UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 442

September Term, 2016

HECTOR COLON

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Leahy,
Battaglia, Lynne A.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: February 10, 2017

In the Circuit Court for Anne Arundel County, Hector Colon, the appellant, pleaded not guilty on an agreed statement of facts to possession of a regulated firearm after being convicted of a disqualifying crime. The court convicted him and sentenced him to three years in prison, all suspended in favor of two years' supervised probation. On appeal, Colon asks whether the court erred by denying his motion to suppress the firearm from evidence. We answer that question in the affirmative, and shall reverse the judgment of the circuit court and remand for further proceedings not inconsistent with this opinion.

FACTS AND PROCEEDINGS

We recount the facts, which were not disputed, as developed at the suppression hearing.[1]

On June 30, 2015, Corporal Ryan Holby, assigned to the Annapolis Police Department Drug Enforcement Unit, applied for a search warrant for 701A Newtowne Drive in Annapolis ("the apartment"). In the warrant application, he asserted as probable cause information from a confidential informant that the apartment was Colon's place of abode and that he was selling controlled dangerous substances ("CDS") out of it. The warrant application was granted that same day.

[1] Our review of a circuit court's decision to deny a motion to suppress evidence "is limited to information contained in the record of the suppression hearing." *Cartnail v. State*, 359 Md. 272, 282 (2000).

The warrant authorized the police to search the apartment and the people inside it and to seize the following property:

> Any and all controlled dangerous substances in violation of the Criminal Law Article including, but not limited to; CR 5-601(a)(1)CDS-Possession: marijuana, and CR 5-601(a)(1) CDS-Possession: not marijuana
>
> Any and all evidence of paraphernalia including but not limited to; records, electronic equipment, pagers, computer records, log sheets, telephone books, tally sheets, address books, any financial institution books, other records or papers related to the sale of illegal controlled dangerous substances in violation of the Criminal Law Article pertaining to; CR 5-619 (c)(1) CDS-Possession: Paraphernalia
>
> Any and all currency or financial instruments in amounts indicative of the proceeds used for the acquisition of illegal narcotics and any other items of value that can be reasonably associated as being used for the unlawful acquisition of Controlled Dangerous Substances under Criminal Law Article CR 5-623 (b).
>
> Any and all items being illegally possessed during the commission of a CDS related offense in violation [of] the Criminal Law Articles; CR 5-621(b)(1), CR 5-621 (b)(2), and CR 5-622. Items included in this violation are firearms and ammunition, including but not limited to; handguns, revolvers, rifles, shotguns, machine guns, and any records or receipts pertaining to firearms or ammunition.

On July 1, 2015, at 10:42 p.m., Corporal Holby executed the warrant with the assistance of Officer David Fitzpatrick, Detective Mann[2], and Officer Josh Ingbretson, a member of the K-9 Unit who brought his drug-sniffing dog with him. Colon, his girlfriend, and two minor children were inside the apartment. After searching the apartment and finding no evidence of CDS, Corporal Holby proceeded to search Colon.

[2] Detective Mann's first name is not in the record.

Upon finding a Chrysler car key in Colon's pants pocket, he asked Colon what the key went to. Colon replied that he did not know. Based on his experience and training in drug crimes, the fact that no CDS was found in the apartment, and what he took to be an evasive answer to his question, Officer Holby suspected that Colon was keeping drugs in the vehicle to which the key belonged. He seized the key and gave it to Officer Fitzpatrick, directing him to determine whether it fit any vehicle located near the apartment.

Officer Fitzpatrick tested the key in the doors of every Chrysler vehicle parked in the apartment complex lot, a number he estimated at less than ten. He then tested it on a Chrysler car parked on Newtowne Drive, next to the parking lot and about fifty yards from the apartment building. When he "stuck the key in the driver's side door" it unlocked the car. He did not open the car door. He called Officer Ingbretson and told him to bring the drug-sniffing dog to the car. The dog scanned the car and "alerted" for the presence of CDS. The officers immediately opened the car and searched it. In the trunk they found an unregistered "Kel-Tec SUB-2000 semiautomatic rifle" and a loaded "30-round magazine," both wrapped in clothing inside a plastic bag. (They did not find any CDS). Corporal Holby was present while the car was being searched. He observed that the car had a least one flat tire and looked like it had not been driven for a while.

Colon was placed under arrest. He told the officers that the car belonged to him.

Colon had a 2005 conviction for conspiracy to possess narcotics with the intent to distribute. Based on that prior conviction, the State charged him with possessing a regulated firearm after being convicted of a disqualifying crime.[3]

On February 22, 2016, Colon filed a motion to suppress the rifle from evidence. He asserted that the search warrant did not cover vehicles. Therefore, "[t]he Annapolis Police Department overextended their authority granted to them by the warrant when they continued their search outside of the confines of the apartment." Accordingly, the rifle should be suppressed on the ground that it was obtained by an unlawful search and seizure and that "the search of the vehicle amount[ed] to a warrantless search where no exigent circumstances existed."

The State filed an opposition in which it conceded that "the vehicle was not a subject of the search warrant and that the search warrant is not the justification for the search of the vehicle." It argued that the search of the car was justified as a warrantless search because there was probable cause to believe there was CDS in the car and the automobile exception to the warrant requirement applied. The State pointed out that the key was discovered "pursuant to a lawful search warrant execution."

A suppression hearing was held on April 8, 2016. The State called Corporal Holby, Officer Fitzpatrick, and Officer Ingbretson, all of whom testified about the facts as we have recited them above. Colon did not call any witnesses. During the hearing, the

[3] Colon also was charged with possession of ammunition by a disqualified person. That charge was *nol prossed*.

parties stipulated that the warrant did not authorize a search of any vehicle. Defense counsel, addressing the court, said, "I don't know if it is covered by the stipulation or if you would prefer me just to introduce a copy of the search and seizure warrant." The prosecutor interjected, "I agree the car is not in it." The court responded, "Well, it sounds like that is the only issue[,]" to which defense counsel agreed. The warrant was not moved into evidence.[4]

In closing argument, defense counsel stated, without elaboration, that the police "overstepped their boundaries by taking the key[.]" He argued that inserting the key into the lock of the car was a warrantless search that was not supported by probable cause, as the police had no reason "to think that there was any sort of activity involving CDS with an automobile[,]" and otherwise was not covered by any exception to the warrant requirement. In particular, defense counsel argued that the automobile exception to the warrant requirement did not apply because, given that the car was not drivable, there were no exigent circumstances.[5]

In her closing, the prosecutor argued that the officers "lawfully locat[ed]" the car key in Colon's pants pocket, and, given that no CDS evidence was found in the

[4] By agreement of counsel, the record has been supplemented to include the warrant.

[5] The automobile exception to the warrant requirement, recognized in *Carroll v. United States*, 267 U.S. 132 (1925), "allows vehicles to be searched without a warrant provided that the officer has probable cause to believe that a crime-connected item is within the car." *State v. Wallace*, 372 Md. 137, 146 (2002).

apartment, they had "a duty at [that] point to further investigate . . . whether [Colon] may have stored [CDS] nearby." Relying on *Fair v. State*, 198 Md. App. 1 (2011), she asserted that fitting the car key in the door of the car, without more, was not a search; and the positive alert by the canine gave the police probable cause to search the car without obtaining a warrant.

In rebuttal closing, defense counsel said that, although Colon "may have been in lawful custody at that time under the execution of the search warrant," the officers did not have the "right to take that [car] key" from him "or to take any other object from [him] that was not targeted in the search warrant."

The court denied the suppression motion, ruling as follows:

> All right. I think, as with all of these types of cases, they are fact driven. I am not sure there is any case law that is specifically on point in this scenario. Certainly the burden is on the State in the warrantless search.
>
> And what I understand to have occurred here is that there was a search warrant for [Colon's] residence, which covered [Colon], as well, should he be present. The officers showed up. They searched the house. They searched [Colon]. There was a key in his pocket that they asked—there was a car key in his pocket, that they asked him what the key was to, that he did not not say anything. He did in fact say something. He said he didn't know what the car key was to.
>
> I find that to be particularly suspicious in light of the fact that the car key was in his pocket. The police take the key. They walk around the parking lot. They check it. And I do think it is similar to the fob situation [in *Fair*]. The fob was more technologically recent. However, traditionally vehicles were started and opened with car keys, not fobs.
>
> Had the police turned the key and opened the car door, I think that would have been considered a separate search. However, they simply located the vehicle that the key went with and did not search the vehicle, the interior of the vehicle, at that time. Canine happened to be present on the scene. They had canine come over. The canine alerted. I think that is probabl[e] cause at that point in time.

> And I would note that just because a vehicle appears to have not been driven in a while and has a flat tire does not [mean] it cannot be driven or that it is no longer a vehicle. So I don't think that it negates any exigency that is in connection with a vehicle.
>
> I think there are several different ways that the police could have gone about the search, but I do not find that the warrantless search was unlawful in this particular scenario.

As noted, Colon proceeded on a not guilty agreed statement of facts. After the court found him guilty of possession of a regulated firearm by a disqualified person and sentenced him, he noted a timely appeal to this Court.

DISCUSSION

Colon makes three arguments to support his contention that the court erred by denying his motion to suppress. First, "[t]he seizure of the Chrysler key found on [his] person was unlawful because [the] police lacked any basis for believing that the car was linked to drug activity[,]" and the car key could not be seized under the "plain feel doctrine[.]" Second, even if the police lawfully seized the car key, they conducted a warrantless search by inserting it in the lock of the Chrysler, and that search was not based on probable cause and was not subject to any exception to the warrant requirement. And third, the warrantless search of the car was not justified by the automobile exception as the car appeared not to be drivable, and therefore exigent circumstances did not exist.

The State responds in three parts as well. Its first, and primary, argument is that the language of the warrant authorized the police to seize the car key found on Colon's person. Second, if inserting the car key in the car's lock to determine whether it fit was a search at all, it was such a "minimal intrusion" that it only required reasonable suspicion

that the car was connected to unlawful CDS activity, which the officers had. (The State also maintains that that search was supported by probable cause.) And, if that search was unconstitutional, its "taint" was "attenuated" by the canine's alert to the car. Finally, the automobile exception applied without "any additional case-specific exigent circumstances."

In his reply brief, Colon asserts that the State's argument that the language of the search warrant authorized the police to seize the car key from his person is not preserved for review because it was not raised below. He further asserts that the argument was waived because it contradicts the prosecutor's concession that the warrant did not cover the car. Colon also addresses the issue on its substance, arguing that the language of the warrant did not authorize the police to seize the car key.

Because it is logical to do so, we first shall address Colon's non-preservation and waiver arguments. With respect to waiver, contrary to what Colon asserts, the prosecutor did not concede that the language of the warrant *did not permit* the officers to seize the car key from Colon's person. Rather, she conceded that the warrant did not cover the car (or any vehicle). So, the waiver argument lacks merit.

There is some merit, however, to Colon's preservation argument that the prosecutor never argued below that the warrant *did permit* the police to seize the car key from Colon. The same confusion Colon now suffers about the prosecutor's concession permeated the hearing. As noted, when Colon argued that the warrant did not permit the police to seize the car key from his person, and offered to move the warrant into

evidence, the prosecutor and the court reacted by focusing not on the seizure of the car key but on the search of the car; and Colon did not follow up on his point. In their closing arguments, each side made mention of the seizure of the key, but in vague terms (defense: the police "overstepped boundaries" by taking the key) (prosecution: the officers "lawfully locat[ed]" the key in Colon's pants pocket), without zeroing in on whether the key (as opposed to the car) was covered by the warrant. Only in rebuttal closing did defense counsel say, clearly, that the officers "didn't [have the] right to take [the] key" from Colon, although he did not follow through with that thought with any comment about the language of the warrant. Nor did the prosecutor ask for surrebuttal to address that issue. And in its ruling, the court did not discuss the language of the warrant at all.

Under Rule 8-131(a), ordinarily this Court will not address any non-jurisdictional argument unless it has been raised *or* decided in the circuit court. In this case, the suppression court did not *decide* whether the language of the warrant permitted the police to seize the car key found on Colon's person. We cannot say that the issue was not *raised* at all, however, although it certainly could have been raised with substantially more clarity. We will address it for that reason and also because it is the State's central argument on appeal, is one we conclude lacks merit, and, because it lacks merit, it is dispositive. Thus, in the final analysis, Colon is helped, not hurt, by our addressing the issue he argues is unpreserved.

The State relies upon the following language in the warrant (already quoted above) as the source of authority for the police to seize the car key from Colon's person:

> [The police are authorized to seize] [a]ny and all currency or financial instruments in amounts indicative of the proceeds used for the acquisition of illegal narcotics and any other items of value that can be reasonably associated as being used for the unlawful acquisition of Controlled Dangerous Substances under Criminal Law Article CR 5-623 (b).

Specifically, the State argues that the car key was an "item[] of value that can be reasonably associated as being used for the unlawful acquisition of" CDS and therefore was covered by the warrant.

The Fourth Amendment reads, in full:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly describing the place to be searched, and the persons or things to be seized.*

U.S. Const. amen. IV (emphasis added). With respect to searches and the particularity requirement, the Supreme Court has explained:

> The manifest purpose of [this] requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.

Maryland v. Garrison, 480 U.S. 79, 84 (1987) (footnote omitted). The same reasoning applies to seizures—the particularity requirement ensures that in executing a warrant the police will not seize items not specified in the warrant. *Marron v. United States*, 275 U.S. 192, 196 (1927) ("The requirement [under the Fourth Amendment] that warrants

shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another.").

With that in mind, we examine the language of the warrant to determine whether it permits the seizure of a car key found on the person of someone in the apartment when the warrant is executed. Obviously, the warrant says nothing about car keys. The question is whether a car key is an "item of value" and, if so, whether it is one that can be "reasonably associated as being used for the unlawful acquisition of" CDS. The State quotes the "item of value" language in a vacuum, without reference to the words preceding it. Unfortunately for their argument, we only can ascertain the meaning of that phrase, and the language that follows it, in the full context of the sentence it is a part of.

The sentence in question begins by describing the following category of items that may be seized: "Any and all currency or financial instruments in amounts indicative of the proceeds used for the acquisition of illegal narcotics . . . ." The next phrase in the sentence is, "and *any other* items of value that can be reasonably associated as being used for the unlawful acquisition of" CDS. (Emphasis added.) Thus, an "item of value" must be *like currency or financial instruments*, in that it has intrinsic worth that makes it usable as a medium of exchange for the acquisition of CDS. Only then does the amount matter, *i.e.*, that the item of value be in an amount that indicates it is being used to acquire CDS.

When read in full and in context, the phrase "item of value" in the search warrant does not encompass the car key. A car key is not akin to currency; it has no intrinsic value that makes it usable as a medium of exchange. Its only value is as a means to

access the car to which it belongs. The State skips over that particular language of the warrant to argue that an item of value is an "item" that "might have been associated with acquiring illegal drugs," and because Colon could have been using the car to which the key belonged to transport or store CDS, the car could have been associated with acquiring CDS. This is too cursory a reading of the warrant language. As explained, the nature of an item of value is specifically described in the warrant, and a car key with no intrinsic value is not of that nature, even if the car it belongs to may be being used to sell CDS.

The State does not argue that there was a basis other than the search warrant to justify the seizure of the car key by the police. In his brief, Colon treats the seizure as a warrantless seizure and proceeds to argue that it was not justified by officer safety, *i.e.*, reasonable articulable suspicion that the car key was a weapon, *see Terry v. Ohio*, 392 U.S. 1 (1968), or the "plain feel doctrine," *i.e.*, seizure of an item by police when it is "immediately apparent" that the item is "evidence of a crime" or contraband, *see McCracken v. State*, 429 Md. 507, 515 (2012). The State responds that these bases for a warrantless seizure of the car key are *irrelevant* because the warrant covered the seizure of the car key. It is clear that neither party is of the view that there was an adequate basis for the seizure of the key without a warrant. (For instance, the State does not argue consent.)

The warrant did not permit the police to seize the Chrysler car key from Colon's person, and there was no basis to seize the key without a warrant. The key was seized in

violation of Colon's Fourth Amendment rights. Under federal decisional law, the exclusionary rule makes evidence obtained in violation of a defendant's Fourth Amendment rights inadmissible against him at trial. *McCain v. State*, 194 Md. App. 252, 265 (2010). This rule extends to the "fruits" of "illegally seized evidence." *U.S. v. Calandra*, 414 U.S. 338, 347 (1974) (citations omitted). The rifle recovered from the Chrysler was obtained by the police as a direct result of Corporal Holby's illegal seizure of the car key from Colon's person. Accordingly, the rifle should have been suppressed from evidence as the "fruit" of the illegal seizure.

Because this issue is dispositive, we need not address the arguments Colon and the State make about the search of the car by means of inserting the car key in the lock and the search of the car after the canine alerted to it. Also, as noted, the State's attenuation argument does not apply to the seizure of the car key.[6]

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY REVERSED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY ANNE ARUNDEL COUNTY.

[6] *Fair v. State*, *supra*, is inapposite because in that case the police legally were in possession of a car key that they then used, by pushing the fob, to determine which car it belonged to.