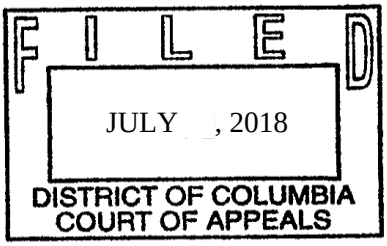
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 16-CF-

[redacted], APPELLANT,

V.

UNITED STATES, APPELLEE.



Appeal from the Superior Court
of the District of Columbia
(CF2- -16)

(Hon. Todd E. Edelman, Trial Judge)

(Submitted November 22, 2017 Decided July , 2018)

Before GLICKMAN, EASTERLY, and MCLEESE, *Associate Judges*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Appellant [redacted] challenges the denial of his motion to suppress and his subsequent convictions for carrying a pistol without a license[1] and related gun charges.[2] Mr. [redacted] argues that the trial court erred (1) in denying his motion to suppress the gun discovered on his person during a traffic stop because the police did not have reasonable, articulable, particularized suspicion to search him for weapons, and (2) by failing to conduct a Rule 11-type inquiry before holding a bench trial where Mr. [redacted] stipulated to every element of every offense with which he was charged. We affirm the trial court's denial of the suppression motion but vacate Mr. [redacted]'s conviction and remand for proceedings consistent with this opinion.

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[1] D.C. Code § 22-4504 (a)(1) (2012 Repl.).

[2] Possession of an unregistered firearm (D.C. Code § 7-2502.01 (a) (2012 Repl.)); unlawful possession of ammunition (D.C. Code § 7-2506.01 (a)(3) (2012 Repl.)); possession of a large capacity ammunition feeding device (D.C. Code § 7-2506.01 (b) (2012 Repl.)).

I.

We first consider Mr. [redacted]'s argument that the trial court erred when it denied his motion to suppress because the police did not have reasonable, articulable, particularized suspicion to search him for weapons.[3] This was not an argument Mr. [redacted] made below (instead he challenged the legitimacy of the traffic stop). Nevertheless, because the trial court explicitly found that there was reasonable articulable suspicion to frisk Mr. [redacted], we consider this issue adequately preserved for our review. *See Abdus-Price v. United States*, 873 A.2d 326, 332 n.7 (D.C. 2005) ("[E]ven if a claim was not pressed below, it properly may be addressed on appeal so long as it was passed upon.") (internal quotation marks omitted).

We review de novo the trial court's legal conclusion that Mr. [redacted]'s Fourth Amendment rights were not violated, but review its findings of fact "only for clear error." *Robinson v. United States*, 76 A.3d 329, 335 (D.C. 2013). We assess the evidence presented "and all reasonable inferences therefrom in the light most favorable to the party prevailing before the [trial] court . . . ." *Id.*

The reasonable suspicion standard "requires substantially less than probable cause and considerably less than proof of wrongdoing by a preponderance of the evidence." *Henson v. United States*, 55 A.3d 859, 867 (D.C. 2012) (internal quotation marks omitted). In evaluating whether there was reasonable, articulable, particularized suspicion to conduct a stop and frisk, "a court must consider the totality of the circumstances, as viewed through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training." *Id.* (internal citations and quotation marks omitted). Here, the trial court determined that four factors, taken together, gave the police reasonable articulable suspicion to search Mr. [redacted]: (1) he was stopped in a high-crime area where there had recently been a violent crime; (2) he was extremely nervous to the point of visibly shaking; (3) he did not immediately comply with the officers' command to step out of the car; and (4) as he started to exit the vehicle he grabbed at his waistband in a manner that suggested to the officers that he was securing a gun.

Mr. [redacted] asserts that "none of these factors—nor all of them in

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[3] *See Terry v. Ohio*, 392 U.S. 1 (1968); *Bennett v. United States*, 26 A.3d 745, 751 (D.C. 2011).

combination—provides a basis for reasonable articulable suspicion that [he] was armed," but he attacks each factor individually and never confronts their collective impact. *See Bennett v. United States*, 26 A.3d 745, 751 (D.C. 2011) ("Reasonableness is based on the totality of the circumstances.") (internal quotation marks and alterations omitted). There is no question his presence in a "high crime area" does not, by itself, provide the basis for a search. *Smith v. United States*, 558 A.2d 312, 316 (D.C. 1989) (en banc), *abrogated in part on other grounds*, *Green v. United States*, 662 A.2d 1388, 1390 (D.C. 1995). "This familiar talismanic litany, without a great deal more, cannot support an inference that appellant was engaged in criminal conduct." *Smith*, 558 A.2d at 316 (internal quotation marks and alterations omitted). But it is one factor on which the trial court could rely, in conjunction with the other circumstances identified by the officer, whose testimony about his reasons for the search was both largely uncontroverted and credited by the trial court. Specifically, once the officer observed a nervous[4] and reluctant-to-exit-the-car Mr. [redacted] grab at his waistband, the officer had reasonable, articulable, particularized suspicion that Mr. [redacted] might be concealing a gun. *See White v. United States*, 68 A.3d 271, 283 (D.C. 2013). We affirm the trial court's denial of the motion to suppress.

II.

Mr. [redacted] also argues that the trial court erred in proceeding with a stipulated bench trial without first (1) ensuring that there was a factual basis for the stipulation and (2) confirming that Mr. [redacted] understood that it meant his conviction was certain. Because he stipulated to every element of every offense he was charged with, Mr. [redacted] argues he effectively entered a guilty plea. Thus, he argues that the procedural protections of Rule 11 (b) of the Superior Court Rules of Criminal Procedure [5] should apply. We review this unpreserved claim for plain

[4] We are not unsympathetic to Mr. [redacted]'s argument that nervousness is a natural response to suddenly being surrounded by eight police officers in ballistics vests. We note, however, that Mr. [redacted] did not press these alternative explanations for his nervousness and reluctance to exit his vehicle to the trial court at the suppression hearing.

[5] Rule 11 (b) requires, *inter alia*, that before accepting a guilty plea, the trial court must personally advise the defendant of their constitutional rights and the consequences of pleading guilty, ensure that the plea is voluntary, and determine that there is a factual basis to support the plea. Super. Ct. Crim. R. 11 (b).

error. *Lowery v. United States*, 3 A.3d 1169, 1172–73 (D.C. 2010).

We have long held that "where a stipulation is tantamount to a guilty plea the trial court must be careful to ensure, by analogy to Rule 11, that the defendant understands the consequences of a stipulated trial . . . ." *Glenn v. United States*, 391 A.2d 772, 776 (D.C. 1978). Mr. [redacted]'s case falls squarely in this camp. As the trial court acknowledged when it gave Mr. [redacted]'s counsel an opportunity to dispute that the stipulation "[met] all the elements of the four charged offenses," the stipulation proved the government's case against Mr. [redacted]. Therefore, the trial court had an obligation to ensure that Mr. [redacted] "understood his constitutional rights and knew that he was waiving them by virtue of the stipulation."[6] *Id.* The government agrees that the trial court's failure to make a Rule 11 inquiry constitutes plain error and that Mr. [redacted]'s conviction must be reversed.[7]

For the foregoing reasons, the order of the Superior Court denying the motion to suppress is *Affirmed*, and Mr. [redacted]'s conviction is *Vacated* and *Remanded* for proceedings consistent with this opinion.

ENTERED BY DIRECTION OF THE COURT:

JULIO A. CASTILLO
Clerk of the Court

Copies to:

Honorable Todd E. Edelman

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[6] The trial court did inquire whether Mr. [redacted] had signed the stipulation and had discussed the stipulation with counsel before doing so, but this does not satisfy the requirements of Rule 11 (b). *Supra* note 5.

[7] The government agrees in its brief that it would be appropriate for this court either to remand for a new stipulated trial or a retrial, but we do not wish to limit the parties' options if, for example it might be more beneficial for Mr. [redacted] to enter a guilty plea. Similarly, we decline, in this case, to exercise our supervisory authority to direct the government to offer only guilty pleas and to discontinue its practice of stipulated trials.

(No. 16-CF)

Director, Criminal Division

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