

COURT OF APPEALS OF VIRGINIA

Record No. 0646-25-1

CHARLES TYLER
v.
COMMONWEALTH OF VIRGINIA

Present: Judges O'Brien, Chaney and Raphael

Argued at Williamsburg, Virginia

Opinion Issued September 22, 2026*

FROM THE CIRCUIT COURT OF THE CITY OF NORFOLK

Joseph C. Lindsey, Judge¹

J. Barry McCracken, Assistant Public Defender, for appellant.

Allison M. Mentch, Assistant Attorney General (Jason S. Miyares,² Attorney General; Austin E. Deramo, Assistant Attorney General, on brief), for appellee.

MEMORANDUM OPINION BY JUDGE MARY GRACE O'BRIEN

Upon a conditional guilty plea, the circuit court convicted Charles Tyler of possessing a firearm as a convicted non-violent felon, in violation of Code § 18.2-308.2(A). On appeal, Tyler argues that the court erred in denying his motion to suppress evidence obtained when he was seized and frisked by United States marshals who were serving an arrest warrant on another individual standing nearby. He contends that his initial seizure was not justified by probable cause or a reasonable suspicion of illegal activity, nor was it “otherwise necessary for the

* This opinion is not designated for publication. *See* Code § 17.1-413(A).

¹ Judge Mary Jane Hall denied Tyler’s motion to suppress, which is the subject of this appeal.

² Jay C. Jones succeeded Jason S. Miyares as Attorney General on January 17, 2026.

officers' protection." He further contends that the "limited search [of his person] for weapons" was not justified by a reasonable suspicion that he was armed and dangerous. Finding no error, we affirm.

BACKGROUND

"We recite the facts in the light most favorable to the Commonwealth, the prevailing party below." *McCumber v. Commonwealth*, 88 Va. App. 169, 173 (2026). "Doing so requires that we 'discard' the defendant's evidence when it conflicts with the Commonwealth's evidence, 'regard as true all the credible evidence favorable to the Commonwealth,' and read 'all fair inferences' in the Commonwealth's favor." *Id.* (quoting *Camann v. Commonwealth*, 79 Va. App. 427, 431 (2024) (en banc)).

The afternoon of July 12, 2023, Deputy U.S. Marshal Michael Tavares and several other marshals of the Capital Area Regional Fugitive Task Force executed an arrest warrant on Deshawn Drummond for his involvement in a shooting. The marshals located Drummond at 1600 East Ocean View Avenue, "[h]istorically" a high-crime area in Norfolk, "includ[ing] gun crime." As they approached, they saw Drummond talking to Tyler and another male.

Marshal Tavares yelled, "Police. U.S. marshals. Put your hands up." Tyler put his left hand in the air but kept his right hand near his waistband with his fist clenched. Marshal Tavares told Tyler to put up both hands and to approach him. Tyler walked towards the marshal with his left hand up and his right hand at his waistband. Tyler "then eventually put the [right] one up." Marshal Tavares conducted a pat-down search of Tyler: specifically, the marshal "place[d] [Tyler's] hands on the wall and patted the outside of his clothing." The marshal felt what he believed was a weapon in Tyler's right-side waistband. Tyler admitted that the item was a firearm, and Marshal Tavares removed the firearm from Tyler's waistband. Officers subsequently determined that Tyler was a convicted felon.

Tyler moved to suppress all evidence recovered during the encounter, arguing that the marshals violated his Fourth Amendment rights by seizing and searching him solely because of his proximity to Drummond—the target of an arrest warrant. At a hearing on the motion, Marshal Tavares testified that once he commanded the three individuals to put up their hands, Tyler was not free to leave. He explained that Tyler was standing “[n]o more than a few feet” away from Drummond when the marshals approached, so he wanted to ensure the safety of the marshals and the other individuals. Marshal Tavares acknowledged that before the marshals tried to execute the arrest warrant, he had no reasonable suspicion that Tyler was armed and dangerous or breaking the law.

Marshal Tavares testified that by only raising “one [hand] and then the other” Tyler looked suspicious, “as if he [were] trying to conceal something.” The marshal specified that Tyler’s initial noncompliance was suspicious because “the other individual” with Drummond and Tyler did comply by “put[ting] both hands up.” He added that the area of 1600 East Ocean View Avenue was known for gun crime and the marshals were aware of Drummond’s propensity for carrying firearms. Marshal Tavares estimated that no more than a few minutes elapsed between the time he approached Drummond and the other individuals and when he performed the pat-down search of Tyler.

Tyler argued that the marshals seized him without probable cause or reasonable articulable suspicion of criminal activity, nor did they suspect that he was armed and dangerous, so both the seizure and the subsequent pat-down leading to the discovery of the firearm were unlawful. The court denied the motion to suppress. The court found that Tyler was seized for purposes of the Fourth Amendment when Marshal Tavares ordered the three individuals to put up their hands and that at the time of the detention Marshal Tavares did not have reasonable articulable suspicion of criminal activity or that Tyler was armed. But the court held that the

brief detention did not violate Tyler’s constitutional rights because the totality of the facts—an arrest in a high-crime area, Drummond being wanted on a firearm charge, and Tyler conversing with Drummond at the time of the arrest—demonstrated that the brief detention was “needed to secure the scene and protect the safety of the officers.”

Tyler entered a conditional plea stipulating to the sufficiency of the evidence and reserving his right to appeal the denial of his suppression motion. At the hearing, the parties introduced a written stipulation of facts. The court accepted Tyler’s plea and found him guilty of possessing a firearm as a convicted non-violent felon.

ANALYSIS

“In reviewing the denial of a motion to suppress, we ‘consider the facts in the light most favorable to the Commonwealth, the prevailing party at trial.’” *Aponte v. Commonwealth*, 68 Va. App. 146, 156 (2017) (quoting *Hairston v. Commonwealth*, 67 Va. App. 552, 560 (2017)). We are “bound by the trial court’s factual findings unless those findings are plainly wrong or unsupported by the evidence,” but we review “the trial court’s application of the law de novo.” *Malbrough v. Commonwealth*, 275 Va. 163, 168-69 (2008). Thus we “defer[] to the factual findings of the trial court but independently decide whether, under the applicable law, the manner in which the challenged evidence was obtained satisfies constitutional requirements.” *Shiflett v. Commonwealth*, 47 Va. App. 141, 145-46 (2005) (quoting *Jackson v. Commonwealth*, 267 Va. 666, 673 (2004)). “It is the appellant’s burden to show that when viewing the evidence in such a manner, the trial court committed reversible error.” *Aponte*, 68 Va. App. at 156 (quoting *Hairston*, 67 Va. App. at 560).

“The Fourth Amendment protects people from unreasonable searches and seizures.” *Williams v. Commonwealth*, 71 Va. App. 462, 476 (2020). It “does not proscribe all seizures, only those that are ‘unreasonable.’” *Hamlin v. Commonwealth*, 33 Va. App. 494, 499 (2000) (quoting

Bethea v. Commonwealth, 14 Va. App. 474, 476 (1992) (en banc), *aff'd on other grounds*, 245 Va. 416 (1993)). “Whether a seizure is unreasonable is determined by balancing the individual’s right to be free from arbitrary government intrusions against society’s countervailing interest in preventing or detecting crime and in protecting its law enforcement officers.” *Welshman v. Commonwealth*, 28 Va. App. 20, 30 (1998) (en banc) (quoting *Bethea*, 14 Va. App. at 476). “The validity of a seizure “turns on an objective assessment of the officer’s actions in light of the facts and circumstances confronting him at the time,” and not on the officer’s actual state of mind at the time the challenged action was taken.” *Id.* (quoting *Maryland v. Macon*, 472 U.S. 463, 470-71 (1985)).

There is no dispute that Tyler was seized within the meaning of the Fourth Amendment when Marshal Tavares ordered him to put his hands in air.³ Tyler asserts that the marshal had neither probable cause nor reasonable suspicion of criminal behavior to justify the seizure. “Ordinarily, in the absence of consent, even a brief detention must be based on at least a reasonable, articulable suspicion [that] the person seized is engaged in criminal activity.” *Hodnett v. Commonwealth*, 32 Va. App. 684, 690 (2000) (quoting *Welshman*, 28 Va. App. at 30). But “the absence of probable cause or reasonable suspicion of criminal activity does not necessarily render a detention unlawful.” *Id.* at 691 (quoting *Welshman*, 28 Va. App. at 30). Under appropriate circumstances, an officer in the process of arresting one individual may briefly detain another in close proximity, “both for [the other person’s] safety and the safety of the officers and other bystanders.” *Welshman*, 28 Va. App. at 32.

For example, in *Welshman*, this Court found no constitutional violation when officers briefly detained Welshman even though they lacked reasonable suspicion or probable cause that

³ “A Fourth Amendment seizure of a person occurs either by physical force or submission of the person to the assertion of law enforcement authority.” *Hill v. Commonwealth*, 297 Va. 804, 811 (2019) (citing *California v. Hodari D.*, 499 U.S. 621, 626 (1991)).

Welshman was engaged in criminal activity. *Id.* In that case, police attempted to apprehend two individuals suspected of selling cocaine. *Id.* at 26. As the officers approached, the target individuals ran into a group of people standing close by, where Welshman was. *Id.* Because that street block was known for high crime and violence, and because several other civilians were close by, the officers directed the group to lie on the sidewalk and extend their arms. *Id.* at 26-27. We determined that the totality of the circumstances supported the court’s conclusion that “the officers reasonably feared for their safety and the safety of the bystanders” and did not act unreasonably when they briefly detained Welshman and others who had been standing with the target subjects. *Id.* at 32-33.

The circumstances of Tyler’s brief detention are similar to those in *Welshman*. Here, the marshals were executing an arrest warrant for Drummond, who was wanted on a firearm charge. The area of 1600 East Ocean View Avenue was known to officers for its high crime, including gun crime. The marshals were also aware of Drummond’s propensity to carry a firearm. Tyler and the other male were standing within feet of Drummond when the marshals arrived, and Tyler and Drummond were engaged in a conversation. Given these circumstances, it was not unreasonable for the marshals to briefly detain Tyler to secure the scene while Drummond was taken into custody. *See id.* at 33.

Tyler asserts that even if the detention were reasonable, the facts and circumstances did not support a reasonable suspicion that he was armed and dangerous to justify the subsequent pat-down for weapons.⁴ “[I]f it is reasonable for the officer to suspect that the stopped individual

⁴ The Commonwealth contends that although Tyler addressed the pat-down search in his motion to suppress, the court did not specifically rule on the issue in its written order, so Tyler’s argument is waived under Rule 5A:18. We disagree. To determine whether an appellant has satisfied Rule 5A:18, we look at “whether the trial court had the opportunity to rule intelligently on the issue.” *Maxwell v. Commonwealth*, 287 Va. 258, 274 (2014) (quoting *Scialdone v. Commonwealth*, 279 Va. 422, 437 (2010)). The record indicates that the court understood Tyler’s position with respect to the pat-down and had such opportunity to rule. Although the

may be armed and presently dangerous to the officer, ‘a limited protective search’ of the individual being detained is reasonable under the Fourth Amendment.” *McArthur v. Commonwealth*, 72 Va. App. 352, 360 (2020) (quoting *Adams v. Williams*, 40 U.S. 143, 146 (1972)). “An officer is entitled to view the circumstances confronting him in light of his training and experience, and he may consider any suspicious conduct of the suspected person.” *Thompson v. Commonwealth*, 54 Va. App. 1, 7 (2009) (citation omitted). “The refusal of a person detained to show his hands may provide just such a basis.” *Welshman*, 28 Va. App. at 34; see *James v. Commonwealth*, 22 Va. App. 740, 745-46 (1996) (permitting frisk of passenger who appeared jittery and did not respond to officer’s order to keep hands in view). Additionally, “whether the conduct of a police officer is reasonable ‘is judged from the perspective of a[n objectively] reasonable officer on the scene allowing for the need of split-second decisions and without regard to the officer’s [subjective] intent or motivation.’” *McArthur*, 72 Va. App. at 360 (alterations in original) (quoting *Thompson*, 54 Va. App. at 7).

In *Welshman*, after being instructed to lie on the ground and extend his arms out in front of him, Welshman kept his arms tucked under his torso. 28 Va. App. at 27. Fearing that Welshman was reaching for a weapon, the officer began to roll him over, and Welshman “complied by extending his arms.” *Id.* The officer was nevertheless still “concerned about the officers’ safety and frisked [Welshman] for weapons.” *Id.* This Court stated that “[o]nce [Welshman] had been detained, [the officer] was entitled to take reasonable steps to protect the safety of the officers.” *Id.* at 34. Welshman’s “subsequent compliance” with the officer’s orders

court focused its analysis on the seizure, “[i]mplicit in the court’s ruling was the finding” that the pat-down resulting from the seizure was also reasonable. *Vinson v. Commonwealth*, 258 Va. 459, 467 (1999). Indeed, as part of its ruling, the court relied on a Virginia Supreme Court ruling that a brief detention and subsequent pat-down of a bystander was reasonable in light of the circumstances presented to the officers during the encounter. See *El-Amin v. Commonwealth*, 269 Va. 15, 18, 22-23 (2005).

“did not remove the possibility” that Welshman “had a weapon on his person and might again try to access it.” *Id.* at 35. We concluded that Welshman’s actions, the reputation of the specific street block, and the drug-related crime that was being investigated gave the officer “specific and articulable facts giving rise to the reasonable belief” that Welshman may have been armed and dangerous, and therefore the “frisk for weapons was not an unreasonable search.” *Id.* at 34-35.

Marshal Tavares initially detained Tyler for safety reasons. But Tyler’s failure to fully comply with the marshal’s orders, along with the marshal’s knowledge of the neighborhood’s reputation for crime, and Drummond’s propensity to carry a firearm, gave the marshal reasonable articulable suspicion that Tyler may have been armed and dangerous. As in *Welshman*, Tyler’s eventual compliance with the marshal’s orders “did not remove the possibility” that Tyler “had a weapon on his person and might again try to access it.” *Id.* at 35. Accordingly, the pat-down for weapons was not unreasonable.

Neither the initial seizure nor the subsequent pat-down of Tyler, resulting in the discovery of the firearm, violated his Fourth Amendment rights, and the court did not err in denying his motion to suppress the evidence.

CONCLUSION

For the foregoing reasons, we affirm the court’s judgment.

Affirmed.

Chaney, J., dissenting.

I respectfully dissent. There is no dispute that the marshals had authority to execute the arrest warrant for Deshawn Drummond, who was wanted in connection with a shooting, or to take lawful measures to reduce the danger of executing that warrant. The question is whether the marshals could also frisk Charles Tyler, who was not the subject of that arrest warrant, without reasonable articulable suspicion that he was armed and dangerous.

The majority concludes that Tyler's initial incomplete compliance, together with the location's reputation for gun crime and the marshals' knowledge of Drummond's criminal history and propensity for carrying firearms, supplied reasonable articulable suspicion to frisk Tyler. R. 97, 111-12, 119-20. It relies principally on *Welshman v. Commonwealth*, 28 Va. App. 20 (1998) (en banc). But the detainee in *Welshman* kept both hands concealed beneath his torso after being ordered to expose them, causing the officer to fear he was reaching for a weapon. *Id.* at 27, 34-35. Tyler's conduct was materially different, and the remaining circumstances the majority identifies concerned Drummond and the location rather than Tyler.

Because the totality of the circumstances did not supply individualized reasonable articulable suspicion that Tyler was armed and dangerous at the time of the frisk, I would reverse the denial of Tyler's motion to suppress and remand for further proceedings for Tyler to withdraw his conditional guilty plea.

Background

Since the suppression issue depends on the circumstances known to Tavaréz when he frisked Tyler, those circumstances are recounted in detail. On July 12, 2023, Deputy U.S. Marshal Michael Tavaréz⁵ was working with the Capital Area Regional Fugitive Task Force

⁵ The suppression hearing transcript renders the deputy marshal's surname as "Tavares." R. 94. The circuit court's written order spells it "Tavaréz." R. 50-52. This opinion follows the circuit court's spelling.

when the task force sought to apprehend Drummond. R. 95. Tyler was speaking with Drummond when the marshals arrived, and Tavaréz testified that Tyler stood “[n]o more than a few feet” from Drummond. R. 95-96. Before the arrest, the marshals were “briefed on the background of the subject,” including his criminal history and his “propensity for carrying firearms.” R. 111-12. Drummond was wanted for a shooting in the Accomack area. R. 120. The encounter occurred at 1600 East Ocean View Avenue, an area that Tavaréz described as “[h]istorically” a high-crime area, including gun crime. R. 119-20. The encounter occurred in the “afternoon,” at “approximately 12:50 hours,” and more than six officers participated in the operation. R. 102, 108, 114-15.

Tavaréz’s personal observations of Tyler and Drummond began only when the marshals came on scene. R. 96. During that observation, Tavaréz saw no “behavior that looked like they were breaking the law.” R. 113. He described their conversation as “jovial,” rather than argumentative, and observed no hand-to-hand transaction. R. 113. Tavaréz agreed that he “didn’t observe [Tyler’s] firearm in that brief observation period prior to taking Drummond under arrest.” R. 114. Tavaréz agreed that, before the marshals initiated the arrest, he had no “reasonable suspicion that [Tyler] was armed and dangerous.” R. 113-14. Tavaréz did not know Tyler’s name, criminal history, or whether he had a propensity to carry a firearm. R. 112-14. The circuit court similarly found that, “prior to the seizure,” Tavaréz did not “suspect that Defendant was armed.” R. 50-51.

The officers quickly exited their vehicles with their firearms drawn, yelled, “Police. U.S. marshals[.]” R. 96, 115-16, and ordered the men to, “Put your hands up,” R. 96, 115-16. Tavaréz testified that Tyler raised his left hand but initially kept his right hand near his waistband with his “fist clutched,” and that Tyler placed that hand “[d]own at his waist” rather than halfway up his body. R. 97, 116-17. Tavaréz clarified that Tyler should raise both hands

and ordered him to approach. R. 97. Tyler “slowly approached” Tavaréz, “kept one hand up[,] and then eventually put the other one up.” R. 97. Tavaréz explained that he called Tyler toward him because the other officers were engaged with Drummond at a 45-degree angle and he wanted to avoid the “line of fire for crossfire.” R. 97.

At the suppression hearing, Tavaréz demonstrated Tyler’s initial hand position. R. 117. The circuit court, on the record, described the position as “Left hand up, right hand at your left side of your left pocket or basically not your pocket, not quite all the way to his pocket.” R. 117. Tavaréz testified that he “just saw a clenched fist” but “couldn’t see anything in [Tyler’s] hand, not from the distance he was at.” R. 117. Tavaréz later realized that Tyler had been holding a cigarette package in that hand. R. 117.⁶

Tavaréz testified that the purpose of directing Tyler to raise his hands and approach was “[s]o that we know that he’s not of any threat or doesn’t have any possible weapons on him.” R. 98. When asked whether Tavaréz observed “any other unusual behavior” as Tyler approached, Tavaréz answered, “[o]ther than the hand in the air, no.” R. 98. After Tyler reached what Tavaréz described as a “safe location at the corner of the building, [Tavaréz] then conducted a pat-down.” R. 98. Tavaréz directed Tyler to place his hands on the wall, patted the outside of his clothing, and “felt what appeared to [him] the outline of a weapon on [Tyler’s] right waistband.” R. 98. During the frisk, other task-force officers were handling Drummond, who was “out of [Tavaréz’s] current line of sight.” R. 102.

Tyler moved to suppress the evidence, arguing that Tavaréz “did not have reasonable suspicion that [Tyler] was armed and dangerous therefore the pat down search of Tyler was unconstitutional,” and that “[m]ere proximity to the lawful arrest of Drummond did not provide

⁶ The record does not establish whether Tavaréz identified the object in Tyler’s hands as a cigarette package before or after the frisk. R. 117.

probable cause to search Tyler.” R. 37. Because the circuit court concluded that Tyler’s constitutional rights were not violated, his motion to suppress was denied. R. 50-52. Tyler later entered a conditional plea to possessing a firearm as a convicted nonviolent felon and retained the right to appeal the order denying his suppression motion. R. 55-56, 78-82.

Analysis

In reviewing the denial of a motion to suppress, we “consider the facts in the light most favorable to the Commonwealth, the prevailing party at trial.” *Hairston v. Commonwealth*, 67 Va. App. 552, 560 (2017) (quoting *Malbrough v. Commonwealth*, 275 Va. 163, 168 (2008)). We are “bound by the trial court’s factual findings unless those findings are plainly wrong or unsupported by the evidence,” but we review “the trial court’s application of the law de novo.” *Malbrough v. Commonwealth*, 275 Va. 163, 168-69 (2008). “We [therefore] give deference to the factual findings of the trial court but independently decide whether, under the applicable law, the manner in which the challenged evidence was obtained satisfies constitutional requirements.” *Jackson v. Commonwealth*, 267 Va. 666, 673 (2004). Here, the circuit court recited the standard governing a pat-down search and then confined its holding to the lawfulness of the detention. R. 50, 52. It did not find that Tavaréz reasonably believed Tyler was armed and dangerous.

Tyler challenges both his seizure and the ensuing frisk. I would resolve this appeal on the frisk. Even if the marshals could lawfully detain Tyler briefly while executing the arrest warrant for Drummond, that detention did not, by itself, authorize a frisk. That conclusion does not require the marshals to release Tyler once he complied with their commands. It requires only that any ensuing frisk be supported by reasonable articulable suspicion that Tyler himself was armed and dangerous.

I. *A frisk requires individualized reasonable articulable suspicion that the person frisked is armed and dangerous.*

“The Fourth Amendment protects people from unreasonable searches and seizures.” *Williams v. Commonwealth*, 71 Va. App. 462, 476 (2020). The Amendment’s “basic purpose” is “to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.” *El-Amin v. Commonwealth*, 269 Va. 15, 20 (2005) (quoting *Camara v. Mun. Ct.*, 387 U.S. 523, 528 (1967)). “The standard for a constitutional search or seizure is reasonableness.” *Id.*

Whether an officer’s conduct is reasonable “is judged from the perspective of a[n objectively] reasonable officer on the scene allowing for the need of split-second decisions and without regard to the officer’s [subjective] intent or motivation.” *McArthur v. Commonwealth*, 72 Va. App. 352, 360 (2020) (alterations in original) (quoting *Thompson v. Commonwealth*, 54 Va. App. 1, 7 (2009)). “[R]easonable suspicion” is “considerably less than proof of wrongdoing by a preponderance of the evidence” and “obviously less demanding than that for probable cause.” *Id.* (quoting *Perry v. Commonwealth*, 280 Va. 572, 581 (2010)). “Review of the existence of reasonable suspicion involves application of an objective rather than a subjective standard.” *McCain v. Commonwealth*, 275 Va. 546, 552 (2008).

A lawful detention, however, does not by itself authorize a frisk. “[T]he authority to conduct a pat-down search does not automatically accompany an investigative detention.” *Williams v. Commonwealth*, 4 Va. App. 53, 66 (1987). “Only where the officer can ‘point to particular facts from which he reasonably inferred that the individual was armed and dangerous’ is he justified in searching for weapons.” *Id.* at 67 (quoting *Sibron v. New York*, 392 U.S. 40, 64 (1968)).

Consistent with that principle, *Welshman* treats the detention and frisk as distinct inquiries. 28 Va. App. at 33-35. Once a person has been lawfully detained, “[a]dditional

information may provide the basis for a frisk.” *Id.* at 34. An officer may conduct the limited pat-down when he “reasonably believes, based on specific and articulable facts, that the suspect might be armed and dangerous.” *Id.* (quoting *Phillips v. Commonwealth*, 17 Va. App. 27, 30 (1993)). Whether such individualized suspicion exists depends on the totality of the circumstances known to the officer at the time of the frisk. *See McArthur*, 72 Va. App. at 359-60.

The Supreme Court of Virginia has stated the requirement directly—“*Terry* requires reasonable individualized suspicion before a frisk for weapons can be conducted.” *El-Amin*, 269 Va. at 21 (quoting *Maryland v. Buie*, 494 U.S. 325, 334 n.2 (1990)). The United States Supreme Court in *Ybarra v. Illinois*, 444 U.S. 85 (1979), likewise emphasizes that “[t]he ‘narrow scope’ of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked.” *Id.* at 94. That requirement did the work in *Ybarra* itself. The officers could see the person, and what they saw supplied nothing—“the State is unable to articulate any specific fact that would have justified a police officer at the scene in even suspecting that Ybarra was armed and dangerous.” *Id.* at 93. The lighting “was sufficient for them to observe the customers,” and the patron “gave no indication of possessing a weapon.” *Id.*

El-Amin applied that individualized suspicion requirement in the companion context. There, the officer initially had “no particularized safety concerns as to El-Amin prior to learning that the fourth individual had a gun.” 269 Va. at 18, 22-23. Another officer first attempted to frisk the fourth individual, felt what he believed to be a gun, yelled “gun,” and recovered a pellet gun from the individual’s waistband. *Id.* at 18. Only after hearing that warning did the officer frisk El-Amin. *Id.* The Court held that the officer was “warranted in inferring that the inherent tendency toward violence demonstrated by one group member carrying a gun raised

reasonable and particularized safety concerns as to other members of the same group.” *Id.* at 23.⁷

Even so, the Court was “careful to dispel any implication that El-Amin’s companionship status alone was sufficient to authorize a pat down search or that an officer’s generalized concern for his safety alone would validate such a search under the Fourth Amendment.” *Id.* Indeed, when the Commonwealth urged a rule permitting a frisk based solely on companion status, the Supreme Court stated—“We decline to adopt such a per se rule.” *Id.* at 21.

Here, no comparable intervening event transformed the officers’ generalized concern into particularized suspicion as to Tyler. Unlike *El-Amin*, nothing in the suppression record establishes that an officer discovered a firearm on Drummond or the third man and alerted Tavarez to that discovery before Tavarez frisked Tyler. R. 97-102. In *El-Amin*, the particularized concern arose “upon learning that the fourth individual had a hand gun.” 269 Va. at 23. Tavarez also possessed no Tyler-specific firearm information before the encounter. He testified that Tyler’s name had not come up during the briefing, that he had “no information about whether or not [Tyler] had a propensity to carry a firearm,” and that he knew nothing about Tyler’s criminal history. R. 112. When defense counsel asked whether he had “reasonable suspicion that [Tyler] was armed and dangerous” during the pre-arrest observation, Tavarez agreed that he had no such suspicion. R. 114.

The circumstances involving Drummond called for caution. Tavarez testified that the marshals had been briefed on Drummond’s background, including his propensity for carrying firearms, and that Drummond was wanted in connection with a shooting in the Accomack area. R. 111-12, 120. When the marshals approached the scene, Tyler was standing only a few feet

⁷ The circuit court described *El-Amin* as involving an officer who first conducted a pat-down of one group member, “found a gun, and alerted the other officers of the gun,” before another officer detained and frisked the remaining group members. R. 52.

from Drummond and speaking with him. R. 95-96. Those circumstances principally concerned Drummond and the danger surrounding *his* arrest, not Tyler. Under *Ybarra* and *El-Amin*, they could not replace the need for circumstances giving rise to reasonable articulable suspicion that Tyler himself was armed and dangerous.

II. *Welshman does not support the frisk.*

The majority relies heavily on *Welshman*, but the facts that created reasonable articulable suspicion in that case were materially different from Tyler's conduct. In *Welshman*, four officers approached two individuals whom police had observed engaging in apparent cocaine sales. 28 Va. App. at 26. As the officers arrived, the two targets retreated into a group of approximately eight people standing in front of a reputed crack house. *Id.* at 26-27. The officers were outnumbered two to one, other people—including children—were nearby, and the block had generated numerous drug and “shots fired” calls. *Id.* at 26-27, 32-33. The encounter occurred around 8:25 p.m., when it was “just barely light outside.” *Id.* at 26. Officer Duff intended to allow the others to leave once the target subjects were secured, and would have frisked only those who chose to stay. *Id.* at 33. Apart from *Welshman* and the two targets, the officers frisked no one at the scene. *Id.* at 28.

In that case, Officer Duff ordered everyone on the sidewalk to get on the ground and extend their arms. *Id.* at 27. Although the group initially complied with Duff's directive, Duff noticed that *Welshman* “had not extended his arms as directed and instead had kept them under his torso.” *Id.* “[F]earing appellant was reaching for a weapon,” Duff “immediately went to [appellant]” and again directed him to extend his arms. *Id.* Only as Duff began to roll *Welshman* over did *Welshman* expose his arms. *Id.* Thus, the conduct giving rise to individualized suspicion in *Welshman* was not merely delayed compliance. *Welshman* kept

both hands concealed beneath his body after being told to expose them, and the officer expressly feared that he was then “reaching for a weapon.” *Id.* at 27.

Welshman’s failure to extend his arms served as the basis for the individualized suspicion supporting the frisk. This Court expressly reasoned that “[w]hen appellant refused Officer Duff’s order to extend his hands from his body, placing them under his torso instead, Duff had specific and articulable facts giving rise to the reasonable belief appellant ‘might be armed and dangerous.’” *Id.* at 35 (quoting *Phillips v. Commonwealth*, 17 Va. App. 27, 30 (1993)). It was after identifying those specific and articulable facts that this Court added that Welshman’s “subsequent compliance” and the failure to find a weapon beneath him “did not remove the possibility” that he possessed a weapon and “might again try to access it.” *Id.*

Welshman, therefore, does not hold that any initial delay in displaying a hand creates continuing authority to frisk after the detainee complies. Nor did *Welshman*’s frisk analysis rest on the criminal history of the target subjects or on the detainee’s association with them. Having identified the arm concealment, this Court added only that the reputation of the immediate area was an appropriate further consideration. *Id.* at 34-35. The majority nonetheless folds Drummond’s propensity to carry firearms into the frisk calculus. *Welshman* supplies no support for that addition, and *El-Amin* supplies it only where an officer has learned that a member of the group is in fact armed. *El-Amin*, 269 Va. at 22-23.

Tyler’s conduct was different. The distinction is not merely that Tyler later complied with the officer’s command to raise both hands. Welshman also ultimately complied with Duff’s commands. *See Welshman*, 28 Va. App. at 27, 35. Rather, the nature of the initial noncompliance, and the circumstances at the time of the frisk differed materially.

Here, when the marshals approached and ordered everyone to raise their hands, Tyler raised his left hand but initially kept his right hand near his waistband with his “fist clutched.”

R. 97. After Tavaréz clarified that Tyler should raise both hands, Tyler walked toward Tavaréz as ordered and “eventually put the other one up.” R. 97. By the time Tavaréz began the pat-down, Tyler had completed his approach to the location Tavaréz described as “safe,” and Tavaréz had directed Tyler to place his hands on the wall. R. 98. Thus, unlike *Welshman*, Tyler did not keep both hands concealed beneath his body in circumstances that caused the officer to fear he was reaching for a weapon. The conduct Tavaréz identified as suspicious—the difference between Tyler’s initial response and the other men’s immediate display of both hands—had ended before the frisk began.

The later discovery that Tyler had been holding a cigarette package does not retroactively determine whether reasonable articulable suspicion existed before the frisk. What Tavaréz actually saw, however, matters. The circuit court’s written order did not find that Tyler’s hand appeared to contain a weapon; it described Tyler only as partially complying with the command by keeping one hand “lowered near his waist.” R. 50. When Tavaréz later explained why he found the conduct suspicious, he said that “it seemed as if [Tyler] was trying to conceal something.” R. 101. The first “outline of a weapon” Tavaréz identified was what he felt on Tyler’s right waistband after he had begun the pat-down. R. 98.

A clenched fist may reasonably suggest that a person is holding or concealing something. The location of Tyler’s hand adds weight to that circumstance—a clenched hand held near the waist is not the same as hands kept openly at the sides. However, Tavaréz could not see what was in that hand, and without accompanying reaching or grasping movement toward the waistband, a closed hand is less suggestive of an immediate attempt to draw a weapon than the conduct in *Welshman*. Tavaréz did not describe Tyler reaching beneath his clothing, placing his hand inside his waistband or pocket, or repeatedly moving toward a concealed area. R. 97-98, 117. He testified that Tyler “kept his right hand near his waistband,”

not that Tyler moved it there. R. 97. *Cf. Riley v. Commonwealth*, 13 Va. App. 494, 497 (1992) (holding that a motion toward the waistband, by a person unknown to the officer in a high crime area at night, did not supply reasonable suspicion of criminal activity to support an investigatory stop, where the officer could not see the waistband and conceded the movement may have been innocent).

Tavarez described no comparable conduct. After he clarified his command, Tyler ultimately displayed his other hand. R. 97. As Tyler approached, Tavarez observed no other unusual behavior; “Other than the hand in the air, no.” R. 98. Tyler then reached the designated “location at the corner of the building” selected by Tavarez before the frisk occurred. R. 98. Tyler’s initial hand position, therefore, remains relevant. However, the reasonable articulable suspicion inquiry does not freeze at the instant of initial noncompliance; what happened before the frisk is part of the totality too. This Court has explained that conduct occurring after a pat-down has begun “cannot be considered in whether appellant was armed and dangerous prior to the onset of the search.” *Thompson v. Commonwealth*, 54 Va. App. 1, 8 n.1 (2009). *Thompson* also identifies what separates the cases finding reasonable suspicion from those that do not— “[t]he common thread in those cases involving high crime areas and nervous behavior is the specific act of a furtive gesture to suggest that the suspect is armed.” *Id.* at 9.

III. *The totality of the circumstances did not establish reasonable articulable suspicion.*

We assess reasonable articulable suspicion under the totality of the circumstances. *See McArthur*, 72 Va. App. at 359-60. The inquiry is less demanding than probable cause and permits officers to “draw on their experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person.” *Id.* at 360 (quoting *Branham v. Commonwealth*, 283 Va. 273, 280 (2012)).

Williams likewise identifies relevant considerations including the “characteristics of the area,” “the time of the stop, whether late at night or not,” suspicious conduct, and “the character of the offense which the individual is suspected of committing.” 4 Va. App. at 67. The Supreme Court of Virginia has since restated those considerations—“characteristics of the area surrounding the stop, the time of the stop, the specific conduct of the suspect individual, the character of the offense under suspicion, and the unique perspective of a police officer trained and experienced in the detection of crime.” *McCain*, 275 Va. at 554.

Under the totality of the circumstances, Tavaréz was not required to know that Tyler possessed a weapon or to wait until a weapon became visible. The standard still required “specific and articulable facts” supporting a reasonable belief that Tyler “might be armed and dangerous.” *Welshman*, 28 Va. App. at 34 (quoting *Phillips*, 17 Va. App. at 30).

The location is one relevant circumstance. Tavaréz described the area only as “[h]istorically” a high-crime area, including gun crime. R. 119-20. However, presence in such an area itself does not diminish an individual’s Fourth Amendment protections. As *McArthur* explains, a “person’s Fourth Amendment rights are not lessened simply because he or she happens to live or travel in a ‘high crime’ area.” 72 Va. App. at 361 (quoting *McCain*, 275 Va. at 553). *Welshman* treats the reputation of the neighborhood as an appropriate consideration in the frisk analysis. 28 Va. App. at 34. However, the location is a general circumstance shared by everyone standing on the block, and in *Welshman* it supplemented conduct that independently supported the frisk. Here, the location is asked to supply what Tyler’s conduct does not.

Williams also identifies “the character of the offense which the individual is suspected of committing” as a relevant circumstance. 4 Va. App. at 67. However, Tavaréz personally observed no conduct suggesting that Tyler was “breaking the law.” R. 113.

The time and corresponding visibility are also relevant to the totality. *Williams* expressly identifies “the time of the stop, whether late at night or not,” as a circumstance to consider in deciding whether a protective frisk is justified. 4 Va. App. at 67. In *Welshman*, the encounter occurred around 8:25 p.m. when it was “just barely light outside.” 28 Va. App. at 26. Here, by contrast, Tavaréz testified that the encounter occurred in the “afternoon,” at “approximately 12:50 hours.” R. 108.

Nothing in the record suggests that lighting or distance impaired Tavaréz’s observation, and he described no outward indication of a weapon—no bulge nor impression beneath Tyler’s clothing. When asked what he could see in Tyler’s clenched hand, Tavaréz testified, “I couldn’t see anything in his hand, not from the distance he was at.” R. 117. Thus, unlike the “just barely light” conditions in *Welshman*, nothing about the time or lighting here limited the officers’ ability to observe Tyler.

That distinction matters. The constitutional question is not simply whether Tyler appeared to be concealing something or whether the circumstances gave rise to generalized safety concerns. It is whether the objective circumstances supported a reasonable belief, “based on specific and articulable facts, that [Tyler] might be armed and dangerous.” *Welshman*, 28 Va. App. at 34 (quoting *Phillips*, 17 Va. App. at 30). The objective facts Tavaréz described included a closed hand, at a distance from which he could see nothing in it, and no reaching, digging, or renewed movement toward a concealed area before the frisk began. R. 97-98, 101, 117.

The circumstances also changed before Tavaréz frisked Tyler. Tavaréz ordered Tyler toward him because the other officers were engaged with Drummond at an angle and Tavaréz wanted to avoid the line of crossfire. R. 97. Tyler followed that direction. R. 97. Tavaréz testified that the purpose of having Tyler raise his hands and approach was “[s]o that we know

that he's not of any threat or doesn't have any possible weapons on him." R. 98. Tyler then reached the location Tavaréz directed him to go. R. 98.

Welshman presented a materially different scene. Four officers confronted a group of approximately eight people into which the two target subjects had retreated, leaving the officers outnumbered two to one. Investigator Thomas testified that officers "always want to outnumber the individuals we're getting out with, but in some cases we can't do it," and the officers "elected to go in with what they had," though Duff called for additional officers on arrival. 28 Va. App. at 26-27, 32-33.

The majority's conclusion ultimately depends on combining Tyler's initial hand position with facts concerning Drummond and the location. The circumstances concerning Drummond and the location are properly considered as part of the totality. The marshals knew that Drummond was wanted in connection with a shooting and had been briefed on his propensity for carrying firearms. R. 111-12, 120. They were operating in a location associated with gun crime. R. 119-20. Tyler was standing within a few feet of Drummond and speaking with him when they arrived. R. 95-96. Those circumstances explain why the marshals approached the scene with heightened concern. However, the circuit court expressly found that, "prior to the seizure," Tavaréz did not "suspect that Defendant was armed." R. 50-51. Thus, although those circumstances provided important context for Tyler's later conduct, the frisk still required reasonable suspicion particularized to Tyler himself.

A pat-down search requires that additional constitutional justification. *Welshman* itself states that "[a]dditional information may provide the basis for a frisk" after a safety detention. 28 Va. App. at 34. Here, the principal circumstance particularized to Tyler was his initial hesitation to immediately raise his right hand. That circumstance gave Tavaréz reason to observe Tyler more closely, and Tavaréz did exactly that. He clarified his command, directed

Tyler toward him, and watched Tyler cross to the “safe location” at the corner of the building.

R. 98. Tyler initially kept his clenched right hand near his waist. R. 97. After Tavaréz clarified his command, Tyler complied and raised his hand. R. 97. Tyler approached because Tavaréz ordered him to do so. R. 97. Tavaréz observed no other unusual behavior during the approach. R. 98. Tyler reached the location designated by Tavaréz, while other officers handled Drummond. R. 98, 102.⁸

In *McArthur*, this Court stressed the significance of the absence of furtive conduct and the defendant’s compliance in assessing the objective reasonableness of a protective search. 72 Va. App. at 361-63. This Court contrasted such conduct with repeated refusal to show one’s hands accompanied by “digging down” toward a concealed area, a combination that reasonably suggests an attempt to access a weapon. *Id.* at 361-62. It noted that officers would not have been justified if the defendant had “simply remained still and refused to show his hands.” *Id.* Here, even if, arguendo, Tyler’s initial hand position was more concerning than simple stillness, the record contains no comparable reaching, digging, repeated concealment, or renewed noncompliance suggesting that Tyler was trying to access a weapon. R. 97-98, 117.

Tavaréz’s description of the task force’s ordinary practice underscores why the constitutional inquiry must remain individualized. When the circuit court described officers who are “after one person who you discover with two other people nearby,” Tavaréz testified that the “[c]ommon practice” is “to separate the subjects from the other two and conduct a safety pat-down for officer safety reasons of the other individuals.” R. 100-01. Asked

⁸ The absence of individualized suspicion to frisk Tyler did not require Tavaréz to disregard legitimate safety concerns. He could have continued to detain Tyler at the designated location while the officers secured Drummond. If additional facts particularized to Tyler arose, *Welshman* recognizes that “[a]dditional information may provide the basis for a frisk.” 28 Va. App. at 34. However, the authority to continue the safety detention did not itself supply the individualized suspicion necessary to frisk Tyler.

separately what the marshals would do about a citizen carrying a firearm who was standing near an arrest target, Tavaréz answered that “[h]aving no prior knowledge of that individual at the time,” they “would have” patted him down “for our safety purposes.” R. 121. Testimony about routine practice does not establish reasonableness, because the inquiry turns on the specific facts known to the officer about the person frisked, not on a general policy. As the Supreme Court of Virginia has explained, “[t]he Supreme Court’s decision in *Terry* does not permit a generalized policy that authorizes a police officer to frisk all persons.” *McCain*, 275 Va. at 555. The Fourth Amendment requires reasonable suspicion that the person to be frisked might be armed and dangerous, not merely the continued possibility that he may possess a weapon. See *Welshman*, 28 Va. App. at 34; *El-Amin*, 269 Va. at 21, 23.

Tyler’s physical proximity to an arrestee, even one reasonably believed to be armed, and even in a high-crime area, is not a substitute for individualized reasonable articulable suspicion that Tyler himself was armed and dangerous. *El-Amin* does not treat association with a person found to be armed as constitutionally irrelevant; it identifies the additional circumstance that makes such association significant. There, the Supreme Court found that the officers actually discovered a handgun on one group member, and concluded that such discovery “raised reasonable and particularized safety concerns as to other members of the same group.” *El-Amin*, 269 Va. at 23. The inference that another member of the group might also be armed therefore rested on more than companionship alone.

No comparable fact arose here before Tavaréz frisked Tyler. Unlike in *El-Amin*, the suppression record identifies no firearm discovered on Drummond or the third man before the frisk. R. 97-102. *El-Amin* upheld the pat-down search on the totality of the place, time, discovery of a weapon, and group activity. 269 Va. at 22-23. Three of those circumstances are absent or materially different here. First, the encounter occurred in the “afternoon,” at

“approximately 12:50 hours,” on a public street. R. 108. Second, the record identifies no weapon discovered on Drummond or on the third man before Tavaréz frisked Tyler. Third, no finding established that Tyler, Drummond, and the third man were a group; in *El-Amin*, the trial court “found, as a matter of fact, that they were a group.” 269 Va. at 22 n.6. Tavaréz had no personal knowledge of how long Tyler had been in Drummond’s physical presence. R. 112. The only evidence on that point was another officer’s hearsay, which the circuit court received for the limited purpose of showing what Tavaréz believed. R. 103, 104-05. Treating the circumstances surrounding Drummond as sufficient to supply individualized suspicion as to Tyler would move substantially toward the per se companion rule *El-Amin* expressly declined to adopt.

Conclusion

Tyler’s initial decision to keep his clenched right hand near his waist warranted caution and justified Tavaréz’s further command that he display both hands. R. 97. However, before the frisk, Tyler displayed both hands, followed Tavaréz’s direction to approach, reached the location Tavaréz himself described as safe, and placed his hands on the wall. R. 97-98. Tavaréz observed no other unusual behavior, and other task force officers were handling Drummond outside Tavaréz’s line of sight. R. 98, 102.

Viewed in their entirety, those circumstances do not establish the reasonable articulable suspicion required by the Fourth Amendment. Tyler’s conduct did not involve the concealed, repeated, or reaching movements that supported the frisk in *Welshman*. R. 97-98, 117. The location’s reputation, Drummond’s propensity for carrying firearms, and Tyler’s proximity to Drummond heightened the marshals’ general safety concerns, but they could not substitute for reasonable suspicion directed at Tyler himself. *See Ybarra*, 444 U.S. at 94; *El-Amin*, 269 Va. at 21-23.

I would, therefore, reverse the circuit court's judgment, vacate the conviction and sentence, and remand for further proceedings at which Tyler is permitted to withdraw his conditional guilty plea.⁹

⁹ See Code § 19.2-254 ("If the defendant prevails on appeal, he shall be allowed to withdraw his plea.").