

Circuit Court for Anne Arundel County
Case No. C-02-CR-18-002282

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 63

September Term, 2019

GEORGE KEENAN NICK

v.

STATE OF MARYLAND

Kehoe,
Nazarian,
Gould,

JJ.

PER CURIAM

Filed: April 10, 2020

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Convicted by the Circuit Court for Anne Arundel County of altering physical evidence, George Keenan Nick, appellant, presents for our review two questions, which for clarity we rephrase:

1. Did the trial court err in permitting a lay witness to opine that a wet cigarette observed in Mr. Nick's vehicle was "a dipper which is a cigarette . . . dipped in PCP that people smoke?"
2. Did the trial court err in denying Mr. Nick's motion to suppress without making findings of fact?

For the reasons that follow, we shall affirm the judgment of the circuit court.

Prior to trial, Mr. Nick was charged with, among other offenses, altering physical evidence and possession of phencyclidine, or PCP. Mr. Nick subsequently moved to suppress "all evidence obtained after [his] arrest" on the ground that "probable cause did not exist to support the arrest." At the hearing on the motion, the State called Annapolis Police Corporal Hil O'Herlihy, who testified that on July 5, 2018, he responded to a parking lot on Spa Road "for a person who passed out in a vehicle." Corporal O'Herlihy "pulled in behind" the vehicle, which "was actually blocking the way through the parking lot." The corporal first spoke to "the person who had called in," who stated that "the car had been sitting there for a long time," and that the witness had "actually . . . turned the car off." Corporal O'Herlihy approached the car and discovered Mr. Nick, who was sitting in the driver's seat with his foot on the brake and asleep. Corporal O'Herlihy woke Mr. Nick and "asked him why he was there." Mr. Nick, who was "mostly incoherent," stated that "he was visiting his cousin." When Annapolis Police Officers Wyatt Davis and Jacob Horner arrived, Corporal O'Herlihy told Officer Horner that the corporal had seen in the

car's center console a "dipper," which is "a cigarette that has been dipped in PCP." Corporal O'Herlihy had Officer Horner recover the "dipper" and placed Mr. Nick under arrest.

The State next called Officer Davis, who testified that as he spoke with Mr. Nick, the officer observed in the car's cup holder "a cigarette which . . . looked like it had a water stain on it and a red straw with white powder." When Officer Davis "asked Mr. Nick to get out of the car," he "collided with the door on his way out," "stumbled backwards into the side of the vehicle," and "braced himself on the . . . pillar between the" driver's side front and rear doors. The officer observed that Mr. Nick "was disoriented," "attempted to walk to the front of the vehicle" when he had been instructed "to go to the rear," and "needed to use the vehicle to steady himself as he walked." During cross-examination, Officer Davis testified that as he "began speaking" with Mr. Nick, the officer "immediately detected a faint odor of what" he knew "through [his] training, knowledge[,] and experience to be a chemical odor that's associated with phencyclidine or PCP." Officer Davis further testified that Mr. Nick's "eyes appeared to be bloodshot and watery, glassed over almost, and . . . his speech was slurred."

Following testimony, defense counsel "object[ed] to both the stop and . . . the arrest." Counsel argued that after Mr. Nick "woke up," the "welfare check turned into a stop," and "[a]t that point . . . any further investigation [was] not justified by reasonable, articulable suspicion." Counsel further argued that because the officers only thought that the cigarette "could be" a dipper, there was "no probable cause to make an arrest." Following argument, the court summarily stated: "[I]n the totality of the circumstances

and with great respect to your hard work, [defense counsel], I think I must deny both motions.”

The parties immediately proceeded to trial, where the officers gave testimony similar to that which they gave at the hearing on the motion to suppress. Corporal O’Herlihy gave additional testimony that when Officer Horner retrieved the “dipper” and “held it up,” the corporal “smelled the odor of PCP.” Officer Davis gave additional testimony that as he was “processing and booking Mr. Nick” in the police department’s “booking facility,” the officer was brought a clear plastic bag containing the dipper and straw, which was “placed . . . on the table where the computer is that [the officers] process arrestees with.” After Officer Davis “took [Mr. Nick’s] property from him,” the officer asked Mr. Nick “to come up and sign a document that says what [the officer] took from him.” Officer Davis “turned [his] back to grab latex gloves so that [he] could fingerprint Mr. Nick,” “re-approached the table,” and “fingerprinted Mr. Nick.”

Mr. Nick subsequently “stated that he needed to use the bathroom.” Officer Horner “escorted [Mr. Nick] into the cell area,” where he “went to the bathroom.” When Mr. Nick returned, the officers “finished the . . . booking process” and “placed Mr. Nick back . . . into the cell.” Officer Davis then “realized that the dipper . . . and the red straw were missing.” At “the same time,” the officer “heard the toilet from the cell flush approximately three times.” Following the close of the evidence, the court convicted Mr. Nick of altering physical evidence, but acquitted him of possession of PCP.

Mr. Nick first contends that the trial court erred in permitting Corporal O’Herlihy to testify at trial, over defense counsel’s objection, that when the corporal “went to the

passenger side” of Mr. Nick’s car, the corporal “saw what [he] recognized in [his] experience to be a dipper which is a cigarette . . . dipped in PCP that people smoke.” Mr. Nick contends that the testimony was inadmissible because “a lay witness is not qualified to opine that a specific substance is, in fact, a particular controlled dangerous substance,” and the testimony “was plainly prejudicial” because “the item was lost and never tested,” and “supplied a motive for Mr. Nick to . . . destroy the evidence.”

Assuming, *arguendo*, that the testimony was impermissible, we are satisfied, for three reasons, that there is no reasonable possibility that the testimony contributed to the rendition of the guilty verdict. First, the State presented evidence that two of the officers, upon confiscating the cigarette, smelled the odor of PCP, and considerable evidence from which the court could reasonably conclude that Mr. Nick was under the influence of an intoxicating substance. Second, Mr. Nick was tried by a judge, and “[t]rial judges are presumed to know the law and to apply it properly.” *Ball v. State*, 347 Md. 156, 206 (1997). Finally, the court acquitted Mr. Nick of possession of PCP, and as the State notes, motive is not an element of the offense of altering physical evidence. Hence, any error in the admission of the testimony is harmless.

Mr. Nick next contends that the court erred “in summarily denying [the] motion to suppress” without “mak[ing] necessary findings of fact.” (Capitalization and boldface omitted.) But, we have stated that “if the evidence that is the subject of the suppression hearing is never offered at trial, the trial judge’s ruling on the motion is not preserved for appellate review.” *Jackson v. State*, 52 Md. App. 327, 332 (1982) (citation and footnote omitted). Here, the cigarette and straw were never offered at trial, and hence, the trial

judge’s denial of the motion to suppress is not preserved for our review. Also, we have stated that “when the [suppression] hearing judge’s fact-finding . . . is . . . non-existent,” the “supplemental rule of interpretation” authorizes “the appellate court [to] accept that version of the evidence most favorable to the prevailing party.” *Morris v. State*, 153 Md. App. 480, 489-90 (2003). Here, the State presented evidence at the hearing on the motion to suppress that Mr. Nick had “passed out” in his car while the car was running and “blocking the way through” a parking lot. Corporal O’Herlihy observed in the car a cigarette that he believed to have been dipped in PCP. Officer Davis subsequently detected the odor of PCP and observed both the cigarette and “a red straw with white powder.” Finally, Mr. Nick exhibited numerous indicators, including incoherent and slurred speech, disorientation, the inability to exit the car and walk without stumbling or bracing himself against the car, the inability to follow Officer Davis’s instructions, and bloodshot and watery eyes, that Mr. Nick was under the influence of an intoxicating substance. These circumstances were sufficient to give the officers probable cause to arrest Mr. Nick, and hence, the court did not err in denying the motion to suppress.

**JUDGMENT OF THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**