancing of, 'on the one hand, the degree to which [a search or seizure] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for

[3] There were dueling concessions at the suppression hearing: Defense counsel conceded that the informant's tip provided "reasonable suspicion" of wrongdoing to permit the police to conduct a *Terry* stop and frisk. *See Terry v. Ohio*, 392 U.S. 1, 27 (1968). On the other hand, it was the position of the prosecutor that "the police needed probable cause" in light of the force used on appellant. As we explained in part A of this opinion, neither of these concessions is binding upon this Court.

the promotion of legitimate governmental interests[.]'" *Eusebio v. State*, 245 Md. App. 1, 30–31 (2020) (citations omitted). In order to pass Fourth Amendment muster, an arrest—whether formal or *de facto*—must be supported by probable cause. To justify a less intrusive *Terry* stop, on the other hand, the police need merely possess reasonable suspicion that a crime has occurred, is occurring, or will occur. *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

"[T]here are no *per se* rules or bright lines to determine when an investigatory stop and frisk becomes an arrest and is elevated to the point that probable cause is required." *In re David S.*, 367 Md. 523, 534 (2002); *United States v. Sharpe,* 470 U.S. 675, 685 (1985) ("Much as a 'bright line' rule would be desirable, in evaluating whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria."). Although a relevant factor, the degree of force used to detain a suspect is not necessarily dispositive of whether a suspect was subjected to a *de facto* arrest. *See Chase v. State*, 224 Md. App. 631, 647 (2015) ("'The distinction between a *Terry* "stop" and an arrest . . . is not in the *method* of detention, but rather has to do with the length of the detention, the investigative activities during the detention, and whether the suspect is removed to a detention or interrogation area.'" (quoting *Farrow v. State*, 68 Md. App. 519, 526 (1986))); *Bailey*, 412 Md. at 373 ("[E]ven if the officers' physical actions are equivalent to an arrest, the show of force is not considered to be an arrest if the actions were justified by officer safety or permissible to prevent the flight of a suspect."); *In re David S.*, 367 Md. 523, 539–40 (2002) (holding that a "hard take down" of the defendant was not tantamount to an arrest where several officers, with weapons drawn, "forced

respondent to the ground and placed him in handcuffs," as the officers' conduct "was not unreasonable because [they] reasonably could have suspected that respondent posed a threat to their safety." (citation omitted)); *Trott v. State*, 138 Md. App. 89, 118 (2001) ("[T]he handcuffing of appellant was justifiable as a protective and flight preventive measure pursuant to a lawful stop and did not necessarily transform that stop into an arrest.").

When confronted with a suspect whom the police reasonably believe poses an imminent threat, either to their safety or to the safety of passersby, they may employ arrest-level force without elevating a *Terry* stop to a *de facto* arrest. *See Harrod v. State*, 192 Md. App. 85, 104 (2010) ("Maryland caselaw has recognized two circumstances in which officers may use arrest-force during a *Terry* stop without effectuating an arrest; one such circumstance being the *Terry* frisk of a suspect whom officers reasonably believe is armed and dangerous, and therefore poses a threat to their safety.") (cleaned up), *rev'd on other grounds*, 423 Md. 24 (2011).

When there was a reasonable basis for the police officers to believe that a person is armed and dangerous immediately preceding his or her detention, arrest-level force may be employed without elevating a *Terry* stop to a *de facto* arrest. We must, therefore, look to the remaining factors bearing on whether an investigatory stop ripened into a *de facto* arrest. Those factors include: (i) the duration of the detention; (ii) the number of officers by whom the defendant was detained; (iii) whether the defendant was detained in public or in private; (iv) whether the defendant was "removed from the place of the stop to another

location"; and (v) "the investigative activities that occur[ed] during the detention[.]" *Chase*, 224 Md. App. at 644 (cleaned up).

In this case, the police detained appellant for less than three minutes prior to their discovering the handgun. Sergeant Maggio's and Detective Horne's body camera footage indicate that approximately seven officers responded to the scene, one of whom conducted the hard take-down, and four of whom participated in appellant's initial detention. During his preliminary seizure, appellant was neither privately detained, nor was he removed from the scene of his initial detention. The ensuing search consisted of a pat-down frisk of appellant's garments. The record does not indicate that the police attempted to question appellant before they discovered the handgun, and that discovery furnished probable cause for a more comprehensive and invasive search. We hold that the amount of force used by the officers was reasonable based upon their reasonable suspicion that appellant was in possession of a concealed firearm. Therefore, the search and seizure of appellant's person did not violate the Fourth Amendment.

C. Proceedings on remand

Pursuant to Md. Rule 8-604(d),[4] we remand this case without affirmance or reversal to the circuit court for it to conduct an *in camera* hearing "to allow the court to interview the

[4] Rule 8-604(d) states:

> If the Court concludes that the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings, the Court may remand the case to a lower court. In the order remanding a case, the appellate court shall

informant, determine what his or her role was in the matter, and reach an informed judgment as to whether the informant's identity should be disclosed." *Edwards*, 350 Md. at 446–47. If the court concludes that disclosure of the informant's identity is required to safeguard appellant's right to a fair trial, the court shall hold a new suppression hearing and, depending upon the results of that hearing, a new trial.

THIS CASE IS REMANDED TO THE CIRCUIT COURT FOR BALTIMORE CITY WITHOUT AFFIRMANCE OR REVERSAL FOR PROCEEDINGS CONSISTENT WITH THIS OPINION.

COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.

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state the purpose for the remand. The order of remand and the opinion upon which the order is based are conclusive as to the points decided. Upon remand, the lower court shall conduct any further proceedings necessary to determine the action in accordance with the opinion and order of the appellate court.