Appeal No. 19-CF-143

DISTRICT OF COLUMBIA COURT OF APPEALS

D.W.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the Superior Court of the District of Columbia
Criminal Division

SUPPLEMENTAL REPLY BRIEF FOR APPELLANT

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ARGUMENT

I. The Police Lacked Reasonable Articulable Suspicion To Seize D.W.

This Court reaffirmed in *Mayo* that when police rely on locational crime evidence and flight to justify a seizure under *Wardlow*, they must point to concrete, specific, and relevant information about other criminal conduct in the area, as well as particularized information about the *individual's* conduct that would support an inference that his flight is suspicious. The facts of this case fall squarely within *Mayo*'s holding: Here, as in *Mayo*, the police rested solely on the bare "high crime area" label rather than offering any concrete and verifiable specifics about the kinds of crimes they knew of or were investigating. Here, as in *Mayo*, D.W. fled only after the officers "communicate[d] to" him, through their coercive conduct, "that they planned to stop him." *Mayo v. United States*, 315 A.3d 606, 628 (D.C. 2024) (en banc). And here, as in *Mayo*, suppression is required.

a. Conclusory reputation testimony that an area is "known" for crime does not satisfy *Wardlow* or *Mayo*.

The government's argument that the Geraldine Apartment complex is a "high crime area" is devoid of the concrete evidence relied upon in *Wardlow*, and instead rests solely on the vague and conclusory assertions about the complex's reputation that this Court found insufficient in *Mayo.* The *Mayo* Court clarified that *Wardlow*'s reference to a "high crime area" was shorthand for "the particular details" about an area that "meaningfully aid[] in the assessment of . . . individualized suspicion"—in other words, "relevant, nonconclusory details about crime in the location in which a

stop is conducted." *Id.* at 632–34.[1] This Court stressed, too, that while "general locational crime evidence" factors into the totality of the circumstances, "the weight to be given to such information will turn on its quality and specificity," particularly its "recency, frequency, and geographic proximity." *Id.* at 632. Under *Mayo*, therefore, verifiable and substantive information is required, not "the mere affixing of a dangling comparative label of 'high crime' to certain city blocks." *Id.* at 633.

Despite these clear admonitions, the government's brief falls back on one piece of general locational crime evidence: "the complex's reputation for gun violence and narcotics trafficking." Gov't Supp. Br. at 2; *see also id.* at 16. But the government cannot launder the "high crime" label through an officer's conclusory reputation testimony and call it probative evidence. The reason for this is particularly obvious when one considers the reputation testimony at issue. The government asked Officer Ewing on redirect whether it was "common knowledge within officers . . . that the Geraldine Apartments are a . . . high-crime area." 10/15/18 Tr. at 169. The officer replied that yes, it was "one neighborhood that gets that reputation." *Id.* But his agreement with the attorney's leading question, without a basis for this purported "common knowledge," is not itself *evidence* that the area suffers from high crime. Rather, his conclusory assertion is nothing more than the "mere affixing of a

[1] The government accuses D.W. of "urg[ing] this Court to disregard *Wardlow*" and stresses that as a matter of "vertical stare decisis," *Wardlow* remains good law. Gov't Supp. Br. at 18. But this argument mischaracterizes D.W.'s brief, which explicitly "[c]ompar[ed] *Miles* with *Wardlow* [to] illustrate[] what type of police behavior is appropriately considered provocative." D.W. Br. at 16. In other words, D.W.'s arguments have always *distinguished Wardlow*, rather than encouraged this Court to ignore it. *See, e.g.*, D.W. Supp. Br. at 7, 10.

dangling comparative label" that *Mayo* so emphatically rejected. 315 A.3d at 633.[2]

Nor does the government's supplemental brief point to any specifics in the officers' testimony—let alone any bearing the "quality," "specificity," "recency, frequency, [or] geographic proximity" that *Mayo* required. *Id.* at 632. And for good reason, as the record does not contain any relevant specifics. Officer Ewing asserted he had recovered firearms and narcotics and had "been to that area where multiple shootings and stabbings have occurred." 10/15/18 Tr. at 120. Officer Bewley, when asked about the Geraldine Apartments, rattled off a host of crimes—"[h]omicides, assault[s] . . . guns, knives"—to which he had responded, without specifics regarding whether arrests resulted from those calls, let alone how many, when, and for which crimes. *Id.* at 11. Indeed, when pressed for concrete information about their personal experience with the Geraldine, the officers could offer nothing by way of specifics. First, they could not offer a number of crimes committed in recent years. (Officer Ewing's best estimate as to the number of firearm-related arrests he had made at the Geraldine over the course of his career was "more than five, I think." *Id.* at 120–21.). *But see Mayo*, 315 A.3d at 636 (deeming 10 guns over three years insufficient). And second, Officer Ewing's lone concrete example of violent crime within the prior year was a stabbing (not a firearms offense) that had, in fact, taken place *two* years prior. *See* 10/15/18 Tr. at 99, 172. In fact, despite the officers' assertions that they responded to numerous "homicides" and "assaults" at the scene, testimony at the

[2] Nor is it relevant that two officers gave "consistent testimony" about the area's reputation, while *Mayo* "involved a single officer's testimony . . . without any evidence that other MPD officers" agreed. Gov't Supp. Br. at 16–17. It would make no sense to find *Mayo* satisfied if enough officers repeated the same rote label.

suppression hearing established that the stabbing was the *only* homicide between May 2015 and D.W.'s stop in August 2017. *Id.* at 172–73. This "weak tea" is even less than what *Mayo* found insufficiently specific, frequent, or recent, 315 A.3d at 636 (10 guns over three years), and so cannot bolster the officers' vague reputation testimony. Therefore, even though the Geraldine complex may be more geographically defined than the area addressed in *Mayo*, the dearth of specific evidence that would substantiate the Geraldine's "reputation" is insufficient to clear *Mayo*'s bar.

The government suggests that *Wardlow* permits relying on conclusory reputation testimony to prove an area is "high crime." *See* Gov't Supp. Br. at 5–6, 16. Not so. *Wardlow* did not consider what kind of evidence makes an area "high crime," but whether high crime and flight could give rise to reasonable suspicion. And the Court did not rest solely on conclusory testimony that the area had a bad reputation—it emphasized that the area was known for "narcotics trafficking" specifically, *and* officers were heading to the area "in order to investigate drug transactions." *Illinois v. Wardlow*, 528 U.S. 119, 121 (2000). The government argues that D.W.'s seizure is constitutional because the CST "could 'anticipate[] encountering' people carrying concealed guns and drugs." Gov't Supp. Br. at 16 (quoting *Wardlow*, 528 U.S. at 124). But *Wardlow* does not hold that the officers "could" anticipate encountering crime because of the area's reputation—it notes that the officers *did in fact* anticipate and were specifically "investigat[ing] drug transactions." 528 U.S. at 121, 124. In contrast, here officers were just patrolling an area, not investigating a report of crime.

The police testimony offered at the suppression hearing below simply lacked the specificity or quality that *Mayo* requires to bolster an assertion of high crime. It

offered precisely the conclusory label that *Mayo* rejected. For this reason alone, this Court should reverse, as no court has ever held that flight alone, without an accompanying high crime area or other particularized facts making the individual's conduct suspicious, suffices to give rise to reasonable articulable suspicion.

b. D.W.'s flight does not support a reasonable inference of guilt.

Nothing about D.W.'s flight permitted a reasonable officer to infer a guilty conscience rather than an understandable desire to avoid contact with the police, given the context of the CST's actions and their history with the Geraldine residents. The government's arguments to the contrary willfully misunderstand both *Mayo* and the trial court's findings based on the record below.

As a legal matter, the officers provoked D.W.'s flight because their conduct unambiguously conveyed to D.W. and the other Geraldine residents that the police intended to stop them. *Mayo* held that flight has negligible probative value if someone flees "after the . . . officers took a series of actions that they should have reasonably understood to communicate to a person in [his] position that they planned to stop him." 315 A.3d at 628. That is precisely what happened here. The officers' undisputed testimony (and body-worn camera footage) showed that two squad cars pulled up with their doors open and officers ready to spring out. 10/15/18 Tr. at 139–40. They assumed strategic positions to block off entry or exit at two different points. *See id.* at 36. And then seven officers unloaded en masse from their cars. *See id.* at 141, 44. Several seconds later, D.W. ran. 10/16/18 Tr. at 228. This conduct is unlike the police actions in *Wardlow*, where the officers were still in their cars and had not made any effort to approach bystanders when Mr. Wardlow took flight. *See* 528 U.S.

at 121–22. Rather, the CST's choices here sent a clear message to the Geraldine's residents: the police were there to question them, whether they wanted to submit or not. This is precisely the "series of actions" that would "communicate" to D.W. that the CST "planned to stop him," *Mayo*, 315 A.3d at 628, and D.W. got the message.

The government insists the only way the officers can communicate their intention to stop someone is to *single them out* before they flee. *See* Gov't Supp. Br. at 12. This is incorrect. True, singling someone out for questioning is a powerful way for officers to communicate their interest in that person, as happened in *Mayo. See* 315 A.3d at 628. But *Mayo* did not hold that singling out is a *necessary* condition for provocation; it was simply, on those facts, a sufficient condition. Here, the CST's conduct—their simultaneous approach, leaping from moving vehicles, and obstructing escape routes—conveyed the very message that Mr. Mayo received: that the CST "did not intend to allow" D.W. "to leave without engaging with them." *Id.*

The government also mischaracterizes the trial court's statement that "[m]ost people simply went about their business" when the CST arrived, 10/16/18 Tr. at 232, taking it out of context to suggest that Geraldine residents other than D.W. were "nonchalant" and felt no "cause for alarm and fear," Gov't Supp. Br. at 13. But the trial court in fact said nothing about nonchalance or alarm—to the contrary, the trial court observed that "[o]ne person . . . lifted his arms to prepare for a frisk," while "[a]nother person . . . lifted his shirt as if to indicate that he was not armed." 10/16/18 Tr. at 232. These reactions, which the court described as going about one's business, are in fact indicators that the other residents, too, felt the CST's coercive power. They simply chose to give in to that coercion by lifting their shirts and preemptively

preparing for frisks. Their actions, far from indicating that D.W. was alone in his fearful response, demonstrate that *everyone* understood that the CST "did not intend to allow [them] to leave without engaging with them." *Mayo*, 315 A.3d at 628.

Nor can the government shield the decision below by casting the trial court's *legal* conclusions about the CST's actions as *factual* findings. *See* Gov't Supp. Br. at 12. The trial court stated: "the police did nothing to provoke [D.W.'s] flight; they simply appeared at" the Geraldine. 10/16/18 Tr. at 239. Whether police conduct constitutes "provocation," as this Court uses that term in the Fourth Amendment context, is a legal question that this Court's recent decision in *Mayo* governs. *Mayo* made clear that police can provoke flight through coercive or intimidating actions that communicate an intention to detain someone, *see* 315 A.3d at 628; the trial court's holding, without the benefit of *Mayo*'s analysis, that the conduct here was not provocation is a legal one reviewed de novo, *id.* at 616. As for the trial court's statement that the police "simply appeared," the government again mischaracterizes the record to suggest the court made a factual finding as to the manner of the officers' approach. But the trial court found that the CST "work[ed] as a team with multiple officers arriving at the same time," 10/16/28 Tr. at 227, and did not dispute Officers Ewing and Bewley's testimony that they pulled up with their doors open, blocked off exits, and simultaneously sprang from their cars. The statement that the officers "simply appeared" is, in context, describing the chain of events: the CST appeared, and D.W. fled seconds later.[3] But the undisputed facts of *how* the officers "appeared"

[3] To the extent that the government maintains "simply appeared" is a factual finding as to *how* the CST approached, that finding is clearly erroneous, as it "is without

(Footnote Cont'd on Following Page)

bear heavily on the legal question of whether that conduct constitutes provocation.

The coercive effect of the CST's approach is all the more obvious considering that this was not the Geraldine's first encounter with the CST. By the officers' admission, they repeatedly employed this approach and frequently conducted humiliating searches of residents who did not immediately comply. 10/15/18 Tr. at 45–46, 69, 71–73. Regardless of how one parses Officer Bewley's testimony about "typical" reactions,[4] he was accustomed to seeing residents immediately respond to the officers' show of authority just as they did on this day—and the trial court found as much. 10/16/18 Tr. at 232 ("[T]his [was] not the first time that some individuals had reacted . . . by holding out their arms or lifting up their shirts."). The officers therefore *knew* that their arrival in this concerted and intimidating fashion conveyed their intention to question the residents. As *Mayo* recognized—and the government ignores—this "flashbang" policing is precisely the type of method this Court has deemed "designed to produce such fear, which could lead either to temporary paralysis or flight." *Mayo*, 315 A.3d at 629 (internal citations omitted).

The government asserts that the officers' testimony about their practices in policing the Geraldine area is "general locational" crime evidence that must be held to the same standard of specificity as evidence the government offers to establish the individualized suspicion necessary to support a *Terry* stop. *See* Gov't Supp. Br. at

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support in either the BWC footage or [the officers'] testimony." *Ward-Minor v. United States*, 316 A.3d 438, 446 (D.C. 2024).

[4] It is worth noting that had Officer Bewley viewed flight as an *atypical* response, one might have expected him to say something to that effect. He did not.

14–15. Of course, no case law supports this assertion, which is a gross misreading of *Mayo*. *Mayo* made clear that the government must meet a certain standard of specificity, quality, relevance, and recency when it relies on locational crime evidence to meet its constitutional burden to articulate reasonable *particularized* suspicion. *See* 315 A.3d at 621. But *Mayo* also recognizes that *general* evidence of past police practices within a community can be relevant—at a broader level—to the flight analysis, because it can explain community members' fears writ large. *See id.* at 630 (discussing "highly policed communities"). And in any event, here there was specific evidence about these officers' prior experiences and their own understanding of the reactions they elicited. *See generally* D.W. Supp. Br. at 12–15.

Finally, the government is incorrect in asserting that the "character" of D.W.'s flight suggested his guilt. The trial court described D.W.'s flight as beginning "upon the mere sight of police" and "sustained over a distance," including over a fence. *See* 10/16/18 Tr. at 239. The first factor boils down to finding his flight unprovoked, which is wrong under *Mayo*. *See supra* pp. 5–8. And the second factor is a red herring: how long a flight lasts, once begun—and once officers have given chase—adds nothing to its probative value. If, as *Mayo* held, it is reasonable to infer that someone might wish to avoid police encounters for innocuous reasons, then surely it is even more reasonable to infer that an individual who has decided to run from the police will thereafter *continue* to run once chased. Once one decides to run from the police, they are unlikely to do so half-heartedly. Continuing to flee adds nothing to the reasonable articulable suspicion that the fact of flight itself does not.

The government cites no case that suggests that the continuation of flight over

a distance or obstacles is a relevant piece of the flight's "character." *Miles*, on which the government relies, addresses cases in which the defendant "abandon[ed] substantial property." *Miles v. United States*, 181 A.3d 633, 644–45 (D.C. 2018) (citing *Dalton v. United States*, 58 A.3d 1005, 1013 (D.C. 2013) (bicycle), and *Coghill v. United States*, 982 A.2d 802, 808 (D.C. 2009) (car)). If anything, *Miles* notes that "acts of avoidance or more overt flight" often *do not* give rise to reasonable articulable suspicion of guilt without more. *Miles*, 181 A.3d at 645 (collecting cases). The length of a flight while being pursued, including flight around or over obstacles, does not affect its "character"—it is just part of "the flight itself." *Id.* at 645.

II. Exclusion Is Required.

The government's brief declines to engage with D.W.'s arguments that the exclusionary rule applies—as it always does absent one of the narrow exceptions recognized by the Supreme Court. Because the government failed to challenge application of the exclusionary rule below (and does not press any such claim now), the argument is waived and this Court should not consider it. In any event, the government appears to agree that this Court's cases are consistent with *Wardlow*, which dooms its belated attempt to rely on *Davis*. *See* D.W. Supp. Br. at 16–18; Gov't Supp. Br. at 18–19; D.W. Reply Br. at 20 n.9. Because *Mayo* merely applied *Wardlow*, as D.W. has always maintained, it does not announce a novel legal rule that would even arguably counsel against exclusion. This Court should reverse with instructions to grant D.W.'s motion to suppress.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief has been served electronically via the Appellate E-Filing System upon Chrisellen R. Kolb and Mark Hobel, of the U.S. Attorney's Office for the District of Columbia, on this 7th day of October, 2024.

/s/ Victoria Hall-Palerm
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