No. _____

In the Supreme Court of the United States

EFRAIN TAYLOR,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under the exception to the warrant requirement announced in *Arizona v. Gant*, 556 U.S. 332, 343 (2009), permitting a vehicular search incident to a recent occupant's arrest "when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle," what quantum of particularized suspicion is required by the Fourth Amendment to justify the search?

2. May the unquantified experience of the arresting officer, alone, supply the necessary particularized suspicion to justify the vehicular search?

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Petitioner, Efrain Taylor, by counsel, Daniel Kobrin, Assistant Public Defender, Maryland Office of the Public Defender, requests that this Court issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland.

OPINION BELOW

The opinions of the Court of Appeals of Maryland, *Taylor v. State*, 137 A.3d 1029 (Md. 2016), and the Court of Special Appeals of Maryland, *Taylor v. State*, 121 A.3d 167 (Md. Ct. Spec. App. 2015), are reproduced in the appendix to this petition. App. 1; App. 12. The transcript of the hearing at which the questions presented were first decided is also reproduced in the appendix. App. 38.

JURISDICTION

The Court of Appeals of Maryland issued its opinion affirming the judgment of the Court of Special Appeals of Maryland on May 23, 2016. App. 1. The Court of Appeals thereafter entered an order denying Petitioner's Motion to Reconsider on July 8, 2016. App. 67. This petition is filed within 90 days of that denial, as required by Rule 13 of the Rules of the Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

CONSTITUTION OF THE UNITED STATES, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be

> violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

1. *Factual Background*. During the early morning hours of March 1, 2013, Officer Chad Mothersell of the Cambridge, Maryland, Police Department saw a white SUV speed through an intersection. App. 43. The officer began following the SUV and saw it roll through a stop sign. App. 44-45. Based on these two observations, Officer Mothersell activated his emergency lights and initiated a traffic stop of the SUV. App. 45. Mr. Taylor was identified as the driver of the SUV. App. 45-46.

On his approach to the passenger side of the vehicle, Officer Mothersell detected a "minor odor" of alcohol on Mr. Taylor's breath, observed Mr. Taylor's eyes to be bloodshot and glassy, and perceived his speech to be slurred. App. 46. When Officer Mothersell asked for the registration for the SUV, Mr. Taylor handed over an insurance card and the title to the vehicle; he held the vehicle registration in his hand but failed to hand it over. App. 46. Finally, when asked where he had been that evening, Mr. Taylor responded: a local bar. App. 47.

Based on the foregoing, Officer Mothersell asked Mr. Taylor to exit the SUV. App. 47. Field sobriety tests were administered to Mr. Taylor, but not completed successfully. App. 47. The officer therefore

placed Mr. Taylor under arrest for driving under the influence. App. 47.

As part of the arrest procedure, Officer Mothersell placed Mr. Taylor in the rear of his patrol vehicle. App. 56-57. Once inside the vehicle, the officer began advising Mr. Taylor of his rights related to taking a breathalyzer exam. At the same time, a second officer, Officer Kenneth Carroll, arrived on the scene. App. 57. As Mr. Taylor sat in the patrol vehicle, ten to fifteen feet from the SUV, Officer Carroll entered the SUV and began searching through the passenger cabin. App. 57. The search uncovered a plastic baggie containing suspected cocaine powder in the center console. App. 48.

The search was not borne of any particular suspicion or observation: Officer Mothersell had not observed any alcohol or paraphernalia within the SUV's cabin during the traffic stop, nor did he indicate that he detected the odor of alcohol emanating from the vehicle. App. 59. Instead, when asked whether he had "any reason to believe that there were any such open containers in the vehicle," Officer Mothersell answered:

> A. A good possibility, yes. I've had several DUI arrests where there's plenty of open containers left in the vehicle. And I want to make sure there's no other alcohol left in the vehicle for the probable cause for my DUI stop.

App. 58.

2. *Trial Proceedings*. Mr. Taylor was indicted in the Circuit Court for Dorchester County, Maryland, on charges of possession with intent to distribute a

controlled dangerous substance (CDS), possession of CDS, driving under the influence of alcohol, and other traffic offenses. Prior to trial, Mr. Taylor moved to suppress the items seized from the center console, arguing that, under the "crime of arrest" exception announced in *Arizona v. Gant*, the search of the SUV violated his Fourth Amendment rights. In particular, defense counsel asserted that Officer Mothersell did not possess the particularized, articulable suspicion required to justify a search of the SUV pursuant to the "crime of arrest" exception. App. 61-62. The State responded that Officer Mothersell's "training, knowledge, and experience" provided the necessary suspicion for the search. App. 63. The trial court denied Mr. Taylor's motion and ruled that the search was lawful under *Gant* because, under the circumstances of the stop, it "could have revealed a pint of whiskey in the glove compartment, who's to say." App. 64.

After a subsequent jury trial, Mr. Taylor was convicted of possession with intent to distribute CDS, driving under the influence, lesser-included offenses, and other traffic offenses. The trial court sentenced Mr. Taylor to 40 years of incarceration for possession with intent to distribute and a concurrent year of incarceration for driving under the influence.

3. *Appellate Review*. Mr. Taylor appealed his judgments of conviction to the Court of Special Appeals of Maryland, challenging the trial court's suppression ruling. In the intermediate appellate court, the State switched its position and argued that the "crime of arrest" exception required no showing of particularized suspicion. Instead, the exception was a *per se* rule based on the nature of the offense of arrest. That is, a

search is permissible whenever the crime of arrest is one that tends to generate physical evidence. Mr. Taylor countered that the exception requires a showing of reasonable articulable suspicion; and, such suspicion was lacking in this case. The Court of Special Appeals agreed with Mr. Taylor that, under the "crime of arrest" exception, the "search of an automobile incident to arrest must be based on a similar level of reasonable suspicion as in an automobile stop under *Terry* [*v. Ohio*, 392 U.S. 1 (1968)]." App. 23. The intermediate appellate court, however, concluded that reasonable suspicion existed to justify the search because of three factors: 1) the officer's experience with inebriated drivers; 2) the lack of an innocent explanation for the inebriation; and, 3) the nature of the crime. App. 31.

Mr. Taylor obtained review of the intermediate appellate court's decision in the Court of Appeals of Maryland. In the state high court, Mr. Taylor again argued that the "crime of arrest" exception required a showing of reasonable suspicion and that such suspicion was lacking. The State abandoned its pursuit of a *per se* rule and agreed, instead, that reasonable suspicion was the correct threshold to support the search under *Gant*. The State added, however, that the necessary reasonable suspicion was supplied by the nature of the offense alone (here, driving under the influence).

The Court of Appeals affirmed the holding of the intermediate court. The Court of Appeals noted that the "crime of arrest" exception was novel in Fourth Amendment jurisprudence and possessed no roots in *Chimel v. California*, 395 U.S. 752 (1969), or its progeny. App. 5-7. As a result, there existed "a fair

question of what, exactly, the *Gant* Court meant in holding that the police may search the vehicle when it is 'reasonable to believe' that evidence of the crime for which the defendant was arrested may be discovered…." App. 8.

After surveying the positions taken by jurisdictions around the country, the Court of Appeals concluded "that the 'reasonable to believe' standard is the equivalent of reasonable articulable suspicion." App. 10. Nevertheless, the requisite reasonable suspicion was supplied in this case by Officer Mothersell's experience alone. App. 10-11. In fact, "in most cases of an arrest for driving under the influence," the officers' experience, alone, would suffice to provide the requisite suspicion under the Fourth Amendment. App. 10.

REASONS FOR GRANTING THE PETITION

This case presents a Fourth Amendment question left open by *Arizona v. Gant*, 556 U.S. 332 (2009), that has been answered three different ways by a multitude of courts. In *Gant*, this Court adopted a new rule permitting a law enforcement officer to search a vehicle incident to a recent occupant's arrest when "it is reasonable to believe the vehicle contains evidence of the offense of arrest." 556 U.S. at 351. The *Gant* opinion, however, "did not elaborate on the circumstances when it will be reasonable to believe" that a vehicle contains evidence, providing no basis for the new rule and no standard guiding its application. *United States v. Vinton*, 594 F.3d 14, 25 (D.C. Cir. 2010). Accordingly, as members of this Court

predicted,[1] application of the "crime of arrest" exception has confused law enforcement officers and suppression courts for the better part of a decade.

The issue is one of fundamental Fourth Amendment application: when is it "reasonable to believe" that relevant evidence will be found in the recent arrestee's vehicle?[2] Ten jurisdictions analyze the existence of a reasonable belief using the reasonable articulable suspicion standard announced in *Terry v. Ohio*, 392 U.S. 1 (1968).[3] Two jurisdictions take the view that a

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[1] *See Gant*, 556 U.S. at 356 (Alito, J., dissenting, joined by Roberts, C.J., Kennedy, J., and Breyer, J.) ("The second part of the new rule is taken from Justice Scalia's separate opinion in *Thornton* [*v. United States*, 541 U.S. 615, 632 (2004)] without any independent explanation of its origin or justification and is virtually certain to confuse law enforcement officers and judges for some time to come."); *see also Grooms v. United States*, 556 U.S. 1231 (2009) (mem.) (Alito, J., dissenting from GVR order); *Meggison v. United States*, 556 U.S. 1230 (2009) (mem.) (Alito, J., dissenting from GVR order); *Montejo v. Louisiana*, 556 U.S. 778, 799 (2009) (Alito, J., dissenting, joined by Kennedy, J.).

[2] *See* Geoffrey S. Corn, *Arizona v. Gant: The Good, The Bad, And The Meaning Of "Reasonable Belief*," 45 Conn. L. Rev. 177 (2012); George M. Dery, III*, A Case Of Doubtful Certainty: The Court Relapses Into Search Incident To Arrest Confusion In Arizona v. Gant*, 44 Ind. L. Rev. 395 (2011).

[3] *United States v. Vinton*, 594 F.3d 14, 25 (D.C. Cir. 2010); *United States v. Reagan*, 713 F. Supp. 2d 724, 728 (E.D. Tenn. 2010); *Taylor v. State*, 137 A.3d 1029, 1033-34 (Md. 2016) (case under present review); *State v. Mbacke*, 721 S.E.2d 218, 222 (N.C. 2012); *United States v. Taylor*, 49 A.3d 818, 824 (D.C. 2012); *Robbins v. Commonwealth*, 336 S.W.3d 60, 63-64 (Ky. 2011); *People v. Tavernier*, 815 N.W.2d 154, 156 (Mich. Ct. App. 2012); *People v. Chamberlain*, 229 P.3d 1054, 1057 (Colo. 2010); *People v. Evans*,

reasonable belief arises when there is probable cause to believe evidence of the crime of arrest will be found in the vehicle.[4] And twelve jurisdictions follow a *per se* rule requiring no particularized suspicion.[5] Under this *per se* rule, a belief is reasonable, and an officer may search a vehicle, when the recent occupant's offense of arrest is a non-traffic infraction that could generate physical evidence.

Within those jurisdictions that require reasonable articulable suspicion, two permit that suspicion to arise from the nature of the offense.[6] Maryland charted yet another course and found reasonable suspicion in

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200 Cal. App. 4th 735, 749 (Cal. Ct. App. 2011); *Powell v. Commonwealth*, 701 S.E.2d 831, 835 (Va. Ct. App. 2010).

[4] *United States v. Williams*, 616 F.3d 760, 764-65 (8th Cir. 2010); *United States v. Grote*, 629 F. Supp. 2d 1201, 1203-04 (E.D. Wash. 2009).

[5] *United States v. Madden*, 682 F.3d 920, 926-27 (10th Cir. 2012); *United States v. Phillips*, 9 F. Supp. 3d 1130, 1136-37 (E.D. Cal. 2014); *United States v. Page*, 679 F. Supp. 2d 648, 654 (E.D. Va. 2009); *Commonwealth v. Perkins*, 989 N.E.2d 854, 858 (Mass. 2013); *People v. Bridgewater*, 918 N.E.2d 553, 558 (Ill. 2009); *Meister v. State*, 933 N.E.2d 875, 878 (Ind. 2009); *People v. Nottoli*, 199 Cal. App. 4th 531, 553 (Cal. Ct. App. 2011); *Baxter v. State*, 238 P.3d 934, 936 (Okla. Crim. App. 2010); *State v. Cantrell*, 233 P.3d 178, 184 (Idaho Ct. App. 2010); *Cain v. State*, 373 S.W.3d 392, 397 (Ark. Ct. App. 2010); *State v. Smiter*, 793 N.W.2d 920, 923 (Wis. Ct. App. 2010); *Brown v. State*, 24 So.3d 671, 677-78 (Fla. Dist. Ct. App. 2009).

[6] *Chamberlain*, 229 P.3d at 1057; *Evans*, 200 Cal. App. 4th at 751-52.

nothing more than the arresting officer's unquantified experience.

Given the frequency of roadside arrests – and, specifically, the frequency of roadside arrests for DUI – the novel exception announced in *Gant* requires clarification by this Court: does the Fourth Amendment require this warrantless search to be supported by, at the least, reasonable suspicion, and, if so, what type of evidence adequately establishes that suspicion? The circumstances of Mr. Taylor's case provide an excellent vehicle for that clarification. The parties have agreed that no other exception to the warrant requirement applied; the lawfulness of the traffic stop was unchallenged; the question presented was squarely addressed at all levels of review; and the facts underlying the stop and search present straightforward circumstances for measuring the existence of any required quantum of suspicion.

I. *Gant* Created A New Exception To The Warrant Requirement And Left Open The Interpretation Of Its Application And Scope.

This Court's opinion in *Gant* explicated when and how law enforcement officers may search a vehicle without a warrant incident to the arrest of a recent occupant. It was not, however, the first opinion to do so. Forty years earlier in *Chimel v. California*, 395 U.S. 752, 763 (1969), this Court held that a police officer may only search, incident to an arrest, "the arrestee's person and the area within his immediate control." Under such restrictions, the scope of the Fourth Amendment intrusion was "strictly tied to and justified by the circumstances which rendered its initiation

permissible," *i.e.* officer safety and evidentiary preservation. *Id*. at 762 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)).

The opinion in *New York v. Belton*, 453 U.S. 454 (1981), applied *Chimel* to the warrantless search of a vehicle's passenger compartment. "[A]rticles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].'" *Id*. at 460 (quoting *Chimel*, 395 U.S. at 763). Accordingly, this Court held in *Belton* that, "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.*

For two decades after *Belton*, courts around the country used its bright-line rule to permit countless vehicle searches where "there [was] no possibility the arrestee could gain access to the vehicle at the time of the search." *Gant*, 556 U.S. at 341. Warrantless searches were permitted under the *Chimel* rationale, even though there was no opportunity for the arrestee to obtain a weapon or evidence from the car subject to the search. *See*, *e.g.*, *United States v. Hrasky*, 453 F.3d 1099, 1002 (8th Cir. 2006) (search of car conducted one hour after arrest, when arrestee was handcuffed and locked in back of patrol vehicle).

In *Gant*, this Court addressed that expansion of the vehicular search incident to arrest exception. The defendant in *Gant* had parked his car, exited it, and walked ten to twelve feet before he encountered police officers. 556 U.S. at 336. Upon arrest, the defendant

was handcuffed and locked in the back of a patrol vehicle. *Id.* Only then did officers begin searching his car. *Id.* This Court held that, under such circumstances, the search of the vehicle constituted a violation of the Fourth Amendment. *Id.* at 335.

In arriving at that holding, the *Gant* opinion recognized that permitting such a search would entirely "untether the rule from the justifications underlying the *Chimel* exception." *Id.* at 343. Thus, the opinion refashioned the vehicular search incident to arrest exception to better reflect its roots in *Chimel*. No longer could police officers search the car of a recent occupant regardless of the occupant's actual ability to obtain a weapon or destroy evidence. Instead, the *Gant* opinion explained, "the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Id.* at 343.

The opinion did not stop there, however. Introducing a second exception for searching a vehicle without a warrant, the opinion continued: "Although it does not follow from *Chimel*, we also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Id.* at 344 (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring in judgment)).

This Court explained:

> In many cases, as when a recent occupant is arrested for a traffic violation, there will be no

> reasonable basis to believe the vehicle contains relevant evidence. *See*, *e.g., Atwater v. Lago Vista,* 532 U.S. 318, 324, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001); *Knowles v. Iowa,* 525 U.S. 113, 118, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998). But in others, including *Belton* and *Thornton,* the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein.

Id.

With that, this Court in *Gant* held that the crime of the defendant's arrest –"driving with a suspended license" – did not warrant a reasonable belief that evidence of that crime would be found in the defendant's car. *Id.*

II. Courts Have Divided Three Ways Over How To Apply The "Crime Of Arrest" Exception Announced In *Gant*.

For nearly a decade, courts have grappled with the "array of possibilities"[7] presented by the "crime of arrest" exception. Each has faced the same fundamental difficulty. This Court "did not elaborate on the circumstances when it will be 'reasonable to believe,'" *Vinton*, 594 F.3d at 25; thus, three approaches to the exception's application have developed in the absence of this Court's guidance.

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[7] 3 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 7.1(d) (5th ed. 2012).

A. Ten jurisdictions treat the reasonable belief standard as permitting a search when an officer possesses reasonable articulable suspicion that evidence of the crime of arrest will be found in the vehicle.

A number of courts have interpreted the "reasonable to believe" language in *Gant* as an adoption of the "reasonable articulable suspicion" standard articulated in *Terry v. Ohio*, 392 U.S. 1 (1968), and its progeny. That is to say, a law enforcement officer may only search a stopped vehicle after arresting and securing a recent occupant when the officer possesses reasonable suspicion, based on articulable facts, that further evidence of the crime of arrest will be found inside the vehicle's cabin. These courts include the D.C. Circuit, the state high courts in North Carolina and Colorado, and a number of state intermediate appellate courts. *See United States v. Vinton*, 594 F.3d 14, 25 (D.C. Cir. 2010); *United States v. Taylor*, 49 A.3d 818, 824 (D.C. 2012); *State v. Mbacke*, 721 S.E.2d 218, 222 (N.C. 2012); *People v. Chamberlain*, 229 P.3d 1054, 1057 (Colo. 2010); *see also, e.g., People v. Evans*, 200 Cal. App. 4th 735, 748-49 (Cal. Ct. App. 2011).

This interpretation of the "reasonable to believe" language enjoys both a general and a specific justification. As a general matter, *Gant* was this Court's express rejection of *Belton* as approving general vehicle searches incident to arrest. The express purpose of the opinion was to re-anchor the exception to the justifications enunciated in *Chimel*, which "derive[] from interests in officer safety and evidence preservation that are typically implicated in arrest

situations." 556 U.S. at 338. Consistent with this purpose, the requirement of particularized suspicion must be present in the "crime of arrest" exception announced in *Gant*.

The precise phrasing used by this Court in setting forth the exception further supports adopting reasonable articulable suspicion as the quantum of suspicion required to justify the search. The "reasonable to believe" phrase used by this Court in *Gant* echoes the language used in *Terry*. *Compare Gant*, 556 U.S. at 335 (search of vehicle permitted when "…reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle"); *with Terry*, 392 U.S. at 30 (stop permitted when officer could "reasonably conclude ... that criminal activity may be afoot" and frisk permitted where officer could "reasonably conclude ... that the person with whom he is dealing may be armed and presently dangerous"). The twin standards enunciated in *Terry* have been universally understood since to require reasonable articulable suspicion. *See*, *e.g.*, *United States v. Place*, 462 U.S. 696 (1983).

B. Two jurisdictions equate the "crime of arrest" exception with the broader automobile exception.

Two courts have read the "crime of arrest" exception in *Gant* as the implementation of the automobile exception[8] in a post-arrest setting. In these

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[8] The exception, established in *Carroll v. United States*, 267 U.S. 132 (1925), authorizes law enforcement officers to conduct warrantless vehicle searches where there is probable cause to believe evidence of a crime will be found, whether or not there has

jurisdictions, an officer must possess probable cause that evidence of the crime of arrest will be found in a vehicle in order to search the vehicle after arresting and securing a recent occupant. The two courts that have adopted this standard are the Eighth Circuit and Eastern District of Washington. *See United States v. Williams*, 616 F.3d 760, 764-65 (8th Cir. 2010); *United States v. Grote*, 629 F. Supp. 2d 1201, 1203-04 (E.D. Wash. 2009).

Insofar as these courts require a particularized showing of suspicion to support an intrusion, this position is in harmony with Fourth Amendment jurisprudence. Moreover, this Court has interpreted the phrase "reasonable to believe" as a synonym of "probable cause." *Draper v. United States*, 358 U.S. 307, 310 n.3 (1959) (phrases "reasonable grounds to believe" in statute and "probable cause" in the Fourth Amendment "are substantial equivalents of the same meaning"). Nonetheless, it is difficult to reconcile this position with the *Gant* opinion as a whole. 556 U.S. at 347 (contrasting directly the automobile exception with the "crime of arrest" exception and concluding that former is broader than the latter). *See also Vinton*, 594 F.3d at 25 ("Presumably, the 'reasonable to believe' standard requires less than probable cause, because otherwise *Gant's* evidentiary rationale would merely duplicate the 'automobile exception,' which the Court specifically identified as a distinct exception to the warrant requirement.")

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been an arrest of driver or occupant. *See also, e.g., Chambers v. Maroney*, 399 U.S. 42 (1970); *California v. Carney*, 471 U.S. 386 (1985).

C. Twelve jurisdictions permit a search pursuant to the "crime of arrest" exception based on a categorical rule that requires no particularized suspicion.

The remaining jurisdictions follow a categorical rule in applying the "crime of arrest" exception. The vehicular search need not be based on any particularized suspicion that evidence of criminal activity may be found in the vehicle; rather, "'reasonable belief,' as used in *Gant,* is solely determined from the nature of the offense of arrest." *Brown*, 24 So.3d at 679. Under this reasoning, *Gant* created a dichotomy in the vehicular search context between offenses for which "evidence is possible and might conceivably be found in the arrestee's vehicle," *Chamberlain*, 229 P.3d at 1056, and offenses, like traffic infractions, for which evidence is not likely to be found in a vehicle. Regardless of the circumstances surrounding the traffic stop, the former categorically permit a search of a vehicle incident to arrest, while the latter do not. *Brown*, 24 So.3d at 678-79; *Cantrell*, 233 P.3d at 184; *Nottoli*, 199 Cal. App. 4th at 553.

Courts that employ this *per se* approach, both with and without addressing the question directly, include the Tenth Circuit, the state high courts in Massachusetts, Indiana, and Illinois, and a handful of state intermediate appellate courts. *See United States v. Madden*, 682 F.3d 920, 926-27 (10th Cir. 2012) (search of vehicle improper because "it was not reasonable to believe [the] vehicle contained evidence of the offense of arrest, i.e., evidence of two outstanding municipal misdemeanor traffic warrants"); *Commonwealth v. Perkins*, 989 N.E.2d 854, 858 (Mass.

2013) (same, where offense was operating motor vehicle without a license); *People v. Bridgewater*, 918 N.E.2d 553, 558 (Ill. 2009) (same, where offense was obstructing a peace officer); *Meister v. State*, 933 N.E.2d 875, 878 (Ind. 2009) (same, where offense was driving with a suspended license); *see also*, *e.g.*, *Cantrell*, 233 P.3d 178, 184 (Idaho Ct. App. 2010) (vehicular search proper where the offense of arrest was DUI); *Cain v. State*, 373 S.W.3d 392, 397 (Ark. Ct. App. 2010) (same); *Brown*, 24 So.3d at 677-78 (Fla. Dist. Ct. App. 2009) (same, where defendant was arrested on outstanding theft warrants).

Support for this position is found in the concurring opinion authored by Justice Scalia in *Thornton v. United States*, 541 U.S. 615, 629 (2004) (Scalia, J., concurring), in which Justice Scalia derived the "crime of arrest" exception from a nineteenth-century exception to the warrant requirement: the "general interest in gathering evidence relevant to the crime for which the suspect had been arrested." Under Justice Scalia's formulation, particularized suspicion connected to the vehicle was unnecessary; instead, there was "nothing irrational" about granting police officers the broad authority to search, without limitation, the entirety of the place "where the perpetrator of a crime [was] lawfully arrested." *Id.* at 630.

The weakness of this categorical approach, however, is three-fold. First, not once in the modern history of the Fourth Amendment has this Court declared reasonable a suspicionless search of an arrestee for purposes of gathering evidence. While suspicionless searches, *see Samson v. California*, 547 U.S. 843, 847 (2006), searches of arrestees, *see Maryland v. King*, 133

S. Ct. 1958, 1980 (2013), and warrantless searches to gather evidence, *see Kirk v. Louisiana*, 536 U.S. 635, 638 (2002), have all separately garnered approval under special circumstances, never have all three passed constitutional muster together.

Moreover, this Court soundly rejected the doctrinal underpinning of the categorical approach – the nineteenth-century exception – on multiple occasions. *See Trupiano v. United States*, 334 U.S. 699, 708 (1948); *United States v. Lefkowitz*, 285 U.S. 452, 466-67 (1932); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931). Indeed, this Court formally disowned the exception, and overruled its last supporting cases, in *Chimel*. 395 U.S. at 768 (overruling *Harris v. United States*, 331 U.S. 145 (1947), and *United States v. Rabinowitz*, 339 U.S. 56 (1950)).

Finally, the categorical approach to the "crime of arrest" exception suffers from flaws in practical application. There exists no meaningful way to delineate which crimes, by their nature, generate physical evidence and which do not. *Reagan*, 713 F. Supp. 2d at 732. Every crime can have relevant physical evidence attributed to it. *Chamberlain*, 229 P.3d at 1057. If the only limit under the categorical approach is the impossibility of finding relevant physical evidence, there exists no functional limit to an officer's entitlement to a search.

III. In The Absence Of This Court's Guidance, Several Jurisdictions Have Further Struggled To Reconcile The "Crime of Arrest" Exception With A Particularized Suspicion Requirement.

Even within the reasonable suspicion camp, different courts have employed conflicting analyses for determining whether reasonable suspicion justified the vehicular search at issue. A majority of courts in this camp follow a traditional *Terry* analysis and require "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the vehicular] intrusion" under the totality of the circumstances. *Taylor*, 49 A.3d at 824; *see also Vinton*, 594 F.3d at 25; *Mbacke*, 721 S.E.2d at 222; *Powell*, 701 S.E.2d at 835. A small minority of courts, however, eschew the traditional analysis and permit the nature of the offense, alone, to suffice as the necessary quantum of suspicion. *Chamberlain*, 229 P.3d at 1057; *Evans*, 200 Cal. App. 4th at 750. With its opinion in this case, Maryland also avoided the traditional analysis, but did so by substituting an officer's unquantified, subjective experience for the traditional totality-of-the-circumstances analysis. App. 10.

As a general matter, "[r]easonable suspicion" in the context of an investigative stop requires a "particularized and objective basis for suspecting the particular person stopped" of breaking the law. *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014) (quotation omitted). The "essence" of the standard is that "the totality of the circumstances … must be taken into account." *United States v. Cortez*, 449 U.S. 411, 417

(1981). An officer must possess more than an "inchoate and unparticularized suspicion or 'hunch'" to meet the level of suspicion required. *United States v. Sokolow*, 490 U.S. 1, 7 (1989). In assessing whether reasonable suspicion was established, a court determines "whether… historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion...." *Ornelas v. United States,* 517 U.S. 690, 696 (1996).

Two courts have departed from this framework in applying the "offense of arrest" exception. The Supreme Court of Colorado, sitting *en banc*, declared that, "[s]ome reasonable expectation beyond a mere possibility, **whether arising solely from the nature of the crime** or from the particular circumstances surrounding the arrest, is therefore clearly contemplated by the [Supreme] Court." *Id.* (Emphasis added). The intermediate appellate court in California has done the same. *Evans*, 200 Cal. App. 4th at 751-52 ("As a practical matter, for crimes such as driving under the influence, absent unusual circumstances the requisite reasonable belief may be readily inferable from the nature of the offense, with little or nothing more.").

The problem with this approach is that it stands as little more than a restatement of the categorical approach. Finding suspicion in the offense of arrest eliminates the particularity requirement – no suspicion need attach to the specific vehicle. For nearly five decades, though, this Court has maintained consistently that reasonable articulable suspicion is a particularized standard, under which suspicion must attach to the place to be searched. *See, e.g., United*

States v. Arvizu, 534 U.S. 266, 273 (2002); *see also Terry*, 392 U.S. at 21 n.18 ("This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence.").

Maryland similarly departed from the established framework for evaluating reasonable suspicion, focusing instead on the arresting officer's experience. The Court of Appeals of Maryland searched for no "particularized and objective basis," *Heien*, 135 S. Ct. at 536, under "the totality of the circumstances," *Cortez*, 449 U.S. at 417. Instead, a single subjective circumstance disposed of the issue. App. 10. In so holding, Maryland conflicted directly on this issue with other courts in the reasonable suspicion camp. *See Taylor*, 49 A.3d at 827 ("Without a great deal more detail [about the officer's experience], we have no basis for determining whether such behavior is indeed 'typical' of someone driving under the influence. Moreover, relying uncritically on that experience would amount to endorsing a *per se* rule governing DUI cases.").

The problem with the Maryland high court's approach is that it disposes of the requirement that reasonable suspicion be based on particularized and objective bases. To be sure, there presently remains an open question on the limits of an officer's subjective experience in the reasonable suspicion analysis. *See* Kit Kinports, *Veteran Police Officers And Three-Dollar Steaks*: *The Subjective/Objective Dimensions Of Probable Cause And Reasonable Suspicion*, 12 U. Pa. J. Const. L. 751 (2010) (exploring this Court's conflicting proclamations on how an officer's subjective experience

may be used in the Fourth Amendment suspicion analysis). This Court has stated that officers may "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." *Arvizu*, 534 U.S. at 273 (quotation omitted). Never, though, has that experience stood alone as the dispositive factor.

Instead, an officer's experience has been viewed as a "lens" that focuses on objective, particularized, and historical facts. *Ornelas*, 517 U.S. at 699. The experience may be considered by a court, but only to the extent that it enabled an officer to derive meaning from objective facts. *See, e.g., Arvizu*, 534 U.S. at 276 ("[S]pecialized training and familiarity with the customs of the area's inhabitants" meant that the driver's "slowing down, stiffening of posture, and failure to acknowledge" the sighted officer warranted "reasonable suspicion"); *Texas v. Brown*, 460 U.S. 730, 742-743 (1983) (officer's experience making narcotics arrests and discussions with other officers enabled him to recognize that balloons tied in the manner of the one possessed by the defendant were frequently used to carry narcotics). In the absence of those facts, there exists no objective basis upon which to justify the search.

Moreover, where an officer fails to quantify his training and experience, he provides a suppression court with no basis for weighing the inferences he drew. *Cf. Navarette v. California*, 134 S. Ct. 1683, 1687-88 (2014) (the "accumulated experience of thousands of officers" suggested that erratic driving was "strongly correlated with drunk driving"). That is

why "a general claim of expertise will not suffice." *United States v. Cervantes*, 703 F.3d 1135, 1140 (9th Cir. 2012) (citing 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 3.2(c) at 45 (4th ed. 2004)).

Maryland thus joined the minority of States that impose a suspicion requirement, but diluted that requirement in a way that is not supported by the Fourth Amendment. Amid the three different approaches to the issue, one of which is further fractured, this case provides an expedient vehicle to clarify the nature of the exception announced in *Gant* and how that exception applies in a typical, roadside DUI arrest.

CONCLUSION

For the foregoing reasons, Mr. Taylor requests that this Court issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND

No. 75
September Term, 2015

[Filed May 23, 2016]

EFRAIN TAYLOR)
)
vs.)
)
STATE OF MARYLAND)
)

Circuit Court for Dorchester County
Case No. K13-014979
Argued 4/4/16

Barbera, C.J.
*Battaglia
Greene
Adkins
McDonald
Watts
Wilner, Alan M. (Retired, Specially Assigned)

JJ.

* Battaglia, J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, she also participated in the decision and adoption of this opinion.

App. 2

Opinion by Wilner, J.

Filed: May 23, 2016

Petitioner was convicted in the Circuit Court for Dorchester County of possession with intent to distribute cocaine and driving under the influence of alcohol. As a repeat drug offender, he was sentenced to a significant term in prison. His sole complaint in this appeal is that the search of his car following a traffic stop, which led to the discovery of the cocaine, was Constitutionally deficient. The trial court denied his motion to suppress the drugs and the Court of Special Appeals affirmed the ensuing judgment of conviction.

In reviewing a trial court's ruling on a motion to suppress, we defer to that court's findings of fact unless we determine them to be clearly erroneous, and in making that determination, we view the evidence in a light most favorable to the party who prevailed on that issue, in this case the State. We review the trial court's conclusions of law, however, and its application of the law to the facts, without deference. *Varriale v. State*, 444 Md. 400, 410, 119 A.3d 824, 830 (2015), citing *Hailes v. State*, 442 Md. 488, 499, 113 A.3d 608, 614 (2015); *also Holt v. State*, 435 Md. 443, 457, 78 A.3d 415, 423 (2013). There were no material disputes regarding the relevant facts in this case. The issue is purely one of law – whether the officer's search of the car as an incident to appellant's arrest was permissible under the Supreme Court's holding in *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed.2d 485 (2009) (hereafter *Gant*).

Officer Chad Mothersell, of the Cambridge Police Department, stopped petitioner at about 1:00 in the

morning after observing him speeding and failing to stop at a stop sign. Although at trial, petitioner claimed he had not been speeding, the validity of the stop is not at issue in this appeal. Officer Mothersell – the only witness at the suppression hearing – said that, when he approached the passenger side of the vehicle following the stop, he detected a minor odor of alcohol coming from petitioner's breath and person, even though petitioner was several feet away, in the driver's seat. Mothersell observed that petitioner's speech was slurred and hard to understand and that his eyes were bloodshot and glassy. When Mothersell asked for appellant's registration card, he was handed an insurance card. Petitioner said that he had been at the Point Break bar in Cambridge.

Mothersell had petitioner exit the car so he could perform standard field sobriety tests, which appellant did not complete successfully. At that point, he was placed under arrest for driving under the influence of alcohol. Just then, a backup officer arrived. Mothersell placed petitioner in the rear seat of his squad car to advise him of his rights regarding whether to take a breath test and, while that was happening, the backup officer searched appellant's car and found the cocaine inside the front seat center armrest.

Mothersell said that the sole purpose for the search was to locate any "other alcohol, open containers, anything pertaining to the DUI arrest." When asked, on cross examination, whether he had any reason to believe that there might be open containers in the car, he said that there was a "good possibility" – that he had "several DUI arrests where there's plenty of open containers left in the vehicle." On this evidence,

defense counsel argued that, under *Gant*, the search was unlawful because there was no independent probable cause for such a search, which, he claimed, *Gant* requires. The court disagreed and, as noted, denied the motion to suppress.

The starting point for analyzing the validity of a warrantless search is the underlying precept that "searches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." *Gant*, *supra*, 556 U.S. at 338, 129 S. Ct. at 1716, 173 L. Ed.2d at 493, quoting from *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514, 19 L. Ed.2d 576, 585 (1967). One of those exceptions is a search incident to a valid arrest, which "derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations." *Gant*, 556 U.S. at 338, 129 S. Ct. at 1716, 173 L. Ed.2d at 493.

Gant was intended to clarify the scope of that exception in the context of a motor vehicle search. Mr. Gant was arrested for driving on a suspended license. After he had been handcuffed and locked in a police car, officers searched Gant's car and found cocaine in the pocket of a jacket on the back seat. The issue was whether such a search, under those circumstances, where it was virtually impossible for Gant to have accessed his car to retrieve either weapons or evidence, could be justified under the holdings in *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed.2d 685 (1969) and *New York v. Belton*, 453 U.S. 454, 101

S. Ct. 2860, 69 L. Ed.2d 768 (1981), and the Court held that the search in that case could not be justified.

In *Chimel*, the Court limited the scope of a warrantless search incident to an arrest to the arrestee's person and the area within his or her "immediate control" – the area "from within which he [or she] might gain possession of a weapon or destructible evidence." 395 U.S. at 763, 89 S. Ct. at 2034, 23 L. Ed.2d at 694. *Belton* exposed some ambiguity in what the limitation of "immediate control" meant in the context of vehicle passenger compartment searches. In *Belton*, an officer stopped a vehicle containing four occupants. While asking for the operator's driver's license, he smelled burnt marijuana and observed an envelope in the vehicle marked "Supergold," a name he associated with marijuana. Concluding that he had probable cause to believe that the occupants had committed a drug offense, he ordered them out of the car, placed them under arrest, patted them down, and separated them from each other, but did not handcuff them. He then searched the car and found cocaine in the pocket of a jacket on the back seat.

The New York Court of Appeals held that, once the occupants were arrested, the car and its contents were safely in the exclusive control of the police and that the search therefore was unconstitutional. The Supreme Court granted *certiorari* because it found that lower courts throughout the country had been unable to agree on a workable definition of "the area within the immediate control of the arrestee" when that area might include the interior of an automobile. The *Belton* Court settled the issue – or thought that it had – by

holding that, when an officer lawfully arrests the occupant of an automobile, the officer, as a contemporaneous incident of that arrest, may search the passenger compartment of the car and any containers therein. That conclusion was based on the assumption that "articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within the area into which an arrestee might reach." *Belton*, 453 U.S. at 460, 101 S. Ct. at 2864, 69 L. Ed.2d at 774-75.

Belton did not solve the problem. As the Court noted in *Gant*, *Belton* had "been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search." The *Gant* Court rejected that view which, it said, would "untether the rule from the justifications underlying the *Chimel* exception," and held instead that the "*Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Gant*, at 343, 129 S. Ct. at 1719, 173 L. Ed.2d at 496.

Had the Court stopped there, we would be obliged to reverse the suppression order of the trial court in this case, as petitioner urges us to do. But the Court did not stop there. In the very next sentence, it added that, although it does not follow from *Chimel*, "circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence **relevant to the crime of arrest**

might be found in the vehicle.'" *Id.* quoting from Justice Scalia's concurring Opinion in *Thornton v. United States*, 541 U.S. 615, 632, 124 S. Ct. 2127, 2137, 158 L. Ed.2d 905, 920 (2004) (Emphasis added). That is the holding relevant to this case. We are not concerned with the *Chimel* "wingspan" but with whether Officer Mothersell reasonably could have believed that evidence relevant to the crime of driving under the influence of alcohol – the crime for which petitioner was arrested – might be found in the vehicle.

The *Gant* Court noted that, in many cases when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe that the vehicle contains further relevant evidence of that offense, but that in other cases, including *Belton* and *Thornton*, "the **offense of arrest** will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein." *Gant*, at 344, 129 S. Ct. at 1719, 173 L. Ed.2d at 496 (Emphasis added). Gant was arrested for driving on a suspended license, an offense for which, on the record in that case, the police could not reasonably expect to find any further evidence in the passenger compartment; hence, there was no basis for the search. Belton and Thornton, on the other hand, were arrested for drug violations, for which there was a greater expectation of finding further evidence in the vehicle.

The issue here, of course, is whether an arrest for driving under the influence of alcohol, under the circumstances of this case, can reasonably lead to an expectation that further evidence **of that offense may** be found in the passenger compartment. Petitioner argues that what the Supreme Court must have meant

when it defined the standard for conducting a vehicle search as an incident to a lawful arrest as whether it is "reasonable to believe evidence of the crime of arrest might be found in the vehicle" is that the officer must have a "reasonable articulable suspicion" in that regard – the same level of suspicion that would justify a temporary investigative detention or a frisk for weapons.

Having equated "reasonable to believe" with reasonable articulable suspicion, petitioner contends that reasonable articulable suspicion cannot be based on or tied to the nature of the crime for which the defendant was arrested because, if that were so, it would allow the police *carte blanche* authority to search vehicles without any reasonable articulable suspicion for one category of crimes but not for another. He accuses the State of positing a *per se* rule -- a "dichotomy" between offenses that may yield physical evidence and offenses that may not, which, he contends, "relies on a hyper-literal reading of *Gant* that ignores the abhorrence of suspicionless searches for evidence and the rejection of general searches incident to arrest."

Petitioner's argument raises a fair question of what, exactly, the *Gant* Court meant in holding that the police may search the vehicle when it is "reasonable to believe" that evidence of the crime for which the defendant was arrested may be discovered and coupling that with the observation that some offenses "will supply a basis for searching the passenger compartment" while others will not. Did the Court intend "reasonable to believe" to be the equivalent of "reasonable articulable suspicion," and, if it did, why

did it not simply use the latter term, which it had created and was already well-known to the judicial and law enforcement community? Whether it did or did not intend such equivalence, was its immediately ensuing language meant to suggest that certain crimes will, **of themselves**, supply a right to conduct the search, without any independent basis for a reasonable suspicion that further evidence of the crime may be found in the vehicle?

In *State v. Ewertz*, 305 P.3d 23, 26-27 (Kan. App. 2013), the Kansas court noted that courts had, indeed, taken two different approaches on the issue – one interpreting "reasonable to believe" as creating "an almost categorical link between the nature of the crime of arrest and the right to search," and the other interpreting that language as "akin to reasonable suspicion," citing *People v. Nattoli*, 199 Cal. App.4th 531, 553 (20 1) as exemplifying the first approach and *United States v. Taylor*, 49 A.3d 818, 822-24 (D.C. 2012) and *People v. Chamberlain*, 229 P.3d 1054, 1057 (Colo. 2010) as supporting the second. Ultimately, the Supreme Court may need to clarify what it meant and, given the vast number of traffic stops that occur every day throughout the country, we hope that it will do so.

We do know that other courts have sustained passenger compartment searches, under *Gant*, following an arrest for driving under the influence or driving while intoxicated, on the premise that there is reason to believe that other evidence of that offense may be found in the vehicle. *See State v. Cantrell*, 233 P.3d 178 (Idaho App. 2010); *State v. Ewertz, supra*, 305 P.3d 23; *Cain v. State*, 373 S.W.3d 392 (Ark. App. 2010); *United States v. Washington*, 670 F.3d 1321

(D.C. Cir. 2012); and *United States v. Oliva*, 2009 WL 1918458 (U.S.Dist. Ct. S.D. Texas (2009) (unreported).

We agree with that result in this case, but not on the basis of any *per se* right to search founded solely on the nature of the offense. We conclude that the "reasonable to believe" standard is the equivalent of reasonable articulable suspicion because we cannot discern any logical difference between the two. If a police officer has a reasonable suspicion that he or she can articulate that something is so, then perforce it is reasonable for the officer to believe that it may be so and *vice versa.* But that suspicion, to be reasonable, must have some basis in fact.

In this case there was, and, we suspect, in most cases of an arrest for driving under the influence, there is likely to be, a basis in fact – the arresting officer's own prior experiences or his or her knowledge of the experience of fellow officers, which can be articulated, of finding open containers or other evidence related to the offense inside the passenger compartment. It is a solid part of "reasonable articulable suspicion" law that reasonable suspicion may be derived from an officer's own experience or his or her knowledge of the experience of other officers. *See Holt v. State*, 435 Md. 443, 461, 78 A.3d 415, 425 (2013), noting the statement in *United States v. Cortez*, 449 U.S. 411, 418, 101 S. Ct. 690, 695, 66 L.Ed.2d 621, 629 (1981) that evidence "must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement" and concluding that the court must "assess the evidence through the prism of an experienced law enforcement officer, and give due

deference to the training and experience of [the officer]."

On this basis, we shall affirm the judgment of the Court of Special Appeals.[1]

JUDGMENT OF COURT OF SPECIAL APPEALS AFFIRMED; PETITIONER TO PAY THE COSTS.

[1] The Court of Special Appeals, though affirming the judgment of conviction entered in the Circuit Court, remanded the case for resentencing. That aspect of the intermediate appellate court's judgment is not before us.

APPENDIX B

REPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 494
September Term, 2014

[Filed August 27, 2015]

EFRAIN TAYLOR)
)
v.)
)
STATE OF MARYLAND)
)

Eyler, Deborah S.
Zarnoch,
Nazarian,

JJ.

Opinion by Zarnoch, J.

Filed: August 27, 2015

Appellant Efrain Taylor claims that police officers violated his Fourth Amendment rights when, after his arrest for driving under the influence of alcohol (DUI), they searched his vehicle for containers of alcohol and instead, found illegal narcotics. For the reasons set forth below, we affirm the ruling of the Circuit Court for Dorchester County that the search of his vehicle incident to his DUI arrest was constitutional. However,

we also hold that the court incorrectly gave Taylor an enhanced sentence. Accordingly, we remand for resentencing.

FACTS AND PROCEEDINGS[1]

Taylor was charged with possession with intent to distribute Controlled Dangerous Substance (CDS), Md. Code (2002, 2012 Repl. Vol., 2014 Supp.), Criminal Law Article ("CL") § 5-602; possession of CDS, CL § 5-601; failure to stop at a lawful stop sign, Md. Code (1977, Repl. Vol. 2012, 2014 Supp.), Transportation Article (TR) § 21-707; driving in excess of a reasonable and prudent speed, TR § 21-801; driving under the influence, TR § 21-902(a); and driving while impaired, TR § 21-902(b). Prior to trial, Taylor filed a motion to suppress evidence.

a. Facts presented at suppression hearing

Around 1:00 a.m. on March 1, 2013, Patrolman Chad Mothersell was on patrol in Cambridge. As he later testified, he "observed a SUV vehicle traveling southbound on Phillips [Street] at what appeared to be a high rate of speed," which he estimated to be about 45 miles per hour in a 25 mile per hour zone. His conclusion was based on his "training and experience" in determining the speed of vehicles. Mothersell followed the vehicle and soon after, noticed that it

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[1] This case comes to us as a challenge to a motion to suppress and to sentencing. Taylor's brief, however, incorporates certain facts that were presented only at the trial, and were not actually before the motions court. For purposes of context only, we have set forth the trial facts and have organized them as they were presented at their respective proceedings.

failed to stop at a stop sign while making a left turn on to Bradley Street. Mothersell turned on his emergency lights, the SUV stopped, and he pulled up behind it.

Mothersell approached the vehicle, in which Taylor was the only occupant, and asked him for his driver's license. He stated that "[a]fter making contact with [Taylor,] I detected a minor odor of alcohol beverage from his breath and person." He observed that Taylor's "speech was slurred, hard to understand at certain times. His eyes were bloodshot and glassy." Mothersell asked Taylor where he was before he started driving. Taylor replied that he had been at the Point Break Beach Bar in Cambridge.

At that point, Mothersell asked Taylor to step out of the vehicle so that the officer could administer "standardized field sobriety tests: the horizontal gaze nystagmus, the nine-step walk-and-turn and the one-legged stand."[2] Mothersell "determined that these weren't done successfully."

Mothersell placed Taylor under arrest for suspicion of DUI. By that time, Mothersell's back-up officer, Officer Carroll, arrived at the scene and conducted a search of the vehicle, while Mothersell read Taylor his DR-15 Advice of Rights.[3] At this time, Carroll reported

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[2] *See* National Highway Traffic Safety Administration, "Standardized Field Sobriety Testing," available at http://www.nhtsa.gov/people/injury/alcohol/sfst/appendix_a.htm *last accessed* 6/9/2015 [http://perma.cc/SA5C-PBNX].

[3] TR § 16-205.1(b)(2) requires an "arresting officer to advise the detainee of the possible administrative sanctions for a refusal to take the breath test and for test results that show blood alcohol

back to Mothersell that he had found some "controlled dangerous substance" in the vehicle inside the center console, which Carroll had opened. Mothersell then went to the vehicle and he "observed a clear plastic baggy containing several knotted bags of what [he] suspected to be powder cocaine."

Mothersell explained at the suppression hearing that the purpose of a "search of a vehicle is to locate any other alcohol, open containers, anything pertaining to the DUI arrest." Taylor's attorney then asked:

> Q: Were you able to make observations of the interior passenger compartment of the car in general?
>
> A: Yes.
>
> Q: And you described the lighting outside while all this is occurring? Obviously it's the middle of the night.
>
> A: Middle of the night, it might be a couple of street lights, illuminated with my spotlight, take-down lights, my own flashlight. . . .
>
> Q: Did you have any reason to believe that there were any such open containers in the vehicle?
>
> A: A good possibility, yes. I've had several DUI arrests where there's plenty of open containers left in the vehicle. And I want to make sure

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concentration above certain levels." *Motor Vehicle Admin. v. Deering*, 438 Md. 611, 617 (2014); *see Advice of Rights, available at* http://www.mva.maryland.gov/_resources/docs/DR-015.pdf [http://perma.cc/YLU7-FG67].

> there's no other alcohol in the vehicle for the probable cause for my DUI stop.
>
> Q: But on this particular case, you had had an opportunity to approach the vehicle on the passenger's side, look inside the vehicle, and see what was going on; is that right?
>
> [State's Attorney]: Objection.
>
> The Court: What's your objection?
>
> [State's Attorney]: Your honor, he already answered the question.
>
> The Court: Well, it is asked and answered. Go ahead.
>
> A: At that point I didn't observe anything during my initial contact with him, my concern was also more directed to him, himself.

Taylor's counsel later argued that Mothersell lacked "independent probable cause" for the search, because "[t]here was [sic] no observed potential open containers. There was no odor of alcohol identified by the law-enforcement officer emanating from the vehicle itself as opposed to Mr. Taylor."

After considering this argument, the court denied his motion, stating:

> [O]n a stop for speed, a subsequent odor of alcohol, glassy eyes, and failure of field sobriety tests, the search of the vehicle incident to the arrest under those circumstances could have revealed a pint of whiskey in the glove

compartment, who's to say. So I feel the search was lawful as well. So the motion is denied.

b. Facts presented at trial

At trial on March 13, 2014, Officer Carroll testified that as Mothersell was reading Taylor his DR-15 Advice of Rights, Carroll approached the two and explained that he had "located some controlled dangerous substance." Carroll later explained that during his search, he noticed the vehicle's center console was closed, but not "fully latched down," as a piece of paper stuck out of it. He opened the console and observed a bag containing seventy-six smaller baggies of what was later tested to be 34.3 grams of cocaine hydrochloride (powder cocaine). Mothersell then approached the driver's side of the SUV, looked inside the cabin, observed the bags on the driver's seat, and seized them. Later, at the stationhouse, Mothersell searched Taylor's person and discovered $1,045 in cash in his pocket and wallet.

Taylor testified that on the night of the arrest, he had drunk one twelve-ounce can of Bud Ice at the Point Break Beach Bar. He stated that he was on his way home at the time of arrest and "he did not own the SUV and that instead[,] another man, Leroy Roberts, owned it." Taylor said he had borrowed the SUV to travel somewhere the following day, and that the morning of the arrest was the first time he had entered the vehicle, so he was ignorant of the contraband inside. As to the cash, Taylor said he was purchasing and investing in tax liens, and that he had been paid the balance of one lien that evening. He said that he had another check from one of those liens on the night of

the arrest and tried to show it to Mothersell, who said "it wasn't necessary."

Taylor also tried to explain his sobriety test failures. He stated that he wore contact lenses and told this to the officer. He explained that he failed the one-legged stand test because of a past fracture in the tested foot. However, Taylor claimed he had passed the "step test" as instructed. He stated that he was not under the influence of alcohol on the night he was arrested. The record does not indicate that Taylor provided any corroboration of his claims regarding the tax liens or his medical ailments.

At trial, a jury acquitted Taylor of driving at an unreasonable speed, but convicted him of all other charges. On July 7, 2014, the court then sentenced Taylor as a subsequent offender. He received a sentence of forty years of incarceration, with twenty years suspended, for the possession with intent to distribute charge, to be served consecutively to a sentence from a prior conviction. He was also sentenced to one year of incarceration for driving or attempting to drive a vehicle under the influence of alcohol, to be served concurrently with the possession with intent to distribute sentence.

QUESTIONS PRESENTED

Taylor presents the following questions, which we have rephrased:[4]

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[4] Taylor asked:

1. Did the court err in denying Mr. Taylor's suppression motion when officers searched the vehicle in which he

1. Did the circuit court err in denying his motion to suppress the narcotics found in his vehicle?

2. Was he properly sentenced as a second-time offender?

DISCUSSION

I. Standard of Review

We review a denial of a motion to suppress evidence seized pursuant to a warrantless search based on the record of the suppression hearing, not the subsequent trial. *State v. Nieves*, 383 Md. 573, 581 (2004). We consider the evidence in the light most favorable to the prevailing party, here, the State. *Gorman v. State*, 168 Md. App. 412, 421 (2006) (Quotation omitted). We also "accept the suppression court's first-level factual findings unless clearly erroneous, and give due regard to the court's opportunity to assess the credibility of witnesses." *Id.* "We exercise plenary review of the suppression court's conclusions of law," and "make our own constitutional appraisal as to whether an action taken was proper, by reviewing the law and applying it to the facts of the case." *Id.* "Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, *what is reasonable depends on the context within which a*

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was driving in violation of *Arizona v. Gant*, 556 U.S. 332 (2009)?

2. Can Mr. Taylor be sentenced according to a second-time offender enhancement, subjecting him to a minimum mandatory 10 years of incarceration without the possibility of parole, when he was never convicted of a first qualifying offense?

search takes place." *State v. Alexander*, 124 Md. App. 258, 265 (1998) (Emphasis added in *Alexander*) (quoting *New Jersey v. T.L.O.,* 469 U.S. 325, 337 (1985)). On that issue, "the ultimate questions of reasonable suspicion and probable cause to make a warrantless search should be reviewed de novo." *Ferris v. State*, 355 Md. 356, 385 (1999) (quoting *Ornelas v. United States*, 517 U.S. 690, 691 (1996)).

II. Search Incident to a DUI Arrest

a. The Search Incident to Arrest Standard

Taylor has challenged the legality of his search under the Fourth Amendment to the United States Constitution,[5] which prohibits warrantless searches and seizures of a citizen's "persons, houses, papers, and effects." One of a number of exceptions to this rule is that an officer may, in certain circumstances, conduct a "search incident to an arrest." *New York v. Belton*, 453 U.S. 454, 459 (1981).

Police may search an automobile incident to arrest of its driver or passenger for two reasons. First, officers may "search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Arizona v. Gant*, 556 U.S. 332, 343 (2009). No one suggests that this exception applies. Second, officers may also search incident to a lawful arrest when it is "*reasonable to believe* evidence relevant to the crime of arrest might be found in the vehicle." *Id.* (Emphasis added) (quoting *Thornton v.*

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[5] Taylor did not argue that the search violated the Maryland Declaration of Rights.

United States, 541 U.S. 615, 632 (2004) (Scalia, J., concurring in judgment)).[6] Absent either of these circumstances, a search of the vehicle would be unreasonable.

b. "Reasonable to believe"

Under what circumstances is it reasonable to believe that evidence of the offense of arrest will be in the vehicle? The Supreme Court did not explain what quantum of suspicion this standard would require. Is it a preponderance of the evidence, probable cause, or the reasonable suspicion for a stop-and-frisk under *Terry v. Ohio*, 392 U.S. 1, 21 (1968)?

Courts that have considered this issue have held that "[p]resumably, the 'reasonable to believe' standard requires less than probable cause, because otherwise

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[6] In *Scribner v. State*, 219 Md. App. 91 (2014), we applied the second *Gant* exception to uphold the search of a motor vehicle after the appellant was arrested for second degree assault and found to be in possession of crack cocaine. We noted:

> The appellant was arrested standing next to the Solara, in which he recently had been riding and that he was trying to enter. Under the circumstances, the arresting officers reasonably could have believed that the Solara contained evidence of the cocaine possession offense the appellant was under arrest for. Under *Gant*, this was sufficient to justify a warrantless search of the Solara. It was not necessary for the warrantless search of the Solara. It was not necessary for the State also to show that the appellant was within reaching distance of the passenger's compartment of the Solara when the search was conducted.

Id. at 102.

Gant's evidentiary rationale would merely duplicate the 'automobile exception,' which the Court specifically identified as a distinct exception to the warrant requirement." *United States v. Vinton*, 594 F.3d 14, 25 (D.C. Cir. 2010) (citing *Gant*, 556 U.S. at 347)). Because the automobile exception "allows searches for evidence relevant to offenses *other than the offense of arrest*, and the scope of the search authorized is broader," an officer must have a greater level of suspicion, *i.e.* "probable cause to believe a vehicle contains evidence of criminal activity." *Gant*, 556 U.S. at 347 (Emphasis added) (citing *United States v. Ross*, 456 U.S. 798, 820–21 (1982) (permitting searches of any area of the vehicle in which the evidence might be found). "Rather, the 'reasonable to believe' standard probably is akin to the "reasonable suspicion" standard required to justify a *Terry* search." *Vinton*, 594 F.3d at 25 (citing *Adams v. Williams*, 407 U.S. 143, 146 (1972)) (noting that a *Terry* search is permissible if the officer has reason to believe that the suspect is armed and dangerous).

"Accordingly, the officer's assessment of the likelihood that there will be relevant evidence inside the car must be based on more than 'a mere hunch,' but 'falls considerably short of [needing to] satisfy[ ] a preponderance of the evidence standard.'" *Id.* (quoting *United States v. Arvizu,* 534 U.S. 266, 74 (2002)); *see Quince v. State*, 319 Md. 430, 433 (1990) (Quotation omitted.)) ("[T]he level of suspicion for a *Terry* stop and frisk 'is considerably less than proof of wrongdoing by a preponderance of the evidence' . . . [and] 'the level of suspicion required for a *Terry* stop is obviously less demanding than that for probable cause.'"); *accord Powell v. Com.*, 701 S.E.2d 831, 835 (Va. 2010).

Similarly, we hold that a *Gant*-like search of an automobile incident to arrest must be based on a similar level of reasonable suspicion as in an automobile stop under *Terry*. Therefore we look at the *Terry* line of cases for guidance here.

c. Factors establishing reasonable belief

Whether a belief is reasonable depends upon the totality of the circumstances, rather than a categorical rule. *See Arvizu*, 534 U.S. at 274 (Quotations omitted.) (noting that the "reasonable suspicion" standard is "somewhat abstract" and that the U.S. Supreme Court has "deliberately avoided reducing it to a neat set of legal rules"); *Graham v. State*, 325 Md. 398, 408 (1992) (Quotation omitted) ("[I]n evaluating the validity of a detention, we must examine 'the totality of the circumstances—the whole picture'"). As the Court of Appeals observed in *Graham*, where the officers "were immediately confronted with an array of facts which led them to reasonably suspect that Graham and Allen were engaged in some kind of criminal activity. . . . the subsequent arrest and seizure of property would not be tainted" and was not unconstitutional. *Id.* We believe relevant cases indicate that the following are appropriate considerations in developing a reason to believe evidence will be found in the vehicle: (1) a police officer's training and experience; (2) the lack of an innocent explanation for a driver's seemingly illicit behavior; and (3) the nature of the crime of arrest.

First, an officer may draw on his or her personal training and experience to develop a reasonable suspicion, or reason to believe, that a crime is afoot. Assessing the totality of the circumstances includes, *inter alia*, "allow[ing] 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.'" *Arvizu*, 534 U.S. at 273.

Second, an officer cannot, however, simply assert that "presumably innocent" behavior provides reason to believe evidence of the crime of arrest is in the vehicle. *See Ferris*, 355 Md. at 387. In *Ferris*, a driver was stopped for speeding at 1:06 a.m. and appeared to the arresting officer to have bloodshot eyes, but there was no odor of alcohol on his breath. *Id.* at 362-68. The officer concluded that the driver was not under the influence of alcohol, but some other CDS. The Court of Appeals held that the officer lacked reasonable suspicion to search the vehicle for evidence of intoxication. *Id.* at 384. The Court reasoned:

> The facts articulated by the trooper—that Ferris had exhibited extremely bloodshot eyes, nervousness, and a lack of odor of alcohol—are too weak, individually or in the aggregate, to justify reasonable suspicion of criminal activity. In the early morning hours, these factors could fit "a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure.

Id. at 387.

> In this case, the State presented no evidence that bloodshot eyes—or excessive speed—are indicative of persons under the influence of a controlled substance. In other words, Trooper

> Smith did not testify that Ferris's bloodshot eyes were somehow distinct from other bloodshot eyes irritated by non-criminal causes; nor did he explain how excessive speed, without any other driving irregularity, might imply a driver's impaired operation.

Id. at 392. Because the officer failed to explain why apparently innocent behavior—driving with bloodshot eyes, nervousness, and lack of an odor of alcohol—established reasonable suspicion of criminal activity, the search of the automobile was impermissible. *Id.* at 391-92 ("The Fourth Amendment does not allow the law enforcement official to simply assert that apparently innocent conduct was suspicious to him or her; rather, the officer must offer 'the factual basis upon which he or she bases the conclusion.'"). Notably, nowhere in *Ferris* is there an indication that the officer ever explained how his training and experience led him to believe that the arrestee's behavior was consistent with illegal activity. Under those circumstances, the *Ferris* officer based his search not on a reasonable suspicion, but on a "mere hunch." *See Arvizu*, 534 U.S. at 274.

Third, certain offenses by their nature will involve evidence that an officer could reasonably believe is in a vehicle. A number of state courts to consider this issue have found that a DUI arrest provides reason to believe there will be containers of alcohol in the vehicle.

In *State v. Cantrell*, 233 P.3d 178 (Idaho Ct. App. 2010), the DUI arrestee challenged the search of his vehicle, stating that it was "not reasonable to believe that evidence of the offense of arrest, DUI, might be found in the vehicle based solely upon evidence of

intoxication." *Id.* at 184. He argued that officers "must possess some additional information suggesting that evidence related to a DUI might be found in the vehicle," such as evidence "in plain view, or partially hidden, but visible to the officers." *Id.* However, the Court of Appeals of Idaho rejected this argument and held that no additional evidence was required once the arrestee was found to be intoxicated; the search incident to arrest for evidence of the DUI offense was "authorized irrespective of whether evidence is known to be located in the vehicle." *Id.* It was "reasonable to believe that evidence of the offense, e.g. alcohol containers or other evidence of alcohol use, 'might be found in the vehicle.'" *Id.* at 185. Notably, the court explained, Cantrell's admission to consuming alcohol did not make it unreasonable for officers to still search for further evidence, as "officers are not required to accept as true a defendant's version of the events." *Id.* Furthermore, the court rejected

> Cantrell's contention that a search of his vehicle is unreasonable because evidence of his DUI would only be contained in his body[, which] ignores the realities of a DUI investigation. Indeed, as the State points out, "a DUI trial does not start and end with a breathalyzer report," considering the fact that the report may be suppressed in some instances.

Id. (Citations omitted).

Other state courts have followed this rationale. On facts similar to this case, the Kansas Court of Appeals held that:

> [L]ike drug offenses, driving under the influence is likely within the category of crimes identified by the *Gant* Court as supplying a basis for searching a vehicle. . . .
>
> In addition to evidence that the car Ewertz was driving swerved in its lane and crossed over the fog line, that [the officer] smelled alcohol in the car after he pulled Ewertz over, that Ewertz failed field sobriety tests, that Ewertz had glassy and bloodshot eyes, and that Ewertz slurred her words, there is also evidence that Ewertz admitted to drinking at least one alcoholic beverage before driving the car. . . . [I]t was "reasonable to believe" evidence relevant to the crime of driving under the influence might be found in Ewertz' vehicle.

State v. Ewertz, 305 P.3d 23, 27-28 (Kan. App. 2013).

In *Cain v. State*, 2010 Ark. App. 30, 373 S.W.3d 392 (2010), the court affirmed a denial of a motion to suppress where the appellant passed two field-sobriety tests, but smelled of alcohol and did not pass the horizontal gaze nystagmus test. *Id.* at 394. After appellant was arrested for DWI, and the officers searched his car and found part of a marijuana cigarette and a small amount of methamphetamine in a wallet on the passenger seat. *Id.*

In these three cases, the officer's suspicion that alcohol containers were in the vehicle flowed simply from the nature of the offense. Other courts, however, have upheld searches incident to DUI arrest only when there was some other indication that alcohol containers would be in the vehicle, such as a container of alcohol

in plain view of the officer. *See United States v. Grote*, 629 F. Supp. 2d 1201, 1204 (E.D. Wash. 2009) ("From the exterior of the vehicle, Officer Moses was able to observe a brown paper bag wrapped around a bottle which was located next to the Defendant. Officer Moses testified that it appeared to be a bottle of alcohol since liquor stores typically put such bottles in brown paper bags"); *see United States v. Washington*, 670 F.3d 1321 (D.C. Cir. 2012) (holding that the smell of alcohol coming from the car and a visible small amount of red liquid in an open cup created an objectively reasonable belief that officers might find another container of alcohol in the car—i.e., the source of the liquid in the cup).

Absent these additional indicators that alcohol was being consumed in the vehicle, two courts have determined that a search incident to DUI arrest was unreasonable. In these cases, the courts proposed a hypothetical in which it would be presumptively unreasonable to believe a DUI arrestee had containers of alcohol in the vehicle. In *United States v. Reagan*, 713 F. Supp. 2d 724, 732 (E.D. Tenn. 2010), a federal court said:

> [A] police officer observes a patron drink several beers in an establishment in a short period of time. If the police officer then observes the patron leave the establishment, get into a vehicle in the parking lot, and drive off, the officer has probable cause to pursue the vehicle, effect a traffic stop, and arrest the driver for DUI.

The court believed that *Cantrell* and *Cain* implied a "*per se*" or categorical rule under which "DUI is an

offense that, by its very nature, might yield physical evidence." *Id.* Under this rule, the court was concerned that an officer would have an unqualified reason to

> lawfully search the passenger compartment of the vehicle without a warrant even though he has absolutely no reason to believe that evidence of DUI is inside—to the contrary, his firsthand observation of the driver drinking several beers gives him a good reason to believe that no evidence of DUI is contained in the vehicle. This result seems completely contrary to *Gant*'s statement that a warrantless search of a vehicle's passenger compartment incident to arrest is lawful when "it is reasonable to believe the vehicle contains evidence of the offense of the arrest."

Id. at 733. The court held that the officer must have something more than prior experience of finding alcoholic beverage containers in a DUI arrestee's vehicle to justify a search of the vehicle:

> The Court acknowledges that a law enforcement officer's general prior experience is certainly *one* of the common sense factors to consider when deciding the reasonableness of his belief that evidence of a specific crime is located inside of a vehicle's passenger compartment. But in this case, the Court finds that Ranger Garner's *general prior experience alone* was not enough to establish a reasonable belief that evidence of DUI was contained within the Defendant's vehicle.

Id. at 733-34 (Emphasis added). The court in *dicta* suggested what it considered to be additional factors that might justify a search incident to arrest.

> Many different facts may provide a law enforcement officer with reason to believe that evidence of DUI is located inside the passenger compartment of a vehicle. Examples include observations of the driver drinking while driving, observations of an open container of alcohol in plain view inside the passenger compartment, statements made by the occupants of the vehicle indicating that an open container is in the passenger compartment, the smell of alcohol emanating from within the passenger compartment, or indications that the driver was traveling from a location such as a recreational area or campground where alcohol is not available unless it is transported in by private vehicle.

Id. at 733 n.7.

The District of Columbia Court of Appeals, following the "not too far-fetched" hypothetical of *Reagan*, *id.* at 732, also held a search impermissible on substantially similar facts. *United States v. Taylor*, 49 A.3d 818, 827 n. 8 (D.C. 2012) ("If a police officer watched a man drunkenly stumble out of a bar, get into his vehicle, and start driving, and if the officer then immediately pulled that driver over, it would not be reasonable to conduct an evidentiary search of the vehicle under *Gant*."). The District of Columbia Court of Appeals considered the "totality of the circumstances" and found that they failed to amount to a reasonable belief that containers of alcohol would be in the automobile.

> To be sure, appellee claimed that he had consumed two beers at his sister's house two hours earlier. In light of his obvious intoxication at the time of arrest, there was an objectively reasonable inference that [appellee] was not being truthful about the timing and amount of his drinking. But that falsehood indicated only that he had been drinking much more recently or in much greater quantities than he had admitted. For example, it might have suggested that he had just left his sister's house, after drinking many more beers than two. Or that he had recently been drinking at a bar. It did not make it any more likely that he had been drinking in the vehicle.

Id. at 827.

Although we may not be able reconcile these divergent holdings, it is clear that (1) an officer's training and experience is an important, though not dispositive factor; (2) the lack of any innocent explanation for apparent intoxication in a vehicle may be grounds for reasonable suspicion; and (3) unless there are contrary indications, it is not unreasonable to think an intoxicated driver became intoxicated in the vehicle.

d. This Case

All three of these factors support the suppression court's finding that it was reasonable for Mothersell to believe Taylor had alcoholic beverages in his vehicle that would be evidence of his DUI.

As a threshold issue, we note that the presence of wholly or partially-consumed alcoholic beverage

containers in a vehicle, at least where the driver is the sole occupant, is circumstantial evidence of DUI. Under TR § 21-902(a)(1), "[a] person may not drive or attempt to drive any vehicle while under the influence of alcohol." Officers may investigate a DUI through a number of means, such as a chemical test incident to a lawful DUI arrest. *See, e.g., United States v. Reid,* 929 F.2d 990, 994 (4th Cir. 1991). Yet officers may also search for evidence of alcoholic containers to establish that the arrestee was under the influence, because in Maryland, a DUI offense may be proved by circumstantial evidence, namely, the presence of alcoholic beverages in the vehicle the arrestee had driven and in which he was found to be intoxicated. *Owens v. State*, 93 Md. App. 162, 166-67 (1992). As Judge Moylan explained, three "partially-consumed" beer cans were circumstantial evidence of DUI;

> At least a partial venue of the spree, moreover, would reasonably appear to have been the automobile. One does not typically drink in the house and then carry the empties out to the car. Some significant drinking, it may be inferred, had taken place while the appellant was in the car.

Id. at 167. And in *White v. State*, 142 Md. App. 535 (2002), we found sufficient evidence of intoxication even though it "arose solely from the results of the field sobriety tests, the arresting officer's observations of appellant before and after her arrest, appellant's admission that she had consumed one glass of vodka earlier that afternoon, and the discovery of a full bottle of whiskey in appellant's vehicle." *Id.* at 548.

We now turn to the relevant factors of this case. First, Mothersell clearly stated that in his experience, "I've had several DUI arrests where there's plenty of open containers left in the vehicle." Though not dispositive, this experience further establishes the reasonableness of the search. *See Reagan*, 713 F. Supp. 2d at 733-34 ("The Court acknowledges that a law enforcement officer's general prior experience is certainly one of the common sense factors to consider when deciding the reasonableness of his belief that evidence of a specific crime is located inside of a vehicle's passenger compartment.").

Second, there was no innocent explanation for Taylor's apparent intoxication. Unlike in *Ferris*, there was no "innocent" explanation for why Taylor or any other driver would be inebriated; any person may have bloodshot eyes while driving late at night, *see* 355 Md. at 387, but it is hard to construct a scenario in which a driver would smell of alcohol, have glassy eyes, and would fail sobriety tests lest they had consumed alcohol. It was clear Taylor had consumed alcohol sometime prior to the arrest; the remaining questions were where, when, and how much.

But during the suppression hearing, no evidence was presented of how much alcohol Taylor had consumed.[7] The first time Mothersell observed Taylor was when Taylor's SUV passed him. After that, it

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[7] At trial, Taylor stated in his direct testimony that he had consumed one beer at a bar. Neither Mothersell nor Carroll ever testified to this fact, and in any event, no one made such a statement at the suppression hearing, and our review is confined to the record of that hearing.

became clear to Mothersell that Taylor was under the influence of alcohol, although there was no evidence as to where or when he came under the influence.[8] As part of his search for evidence of the DUI, Mothersell had to determine whether instruments of the offense, the intoxicants, were in Taylor's vehicle (the only place he knew Taylor had been) or somewhere else, about which Mothersell could only speculate. It was reasonable, in this scenario, to believe that Taylor had been drinking in the place where he was stopped.

The unknown timing surrounding the encounter further supports the reasonableness of Mothersell's belief. It is also a widely-recognized fact that the state of being under the influence of alcoholic beverages is not too temporally removed from the act of drinking the alcoholic beverages. As the U.S. Supreme Court has frequently noted, alcohol dissipates quickly in the body; this fact has long been accepted to justify compulsory blood testing under an "exigent circumstances" theory. *See Schmerber v. California*, 384 U.S. 757, 770-71 (1966) ("We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system."); *see also Missouri v. McNeely*, 133 S. Ct. 1552, 1560 (2013). It follows logically (and perhaps scientifically) that when alcohol is found or suspected to be in a person, it likely has not been there long.

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[8] And, assuming *arguendo* that the suppression court had heard evidence that Taylor only drank one beer at the Point Break Beach Bar, this would further support Mothersell's suspicion that containers of alcohol were in the vehicle, assuming that most adult males do not become so inebriated as to be intoxicated after consuming one beer.

Taylor was apparently DUI in his vehicle; it was not unreasonable to believe, therefore, that he had recently consumed alcoholic beverages.

In addition, it was reasonable to search for additional evidence of inebriation even after Taylor failed the sobriety tests; as Mothersell explained, "I want[ed] to make sure there's no other alcohol in the vehicle for the probable cause for my DUI stop." That way, even if Taylor had successfully challenged a chemical test or the field sobriety tests, the presence of an alcoholic beverage container would have provided additional evidence to establish Taylor's guilt.

We further note that in Maryland, and particularly in Dorchester County, certain bars will allow their patrons to purchase alcoholic beverages on-site to consume elsewhere. *See* Md. Code (1957, 2011 Repl. Vol.), Article 2B § 6-401(k) (listing counties in which establishments may receive licenses for "consumption on premises or elsewhere"). It would not be unreasonable to conclude that a bar patron in Maryland might have left with an intoxicating package good and topped off the night's consumption on the drive. In sum, it was reasonable for Mothersell to conclude that Taylor's state of intoxication arose in his vehicle.

Taylor argues that by finding the search of his vehicle to be reasonable, we will usher in a law enforcement regime in which *any* arrest of a motorist would lead to a search of the vehicle. This fear is unjustified. Our holding is based on the totality of the circumstances here, namely: the officer's experience with inebriated motorists; the temporal nexus between alcohol consumption and inebriation; the fact that

Mothersell never observed Taylor drinking in a bar; and the fact that the presence of open alcoholic beverage containers in a vehicle is a means of proving DUI in Maryland. Accordingly, Mothersell had reason to believe that Taylor would have alcoholic beverages in his vehicle and thus, the search was justified.

III. Legality of Sentence

Taylor also argues that he was improperly sentenced to ten years' incarceration without parole because the State did not offer proof of a predicate conviction to justify that enhancement. Possession with intent to distribute, CL § 5-608, permits a 10 year mandatory minimum sentence when a defendant is convicted for a second qualifying narcotics offense. CL § 608(b). The statute applies this enhancement only to offenses enumerated in §§ 5-602 through 5-606, conspiracy to commit those offenses, or any other crime in the United States that would be a violation of those offenses. CL § 5-608(b)(i) - (iii). The State agrees with Taylor that it did not meet its burden of proving that Taylor had violated one of these offenses. The only offense the State offered as proof was a violation of CL § 5-601, "CDS POSSESSION—NOT MARIHUANA." As Taylor notes, and the State does not contest, simple possession of narcotics is not covered by CL § 5-608(b).

The parties disagree, however, as to what we should do. Taylor requests that we vacate this portion of his sentence. The State seeks a limited remand to hold a new sentencing hearing. Md. Rule 8-604(a)(5) permits an appellate court to "remand the action to a lower court in accordance with section (d) of this Rule." That section states that "[i]n a criminal case, if the appellate court reverses the judgment for error in the sentence or

sentencing proceeding, the Court shall remand the case for resentencing." Md. Rule 8-604(d). Further, an appellate court may, under Rule 4-345(a), "correct an illegal sentence at any time," whether the issue was raised during sentencing proceedings or not. *Bryant v. State*, 436 Md. 653, 660-62 (2014). A sentence is illegal when "the illegality inheres in the sentence itself. . .' *Id.* at 663 (Internal quotation marks omitted). In *Clark v. State*, 218 Md. App. 230 (2014), the circuit court "thought, incorrectly, that the appellant was subject to a mandatory minimum sentence of ten years without parole for his conviction under Count 8, and sentenced him accordingly. That sentence was contrary to law." *Id.* at 257-58. Accordingly, the court remanded for resentencing. *Id.* at 258

Similarly, we hold that the court incorrectly sentenced Taylor where the State did not establish a predicate conviction under CL § 5-608(b) to warrant the enhanced sentence. We therefore remand for resentencing.

JUDGMENTS OF THE CIRCUIT COURT FOR DORCHESTER COUNTY AFFIRMED; CASE REMANDED FOR RESENTENCING CONSISTENT WITH THIS OPINION; COSTS TO BE EQUALLY DIVIDED BETWEEN APPELLANT AND DORCHESTER COUNTY.

APPENDIX C

IN THE CIRCUIT COURT FOR DORCHESTER COUNTY, MARYLAND

Criminal Docket No. K13-014979

[Dated November 4, 2013]

STATE OF MARYLAND,	)
	)
vs.	)
	)
EFRAIN W. TAYLOR,	)
Defendant	)
	)

TRANSCRIPT OF PROCEEDINGS
MOTIONS HEARING

Cambridge, Maryland
November 4, 2013

BEFORE:

THE HONORABLE RAYMOND E. BECK, JUDGE

APPEARANCES:

On behalf of the State of Maryland:
BRIDGET LOWRIE, ESQUIRE

On behalf of the Defendant:
DAVID O. WECK, ESQUIRE

Typed from electrical recording by:
Valerie M. Dawson, RMR
Official Court Reporter - Wicomico County
410-548-4938

[p.2]

T A B L E O F C O N T E N T S

WITNESSES: DIRECT: CROSS: REDIRECT: RECROSS:

On behalf of the State:

Pfc. Mothersell 5 14 -- --

On behalf of the Defendant:

None

EXHIBITS

Identification Evidence

On behalf of the State:

None

On behalf of the Defendant:

None

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P R O C E E D I N G S

THE COURT: I still have two, I have Efrain Taylor and Sabrina Cottle.

MS. LOWRIE: Your Honor, Taylor, I believe, is going to be litigated motions. And certainly if this Court wants to proceed with that, we can.

MR. WECK: And to clarify, Your Honor, the defense is in a position to litigate motions with respect to the case that's scheduled to go to trial on Wednesday, which is the 79 case, or the case ending in number 79. There's also a case ending in number 80 which, based upon a video and some witnesses, I'm actually requesting a new motions and pre-trial date. That second case is not scheduled until the 27th of November.

And there's an intervening motions and pre-trial date the 18th of November that I'd ask the 80 case to be re-set on.

But we are here and available to litigate motions in the 79 case, whenever the Court is inclined.

THE COURT: Now, 14-979 is Efrain Taylor, is that the one you're talking about?

MR. WECK: Yes, they're both Efrain Taylor, Your Honor.

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Your Honor, I'm just going to grab him. He's in the hallway, Your Honor.

THE COURT: All right.

And what was the story with Cottle?

MS. LOWRIE: Your Honor, I believe we will be able to resolve Cottle, if we could just hold her until later in the docket.

THE COURT: Well, it's 10:15. We might as well go ahead with the 9:30 docket and litigate these motions, if we're ready to go.

MR. WECK: Sure.

MS. LOWRIE: Your Honor, the State would call Efrain Taylor, 13-14979.

Your Honor, if we could request counsel just to put on the record specifically what they're litigating.

THE COURT: I'm sorry, I'm not hearing you. You're speaking so fast, I can't understand you.

MS. LOWRIE: I'm sorry, Your Honor. I just requested if counsel can just put on the record specifically the issues they're litigating.

THE COURT: All right.

Mr. Weck.

MR. WECK: We are litigating the legality of the stop and the ultimate search of the vehicle and

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person of Mr. Taylor.

THE COURT: The legality of stop and search.

All right.

Satisfied, Ms. Wyant?

MS. LOWRIE: I am, Your Honor.

Your Honor, if I could just place on the record, the ultimate search of the vehicle was done by Officer Carroll. Your Honor, Officer Carroll was not available

today. It was my understanding in speaking with Mr. Weck that, based on his limited role, that Pfc. Mothersell would be able to testify to his involvement for purposes of the motions hearing.

THE COURT: Mr. Weck.

MR. WECK: Hearsay is admissible in a motions hearing, as long as it's reliable, Your Honor. And so, for that reason, I indicated to Ms. Wyant that that would be fine.

THE COURT: All right.

MS. LOWRIE: Your Honor, the State would call Pfc. Mothersell.

PFC. MOTHERSELL,

a witness produced on call of the State, having first been duly sworn, according to law, was examined and

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testified as follows :

DIRECT EXAMINATION

BY MS. LOWRIE:

Q. Officer, can you state your name and current duty assignment?

A. Officer Mothersell, Cambridge Police Department, assigned to the K-9 unit.

Q. And were you so employed on March 1st of this year?

A. Yes, I was.

Q. Specifically on that date can you tell the Court where it was you first observed the Defendant's vehicle?

A. I observed the Defendant's vehicle at the intersection of Robins and Phillips Street.

THE COURT: Robins and what street?

THE WITNESS: Phillips.

THE COURT: All right.

BY MS. LOWRIE:

Q. What, if anything, brought the vehicle to your attention?

A. While I was at the intersection I observed the vehicle pass my location at a high rate of speed. I estimated the speed roughly forty to forty-five miles an hour in a twenty-five-mile-an-hour zone.

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Q. What was that estimation based on?

A. The radar that I've done in that location, I'm familiar with the speed of 25 miles an hour and vehicles doing 25, and also working radar on U.S. Route 50, I can do a speed estimate between, at a 50-mile-an-hour zone and a 45.

Q. In addition to your experience, have you ever received any training in this field?

A. Yes.

Q. Can you tell the Court what that is?

A. Training in speed estimates and radar training.

Q. Was this done through the Academy?

A. Yes.

Q. Have you received any subsequent training in this field?

A. Yes.

Q. Can you tell the Court what that is?

A. Excuse me?

Q. Could you tell the Court what that training would be?

A. Oh, just for LIDAR, radar, speed estimates. At the Academy we had to do within three miles an hour for the speed, for the testing, you had to be within three miles an hour.

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Q. And did you successfully complete that training?

A. Yes.

Q. Were you radar certified on the day in question?

A. Yes.

Q. Based on your observations of the vehicle, what did you do?

A. At that point I pursued the vehicle. The vehicle continued down Phillips Street, approaching Bradley Avenue. As I got closer to the vehicle, the driver failed

to stop at the stop sign at Bradley Avenue, made a left on to Bradley Avenue from Phillips, headed towards Pine Street.

Q. Can you describe a little more, when you say he failed to stop, was there any slowing down, was there -- can you tell the Court a little bit more about that violation?

A. It was a slow down but it was not a complete stop. It made a left turn without even coming to a complete stop.

Q. Okay. Based on that, what did you do?

A. At that point I activated my emergency lights on my vehicle and effected a traffic stop on the vehicle in question, which was a gray-in-color

[p.9]

Ford Escape.

Q. Okay. And where did the actual traffic stop take place?

A. It occurred at Bailey Road, just east -- correction, west of Pine Street.

Q. All right. Were you able to identify the driver?

A. Yes, I did make contact with the driver, identified him with a Maryland driver's license as Efrain William Taylor.

Q. And is he in court today?

A. Yes, sitting to my left with defense counsel, blue sweatshirt, gray tee shirt.

MS. LOWRIE: Let the record reflect he identified the Defendant.

THE COURT: It will so reflect.

BY MS. LOWRIE:

Q. What, if anything, did you note about the Defendant upon making contact?

A. After making contact with him I detected a minor odor of alcohol beverage from his breath and person, and this was from my passenger's side approach.

Q. Approximately what time of day or night was this?

[p.10]

A. It was about five minutes after 1:00 in the morning.

Q. What else did you note about him?

A. I noted that his speech was slurred, hard to understand at certain times. His eyes were bloodshot and glassy.

Q. What, if anything, did you request of the Defendant?

A. I requested to see the vehicle's registration. At which point he handed me the vehicle insurance card, the title to the vehicle. But I also did observe the registration card in the same hand, but he failed to give that to me until I pointed it out to him.

Q. Okay. Did you have occasion to ask him about where he was previous to this?

A. Yes, I did.

Q. And what did you ask him? What was his response?

A. He stated that he was at the Point Break bar here in Cambridge, Maryland.

THE COURT: Point what?

THE WITNESS: Point Break bar.

BY MS. LOWRIE:

Q. Based on all these observations, what did

[p.11]

you do?

A. At that point I had Mr. Taylor step out of the vehicle so I could administer standardized field sobriety tests.

Q. Can you tell the Court what the results of those tests were?

A. After administrating the horizontal gaze nystagmus, the nine-step walk-and-turn and the one-legged stand, I determined that these weren't done successfully. And at that point Mr. Taylor was placed under arrest for suspicion of DUI.

Q. As a result of that what, if anything, did you do?

A. At that point, once he was placed under arrest, my back-up officer had already arrived at that point, he made a quick search of the vehicle while I was reading the DR-15 advice of rights to Mr. Taylor, which he subsequently refused to take the breath test.

Q. What was the purpose of the search of the vehicle?

A. A search of the vehicle is to locate any other alcohol, open containers, anything pertaining to the DUI arrest.

Q. What eventually was done with the vehicle?

[p.12]

A. It was impounded by B & B Auto.

Q. Is there any other purpose in searching the vehicle?

A. Just for the purposes of alcohol, any other thing pertaining to the alcohol violation that I observed and made the arrest for.

Q. What, if anything, was found as a result of that search?

A. During the search Officer Carroll, who was assisting, came back to me and stated that he had located some controlled dangerous substance, CDS, drugs, in the vehicle. At that point I went back to the vehicle and observed a clear plastic baggy containing several knotted bags of what I suspected to be powder cocaine.

Q. Specifically where did Carroll indicate that the bag was found, and if you can describe sort of the state it was in when he found it?

A. He stated that it was in the armrest center console area when he, he stated that when he opened it up it was sitting in the center console on top of a black plastic bag with other paper that was inside the

vehicle. It appeared to him that it was just opened up and sat there directly, it wasn't hidden, it was just in plain view when he opened up the

[p.13]

center console.

MS. LOWRIE: Court's indulgence, Your Honor.

BY MS. LOWRIE:

Q. Did you eventually have occasion to search the Defendant's person?

A. Yes.

Q. And what was the purpose of that search?

A. A search incident to arrest for any other contraband or anything pertaining to the arrest and take inventory of what he had on his person.

Q. Are there any safety issues involved with doing that search?

A. Yes, we're searching for any other weapons, knives, anything that was going to hurt myself or any other officers or Mr. Taylor himself.

Q. When was the search done in reference to the actual placing of handcuffs on him?

A. The initial search pat-down was at the scene of the traffic stop, to make sure he didn't have any weapons on him, and when we got back to the police department we observed that he had a significant amount of U.S. currency in his possession.

Q. Specifically where was that located?

A. It was in his pockets and wallet.

MS. LOWRIE: Court's indulgence, Your Honor.

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BY MS. LOWRIE:

Q. Where did all these events occur?

THE COURT: Pardon me?

BY MS. LOWRIE:

Q. Where did these events occur?

A. Cambridge, Dorchester County, Maryland.

MS. LOWRIE: Your Honor, that's all I have at this time.

THE COURT: Cross, Mr. Weck.

CROSS-EXAMINATION

BY MR. WECK:

Q. Good morning, Officer.

A. Good morning.

Q. Officer, you indicated that the initial reason that your attention was drawn to this vehicle was that you believed that that vehicle was speeding; is that correct?

A. Absolutely.

Q. And you've indicated that that belief is based upon training and experience?

A. Yes, that's a 25-mile-an-hour zone, when I see vehicles speeding in a 25-mile-an-hour zone it's very

significant, I mean, very detailed, when a vehicle is going over 25 miles an hour.

Q. Is your car equipped with a radar gun?

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A. I have a hand-held unit.

Q. Is there some reason that you didn't utilize that hand-held unit to get an actual instrumental evaluation of the speed at which that vehicle was traveling?

A. No.

Q. The radar gun that you had, the hand-held radar gun was in working order?

A. I did not have the radar gun.

Q. Oh, you didn't have it with you?

A. No.

Q. Okay. And there's no secondary or other radar gun that's attached to the vehicle or stays with the vehicle?

A. No.

Q. You indicated that after you made the observations you made, you began to pursue the vehicle?

A. Right, the vehicle passed my location, at that time I turned left, continued to follow the vehicle. That's when I observed the vehicle fail to stop at the stop sign at Phillips and Bradley, made a left-hand turn on to Bradley without stopping at the stop sign.

Q. For what length of time did you pursue the

[p.16]

vehicle prior to observing this traffic infraction?

A. The distance between that intersection and the others, only a couple hundred feet. I don't have the actual distance, per se, how many feet it is.

Q. I'm not trying to --

A. You're looking maybe at a couple blocks.

Q. -- I'm not trying to hang you up on that, I'm just trying to get a feel for it for the purposes of the record.

The traffic infraction that you indicated that you secondarily observed was the failure to completely stop at a stop sign?

A. Right.

Q. Were there other vehicles in the area?

A. No.

Q. This was in the early morning hours?

A. Yeah, 1:00 in the morning.

Q. The observations that you made of the vehicle with respect to your estimated speed, with respect to the vehicle's estimated speed, how far away were you from the vehicle in which Mr. Taylor was traveling when you made those observations regarding speed?

A. Speed? I was at the stop sign at Phillips and Robins, at the stop sign the vehicle came in a

[p.17]

south direction right past my location.

Q. Okay. Just so I understand, the vehicle in which Mr. Taylor was traveling was ultimately, was oriented the same way, in the same direction of travel as ultimately your vehicle --

A. No.

Q. -- travelled?

A. No.

Q. Can you describe the orientation of the vehicle?

A. I was facing west. Mr. Taylor's vehicle was traveling south from Washington Street, where there's no stop signs between Washington Street and Bradley Avenue, so you have several blocks, if you will, between Washington Street and Bradley with no stop signs. So I was stopped, lawfully stopped, and the vehicle passed facing the front of my vehicle.

Q. Now, when you say you were lawfully stopped, were you lawfully stopped on the road because of a traffic control device, or were you lawfully stopped off the road?

A. Yes, I was stopped at a stop sign.

Q. And then when you made this secondary observation relating to the failure to completely stop at the stop sign, how far away were you from the

[p.18]

vehicle in which Mr. Taylor is traveling at that point?

A. Maybe 100 feet. Roughly.

Q. When was it that you activated your emergency equipment on the vehicle?

A. At the same time, when he made the left turn on to Bradley, I was very close to the intersection at that time, I activated my lights at that intersection. And at that point he continued towards Pine Street, as I was still behind him with the lights on he made a right turn on to Pine and then a right turn on to Bailey, and that's when he eventually pulled over.

Q. And this all happened back on March 1st of this year?

A. Uh-huh.

Q. On March 1st of this year was the vehicle in which you were traveling a regular standard marked patrol car?

A. Yes, it was a marked patrol car.

Q. And was that vehicle equipped with the ability to either audio or visually record --

A. No.

Q. -- incidents?

A. No.

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Q. And when you say it wasn't so equipped, was it -- was the car equipped but it wasn't working?

A. No.

Q. Or was it just not equipped at –

A. It was never equipped.

Q. So ultimately you pulled the vehicle over, and you indicate that you approached the vehicle on the passenger's side?

A. Correct.

Q. How close did you get to the vehicle?

A. A few inches.

Q. Okay.

A. From the passenger's side.

Q. And you indicated during direct you were able to make observations of Mr. Taylor as he was trying to retrieve documents that you requested?

A. Yes.

Q. Were you able to make observations of the interior passenger compartment of the car in general?

A. Yes.

Q. And you described the lighting outside while all this is occurring? Obviously it's the middle of the night.

A. Middle of night, it might be a couple of street lights, illuminated with my spotlight,

[p.20]

take-down lights, my own flashlight. For my safety.

Q. Ultimately you detected an odor of alcohol and you got Mr. Taylor out of the car?

A. Correct.

Q. Did you ask him to get out of car, or did you tell him to get out of the car?

A. I asked him to step out of the vehicle to administer, so I can do the field sobriety tests.

Q. And ultimately he didn't perform those tests to your satisfaction?

A. No.

Q. And it was after the performance of those field sobriety tests that you placed Mr. Taylor under arrest?

A. Correct.

Q. You read him the DR-15 at some point?

A. Correct.

Q. So the record is clear, the DR-15 is the thing that tells the motorist what happens if they take a breath test?

A. Correct.

Q. At the point in time that you had him, that you gave him the instructions as it relates to the DR-15, was he already physically, like, cuffed?

A. Yes, he was in the rear passenger's seat,

[p.21]

and I was in the driver's seat.

Q. He was in the rear passenger's seat of your patrol car?

A. My patrol car.

Q. And how far away was your patrol car from Mr. Taylor's car?

A. Ten, ten feet distance at that time between the two.

Q. At some point in time during this interaction that you're having with Mr. Taylor, another law-enforcement officer shows up?

A. Yes.

Q. One more or a couple more?

A. There was one more that was there when I was doing the test, and another officer later arrived.

Q. Is the officer who later arrived, was that the officer that undertook the search of the vehicle?

A. He was the first one that arrived.

Q. Okay. And when did he arrive?

A. If I recall, during the time that I was doing my field sobriety tests.

Q. And when was it that you undertook the search of the vehicle?

A. After I placed him under arrest and put him, excuse me, Mr. Taylor in my patrol car. When I was

[p.22]

sitting in the car he proceeded to search the vehicle.

Q. Now, you've indicated that, as far as you knew, the reason why this search of the vehicle was taking

place was to discern whether or not there were any open containers or any other evidence supporting your DUI arrest –

A. That's correct.

Q. -- in the car?

A. Yes.

Q. Did you have any reason to believe that there were any such open containers in the vehicle?

A. A good possibility, yes. I've had several DUI arrests where there's plenty of open containers left in the vehicle. And I want to make sure there's no other alcohol in the vehicle for the probable cause for my DUI stop.

Q. But in this particular case, you had had an opportunity to approach the vehicle on the passenger's side, look inside the vehicle, and see what was going on; is that right?

MS. LOWRIE: Objection.

THE COURT: What's your objection?

MS. LOWRIE: Your Honor, he already answered the question.

[p.23]

THE COURT: Well, it is asked and answered.

Go ahead.

BY MR. WECK:

Q. Did you observe anything when you interacted with that vehicle that led you to believe that there might be open containers in the vehicle?

A. At that point I didn't observe anything during my initial contact with him, my concern was also more derived to him, himself. And I would glance here and there in the passenger's compartment of the vehicle, but my more concern was Mr. Taylor.

Q. Okay. And if I understand correctly, you have an actual knowledge through communicating with other officers that some contraband was located in the center console of the vehicle?

A. Right. Officer Carroll came to me and observed, stated that he had observed, or located CDS. At that point I got out of the car and went up and observed what he observed.

Q. Which was inside the center console of the vehicle, and Officer Carroll told you that when he found that suspected contraband in the center console, the center console was closed?

A. Yes.

Q. Ultimately it was in plain view but only

[p.24]

after the center console was opened?

A. Right, the arm part of it was opened up, he observed it in plain view sitting there.

Q. In addition to Mr. Taylor, were there any other occupants of the vehicle?

A. No, he was the only one in the vehicle.

MR. WECK: Thank you, Officer Mothersell, I don't have any further questions at this point.

THE COURT: Redirect.

MS. LOWRIE: None, Your Honor.

THE COURT: Officer Mothersell, you can step down.

THE WITNESS: Yes, sir.

THE COURT: Ms. Wyant.

MS. LOWRIE: Thank you, Your Honor.

THE COURT: Do you have any other witnesses?

MS. LOWRIE: I do not, Your Honor.

THE COURT: All right. Does counsel wish to be heard?

MS. LOWRIE: Your Honor, if I can reserve argument to respond to defense counsel.

THE COURT: All right.

MS. LOWRIE: Thank you.

THE COURT: Yes, sir.

MR. WECK: Your Honor, there are two

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problems here from a legal perspective. When I began the motions hearing, and this is why I put motions hearings on, I thought that the larger problem was going to be with respect to the initial stop, the pursuit of Mr. Taylor by Officer Mothersell based upon his own determination without the benefit of any sort of mechanical or instrumental device, that Mr. Taylor was exceeding the posted speed limit.

As it turns out, I think the true problem with respect to what transpired here is the testimony of Officer Mothersell does not support the ultimate search of the vehicle in which Mr. Taylor was traveling.

I'd refer the Court in general to the case of Arizona versus Gant. Gant was a traffic stop for purposes of driving on a suspended license. Ultimately Mr. Gant was secured in the law-enforcement officer's vehicle. A search was undertaken of that vehicle. And what the Supreme Court indicated was that that search was not lawful as it wasn't supported by any independent probable cause.

There is no independent probable cause here for the actions that the Cambridge Police Department took in the search of Mr. Taylor's vehicle. There

[p.26]

was no observed potential open containers. There was no odor of alcohol identified by the law-enforcement officer emanating from the vehicle itself as opposed to Mr. Taylor. There was no reason for this law-enforcement officer to undertake a search of the vehicle for open containers.

Additionally, I want to make sure that the record is clear, I think it was cleared up by the law-enforcement officer, this item that's found was not found in plain view. It was found in plain view in the sense that if an interior compartment of the vehicle were opened, it was then in plain view once the compartment was opened. There was no justification for that search. It's theoretically a justifiable search if the law-enforcement officer had pointed to some sort of departmental policy to inventory the contents of the vehicle for purposes of safeguarding people's property so that there aren't later claims against the police department that they stole someone's stuff.

But that isn't here. What's here, based upon this officer's testimony, is a secondary suspicionless search for open containers, which didn't exist. And the fact that they didn't exist doesn't control the day, but the fact that he had no

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independent reason or justification for believing they might be there puts this in the realm of Arizona versus Gant and justifies the suppression of anything that was found in the vehicle.

With respect to the search of Mr. Taylor's person, I submit that anything that was found on his person, assuming the Court finds the stop appropriate, was appropriately seized by law enforcement. So with that, I would submit.

THE COURT: All right. Ms. Wyant.

MS. LOWRIE: Thank you, Your Honor.

Your Honor, with regards to the stop, I think the officer was able to clearly articulate he had prior training where he had to identify vehicles within three miles an hour of their -- to estimate within three miles an hour of their actual speed. He is radar-certified and has had numerous occasions to observe vehicles speeding --

THE COURT: I don't have any problem with the stop.

MS. LOWRIE: Thank you, Your Honor.

THE COURT: That's the way we used to do it before we had devices.

MS. LOWRIE: Thank you, Your Honor.

Your Honor, with regards to the search, the

[p.28]

officer was able to articulate, Gant certainly holds that, with regard to a case where you have something like a driving while suspended and there's no furtherance you wouldn't be able to find any further evidence of the crime. Certainly if that was the case and we just had a driving while suspended he would not be able to do the search.

However, the officer was able to articulate through his training, knowledge, and experience, that he has on prior occasions been able to find further evidence of the crime that was being committed here and that was the driving under the influence of alcohol.

He was able to articulate that that was something that he does routinely and often does find further

evidence of that crime. And that's what he directed the officer to do on that day with regard to that search.

The vehicle was ultimately towed. The officer was not able to point to any specific policy, certainly we know that one exists. But he was able to show that the reason for the search was based on finding further evidence of alcohol, and that was the purpose for it.

THE COURT: All right. Anything further?

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MS. LOWRIE: Nothing from the State.

THE COURT: Arizona versus Gant does deal with the question of a stop on a suspicion of driving while suspended, and you wouldn't look in the glove compartment to see if the Defendant had a notice of suspension in there, I mean that would be ridiculous. But on a stop for speed, a subsequent odor of alcohol, glassy eyes, and failure of field sobriety tests, the search of the vehicle incident to the arrest under those circumstances could have revealed a pint of whiskey in the glove compartment, who's to say. So I feel the search was lawful as well. So the motion is denied. matters.

MS. LOWRIE: Thank you, Your Honor.

MR. WECK: Your Honor, two housekeeping matters. The case is set for Wednesday. At this point we would ask the Court to keep it in for purposes of a trial by jury on Wednesday.

Additionally, with respect to the case ending in 80, I would ask that the Court postpone the motions hearing to the November 18th pre-trial date, which

would not do any harm to the November 27th trial date.

THE COURT: That will be granted.

MR. WECK: Thank you, Your Honor.

[p.30]

THE COURT: And we'll leave it set for Wednesday, but there is a likelihood that it won't go Wednesday.

MR. WECK: Yes, Your Honor.

MS. LOWRIE: Thank you, Your Honor. We'll be available Wednesday.

MR. WECK: Thank you.

THE COURT: All right. Thank you.

(End of Proceedings.)

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CERTIFICATE OF TRANSCRIPTION

I, Valerie M. Dawson, certify that this transcript, consisting of 31 pages, is a complete and accurate transcript of the proceedings recorded by electrical recording, on the 4th day of November, 2013.

I further certify that to the best of my knowledge and belief, the foregoing transcript constitutes a true and correct transcript of the said proceedings as can be transcribed from an electrical recording.

Given under my hand this 7th day of July, 2014, at Salisbury, Maryland.

/s/ Valerie M. Dawson
Valerie M. Dawson

APPENDIX D

IN THE COURT OF APPEALS OF MARYLAND

No. 75
September Term, 2015

[Filed July 8, 2016]

EFRAIN TAYLOR)
)
v.)
)
STATE OF MARYLAND)
)

ORDER

The Court having considered the Motion for Reconsideration filed in the above-captioned case, it is this 8th day of July, 2016

ORDERED, by the Court of Appeals of Maryland, that the Motion for Reconsideration be, and it is hereby, DENIED.

/s/ Mary Ellen Barbera
Chief Judge