IN THE COURT OF SPECIAL APPEALS OF MARYLAND

SEPTEMBER TERM, xxxx

NO. xxxx

STATE OF MARYLAND,

Appellant

v.

CHRISTOPHER M. XXXXX,

Appellee

APPEAL FROM THE CIRCUIT COURT
FOR MONTGOMERY COUNTY
(The Honorable DeLawrence Beard, Presiding)

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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APPEAL FROM THE CIRCUIT COURT
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STATEMENT OF THE CASE

Appellee adopts Appellant's Statement of the Case.

QUESTION PRESENTED

Did the trial court correctly grant Appellee's motion to suppress in ruling that the police lacked probable cause for his arrest and the search of his vehicle?

STATEMENT OF FACTS

The testimony taken at the brief hearing on the Motion to Suppress in this matter, taken in a light most favorable to Appellee as the prevailing party, in pertinent part established the following:

On February 14, 2007, Officer Gomez, a member of the Montgomery County Police Germantown Special Assignment Team (S.A.T.), received information from a confidential informant concerning a person named Christopher Xxxxx. (T6). Officer Gomez had never before obtained information from this confidential informant and he had no other factual basis upon which to weigh the informant's reliability. (T13,32-3). The informant told Officer Gomez that Mr. Xxxxx was staying at the "Extended Stay Hotel, that he'd be operating a Nissan Xterra with South Carolina tags, and that he would be meeting somebody in a certain location. . . in a ***red*** Nissan Xterra with South Carolina tags 767RWB." (T6-7). Additionally, the informant advised that the meeting would take place at a nearby Wal-Mart and that Xxxxx would have a quantity of CDS of an unspecified nature on him at that time. (T8-9).

Later that same day, Officer Bernota, another member of Germantown S.A.T., observed a ***black*** Xterra in the Extended Stay lot. (T8,36). The vehicle left the hotel at around 10:00 p.m. and was followed to the nearby Wal-Mart lot, where it was observed to park in a lawful parking spot. (T39, 46). The informant

was driven past the vehicle and identified the driver as Christopher Xxxxx and this information was radioed to Officer Baskot, who was setting up with other members of the team to do the "rip" (T36).

Based on this information, a decision was made and strategy devised "to take the vehicle down, blocking the vehicle..." (T37). Officer Baskot approached in his vehicle from the rear pulling his car behind the Xterra while other officers, including Officer Bernota, participated as planned (T37-8, 44).

Officer Baskot immediately jumped out of his police vehicle, went straight to the Xterra, opened the driver's side door and ordered Appellee out of the vehicle. (T37,49-50). Appellee complied with the order to get out and Officer Baskot then observed what he believed to be a quantity of CDS between the floorboard and driver's side seat but only after he opened the door. (T37,50). Defendant was ordered to the rear of his vehicle where he was placed in handcuffs by Officers Bernota and Baskot. (T49).

ARGUMENT

I. THE TRIAL COURT CORRECTLY GRANTED APPELLEE'S MOTION TO SUPPRESS IN RULING THAT THE POLICE LACKED PROBABLE CAUSE FOR HIS ARREST AND SEARCH OF HIS VEHICLE

A. STANDARD OF REVIEW

Review of the circuit court's ruling on a motion to suppress is based solely upon the record of the suppression hearing. *Ferris v. State*, 355 Md. 356, 368

(1999). The appellate court reviews the lower court's factual findings in the light most favorable to the prevailing party under a clear error review, while legal conclusions are reviewed *de novo*. *Id*. "[T]he court's findings of fact and determinations of credibility are afforded great deference, and they are to be accepted unless clearly erroneous. *Dixon v. State,* 133 Md. App. 654, 668 (2000). The Court is "further limited to considering only that evidence and the inferences there from that are most favorable to the prevailing party on the motion," in this case, Appellee. *Charity v. State*, 132 Md. App. 598, 606 (2000). [1]

Where the hearing court does not make findings of fact pertinent to the issue on appeal, the appellate court must review the factual evidence, and draw conclusions and inferences in favor of the prevailing party and against the losing party. *State v. Ofori*, 170 Md. App. 211, 217(2006)(*citing Morris v. State*, 153 Md. App. 480,489 (2003)). This mechanism arises when the hearing judge's fact- finding is ambiguous or incomplete. *Id*.

B. THE CIRCUIT COURT CORRECTLY RULED THAT THE POLICE LACKED PROBABLE CAUSE TO ARREST APPELLEE AND TO SEARCH HIS VEHICLE

The testimony adduced at the suppression hearing below, taken in a light most favorable to Appellee, established that he was arrested without probable cause prior to the discovery of any evidence of a crime. The testimony showed

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1 The Appellant's Brief erroneously declares that the State was the prevailing party at the Motions hearing below. Commendably, after noticing the error, Appellant's Counsel contacted the undersigned and counsel agreed to disregard the error.

that the Montgomery County Police Germantown S.A.T. squad planned and executed a "rip" or take-down of Appellee's vehicle upon information provided by a confidential informant. Consistent with their plan, the team blocked in the Appellee's lawfully parked vehicle with at least one police vehicle. Officer Gomez went directly to Appellee's vehicle and opened its driver's side door intending to order him out of the vehicle. Defendant was ordered to the rear of his vehicle where he was handcuffed. Controlled substance was found next to the driver's seat but only after the door was opened by the police. The Lower Court found that these actions amounted to an arrest in this case. Since Appellee's arrest lacked probable cause, the trial court correctly suppressed the evidence.

The circuit court's holding that "there wasn't sufficient justification for the warrantless search or arrest in this case" was an imminently correct application of the facts found from the evidence to well-settled case law. (T67) In *Dixon v. State,* 133 Md. App. 654, 678 (2000), this court defined an arrest as "the taking, seizing, or detaining of the person of another (1) by touching or putting hands on him; (2) or by any act that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest or (3) by the consent of the person to be arrested", and further set forth the elements of arrest as:

(1) an intent to arrest;
(2) under a real or pretended authority;
(3) accompanied by a seizure or detention of the person; and
(4) which is understood by the person arrested.

Id. at 671. (*See also Longshore v. State,* 399 Md. 486, 520 (2007)(wherein the Court of Appeals declared that Dixon provides an "appropriate model for determining when someone is arrested.")

The *Dixon* Court went on to define "an arrest in general terms as the detention of a known or suspected offender for the purpose of prosecuting him for a crime." *Id.* (citing *Bouldin v. State,* 276 Md. 511 (1976) (additional citations omitted)). In *Bouldin*, the Court of Appeals held that an arrest has occurred when there is an act by an officer that indicates an intention to take someone into custody. *Id*. at 530.

Curiously, perhaps because it was never argued below, the Appellant argues in the alternative both that probable cause did exist to make the arrest Constitutional, but if not, that the initial "rip" was not an arrest and that an arrest occurred only after the drugs were found. A comparison of the tactics of the officers here with the officers in *Dixon, supra,* applied to *Dixon's* legal analysis, aptly shows that the State's alternative arguments are off the mark.[2]

The testimony below showed that the officer's planned an aggressive "rip" or take down of the Appellee, planning to surround his vehicle and take him into custody. One of the officers involved in this take down described how he blocked

2 Interestingly, the police officers in *Dixon* were also members of the same Montgomery County Police Department Germantown S.A.T. unit.

Appellee's vehicle and while the transcript is ambiguous as to the placement of the other police vehicles, it must be inferred, taking the evidence in the light most favorable to Appellee, that the take down was executed as planned and that other police vehicles surrounded the Appellee's vehicle. *State v. Ofori*, 170 Md. App. 211, 217(2006). Officer Gomez went directly to Appellee's driver's side door, opened it and subsequently ordered Appellee out of the vehicle shortly after which he was placed in handcuffs. The circuit court's ruling that these coercive actions amounted to an arrest which occurred prior to the discovery of any evidence of crime, a factual finding based both on the content and credibility of the officers testimony, was not clearly erroneous and should not be disturbed on appeal. *See Longshore, supra* at 509 ("Maryland has recognized very limited instances in which a show of force, such as placing a suspect in handcuffs, is not an arrest.") The take down procedure employed here is indistinguishable from *Dixon's* arrest.

As such, Officer Gomez's actions required probable cause which the trial court in the case *sub judice*, correctly held was lacking. A multitude of cases define probable cause but it is perhaps most simply defined as "a fair probability that contraband or evidence of a crime will be found in a particular place." *Nathan v. State*, 370 Md. 648 (2002) (quoting *Dixon v. State,* 133 Md. App. 654, 678 (2000)). *See also Maryland v. Pringle,* 540 U.S. 366,370 (2003) ("the probable cause standard is a practical, nontechnical conception that deals with the factual

and practical considerations of everyday life on which ***reasonable and prudent men*** not legal technicians act."(emphasis added.))

Since the Supreme Court's decision in *Illinois v. Gates*, 462 U.S. 213 (1984), the "totality of the circumstances" test has been applied to the judicial determination of whether probable cause exists for an arrest or search. The test allows for the common sense and practical consideration of both the reliability or veracity of the informant and the basis of knowledge for the information. It is well-settled that a deficiency in either the reliability of the informant or his basis of knowledge may be overcome by a substantially strong showing of the other. *See Illinois v. Gates, supra* at 233. Moreover, independent corroboration by the police of "major portions" Id at 246, of an informant's tip certainly has long recognized value in judging the credibility and veracity of the informant.

Applying these standards in this case, the evidence indisputably showed that the confidential informant had never before been used before this "rip" and, therefore, had no inherent veracity. (T66-67). *See also* (T 28-33) (wherein the court questioned the officer and implicitly concluded that there was no basis to deem the informant reliable.)[3] Additionally, the court found that his allegation that Appellee would have drugs was just a mere assertion, really just a bare conclusory statement, without any further basis of knowledge offered in

3 It should also be noted that the tip was inaccurate in that the informant told the police that Appellee's vehicle was red when it was in fact black.

testimony. (T66-67)[4]. Such statements have always been considered insufficient as emphasized in *Illinois v. Gates, supra at 239* ("Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others.") The police attempted to buttress the informant's basis of knowledge with testimony that he identified Appellee in the parking lot just prior to the take down. Officer Gomez testified, however, that the confidential informant was shown a photograph of Appellee prior to the identification and even if the identification is given some weight, it did not enhance the informant's basis for saying that Appellee would possess controlled substance on this record. (T26).

The Appellant's primary argument that the Officers had probable cause to arrest the Appellee would require this Court to reinterpret the facts as found by Judge Beard below and hold for the first time that corroboration of the accurate prediction of otherwise non-inculpatory behavior, standing alone with a bare conclusory assertion that drugs would be present, satisfies the totality of the circumstances test for probable cause. To be sure, *Illinois v. Gates*, *supra* and

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4 The court specifically held that "as I indicated during my questioning, there was some concern about the course of the basis of knowledge of this assertion that the defendant had drugs in his possession. That wasn't satisfied to any meaningful degree, although there was a substantial amount of factual recitation about personal effects concerning the defendant." *Id*. As for the questioning of the officers in this regard, *see* (T28-33)and the Court's exchange with the Assistant State's Attorney at T57-8 (wherein the court observed that the informant "didn't say I was a participant, I saw it, I heard it, I smelled it. All he says is 'he'll have cocaine'…not that I helped package it, not that he told me he would have it, not that I saw it. Not that I sold it to him. He just makes the assertion.")

its prolific progeny emphasize the usefulness of this sort of corroboration in cases where the informant has no track record. Where the corroboration establishes a sufficiently strong showing of veracity in the informant, that showing may even overcome a deficiency in the basis of knowledge prong. *See Illinois v. Gates, supra* at 233. [5]

The Appellant suggests that this court's recent opinion in *Massey v. State*, 173 Md. App. 94 (2007), and its references to the added veracity given a known informant, even one without any track record, supports its argument that probable cause existed. The Appellant's reliance upon *Massey's* holding is misplaced. In *Massey*, the informant had just been arrested for a drug felony and agreed to cooperate with officers concerning a previously planned and imminent drug delivery. The Officers fully interviewed the informant as to how he dealt with and spoke to the target and then listened into a conversation between the informant and Massey during which certain previously described words were used to signify that the drug delivery was en-route. Other police officers located and then followed Massey on his predicted route of travel and when he arrived at the planned location for the transaction, he was taken into custody and incident to that arrest, drugs were recovered.

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5 The Appellant's reliance upon *Alabama v. White*, 496 U.S. 325 (1990) and *Florida v. J.L.*, 529 U.S. 266(2000)is misplaced here as both involve the corroboration of anonymous tips which may provide a basis for a limited investigatory stop rather than the arrest which occurred in this case. The Appellant's alternative argument in this regard is discussed in more detail, *infra*.

Analyzing these events and distinguishing the case from *Dixon, supra,* this court held that the informants credibility was enhanced by the face-to-face interview process but more importantly by the verification of the details "within the context of his past dealings with Massey" as to their "similar transactions in the past." *Massey, supra* at 110-11. In other words, the evidence showing the informants prior criminal activity following a pattern identical to the activity being observed by the officers in the present was paramount. The record in the case *sub judice* contains no testimony about any past dealings or contacts of any kind between the informant and Appellee and, as Judge Beard observed, the allegation that Appellee would have drugs was merely an assertion on the record before him. [6] Quite simply, a "reasonable and prudent man" would not "rip" or take-down a vehicle upon the minimally corroborated predictions and mere assertion of the presence of controlled substance. Judge Beard was imminently correct in so ruling.

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6 The Appellant implies in the introductory paragraphs of its brief that the lower courts ruling in favor of Appellee may have been the result of some sort of confusion on the part of Judge Beard as to the effect of a search warrant subsequently obtained by the state. Judge Beard was of the mistaken belief initially, based upon the evidentiary presentation by the State, that the vehicle search occurred after a warrant was obtained and correctly observed that no basis to set aside a search warrant had been demonstrated or argued. He clearly held that Appellee had been searched and arrested and applied the correct "totality of the circumstances" test. (T66-7). There was no confusion on the part of Judge Beard which somehow infected his ruling to the detriment of the state.

The Appellant alternatively argues that there may have been reasonable suspicion for a *Terry*-type investigation, an argument which ignores Judge Beard's findings of fact and presupposes that Appellee was not arrested until after the drugs were found. In order to accept this argument, this court would have to adopt a revisionist view of the events that evening, overlook the fact that the S.A.T. team had not intended a mere *Terry* stop and disregard the extremely aggressive and coercive environment which Judge Beard necessarily found that Appellee faced at the Wal-Mart.

The take down conducted in this case stands in stark contrast to the traffic stop like investigatory detention found to have been Constitutionally proper on reasonable articulable suspicion in *State v. Rucker*, 374 Md. 199 (2003). In *Rucker*, the Court of Appeals noted that Rucker was initially questioned by officers after they pulled behind his vehicle in a manner no more coercive than during a traffic stop. The court went on to hold that Rucker was only placed in custody after he told the officers he was in possession of cocaine and it was found. It is the difference in the level of coerciveness of the detentions which distinguishes this case from *Rucker* making it much more like the arrests found to have occurred in *Longshore* and *Dixon.* The Appellee here was the officers "target" that night and they planned and executed a highly coercive and intrusive vehicle take down, not a traffic stop. The trial court properly relied on this testimony in finding that Appellee was arrested and that probable cause was

required to justify the take down in the first place.

The State's Investigatory stop theory would also require this court to ignore *Dixon* in which a similar argument was dismissed. The facts known to the police prior to Dixon's seizure was that a confidential informant advised that Dixon would be transporting ten pounds of marijuana in a dark colored Acura and that he would arrive at a garage at a specific time. When police arrived at the location to begin surveillance, over an hour prior to the time designated by the informant, the vehicle was already parked there. When Dixon arrived on the scene, he unlocked the door and got in the vehicle at which time several unmarked police cars blocked the vehicle, removed Dixon, and handcuffed him. The State's theory, similar to the alternative theory argued in this case, was that Dixon's seizure was merely an investigatory stop. This court concluded that Dixon had not merely been detained but that "the officers **arrested** [him] at the time they blocked his car, removed him from his vehicle and handcuffed him." *Id.*at 673 (emphasis added).

Case law also recognizes one other alternative justification for the type of felony "take-down" found by the lower court to have occurred here, other than probable cause, where the officers had reasonable, articulable, suspicion that the target of the stop was in possession of a gun. In *In re David S.*, 367 Md. 523, 539 (2002), the Court of Appeals held that forcing the defendant to the ground and placing him in handcuffs did not amount to arrest, only because the police had articulated a reason to believe that David S. was in possession of a gun. There

was no articulated basis to believe that Appellee was armed in the case ***sub judice*** and of course no such finding of fact. The officers testified here that their aggressive take-down of Appellee was a "safety thing," yet had no information that defendant was in possession of a gun or even might possibly be armed. The trial court found that the confidential informant simply made mere assertions that Appellee would be in possession of unspecified drugs and nothing about firearms or weapons of any type. Thus, the actions of the Officers in this case cannot be justified as a "frisk" for weapons as in *In Re David S., supra*.

CONCLUSION

For the foregoing reasons, Mr. Xxxxx respectfully requests that this Court affirm the judgment of the Circuit Court for Montgomery County, order the final dismissal of all charges against Appellee and award costs and attorney's fees to Appellee pursuant to Md. Cts. And Proc., Code Ann. §12-302 (c)(3)(vi).

Respectfully submitted,

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***This brief was prepared using Arial 13 point font.**

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***Appellant*,**	**:**	
v.	**:**	**No. 1295, September Term, 2007**
CHRISTOPHER M. XXXXX	**:**	
***Appellee*.**	**:**	

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Appellee were sent on this _____ day of _____, 2007 postage pre-paid, to:

Brian Kleinboard, Esquire
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_____
RICHARD A. FINCI