Circuit Court for Prince George's County
Case No. CT180199A

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 624

September Term, 2019

DARSHE BOGAN

v.

STATE OF MARYLAND

Kehoe,
Beachley,
Shaw Geter,

JJ.

Opinion by Kehoe, J.

Filed: May 13, 2021

*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. *See* Md. Rule 1-104.

After a jury trial in the Circuit Court for Prince George's County, Darshe Bogan was convicted of possession of a regulated firearm after having been convicted of a disqualifying offense, possession of a regulated firearm while under the age of 21, transporting a handgun in an automobile, and possession of ammunition by a prohibited person. Mr. Bogan raises two issues on appeal, which we have reworded slightly:

> (1) Did the suppression court err in concluding that there was a lawful basis for the traffic stop that led to his arrest?
>
> (2) Did his convictions for possession of a regulated firearm while under the age of 21 and possession of a regulated firearm after having been convicted of a disqualifying offense merge for sentencing purposes?[1]

We conclude that the circuit court did not err in denying Mr. Bogan's motion to suppress. However, we agree with him that there is a merger problem with the sentences for possession of a regulated firearm conviction and the transporting a firearm in a motor vehicle conviction. Because the transcript of the sentencing proceeding is not clear as to which sentences were imposed for which counts, we will remand the case to the trial court for clarification of its sentence and a decision as to which conviction should be vacated.

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[1] In his brief, Mr. Bogan presents his issues thus:

> Did the circuit court err in finding a lawful basis for the traffic stop?
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> Is the sentence for possession of a regulated firearm while under the age of 21 illegal?

Background

The case arises out of a traffic stop. The driver of the vehicle was Darnell Bogan and the front-seat passenger was his brother, Darshe Bogan. Because both men have the same surname, we will refer to Darnell Bogan as "Darnell" to avoid confusion. We mean no disrespect.

In 2017, while on patrol in an unmarked car, Sergeant Justice Halsey, and Officer Kenneth Meushaw of the Prince George's County Police Department noticed an automobile stopped at a red light. A dealership license plate frame partially obscured the word "Virginia" on the car's rear license plate. Meushaw, who was driving the police vehicle, stopped at the light in the lane to the car's left. Halsey looked at the car in the adjacent lane and saw that it had two occupants, neither of whom was wearing a seatbelt. He made eye contact with the driver and saw him toss what appeared to be a "blunt" out of the window.[2]

Once the traffic light turned green, the officers pulled the car over. Halsey approached the car and asked the driver for his license and registration. While talking with the driver, Halsey smelled burnt marijuana. Because of the odor, Halsey ordered the driver and the passenger to exist the vehicle.

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[2] A blunt is a cigar hollowed out and filled with marijuana. Sergeant Halsey did not recover the object that the driver threw out his window.

Meushaw stood with the driver and the passenger while Halsey searched the car. Under the front-passenger-seat, he found a loaded handgun. Halsey then told Meushaw to put the brothers in handcuffs. As Meushaw cuffed Mr. Bogan, he said, “We just found the gun.” The officers arrested both men, and the State later charged them with crimes associated with having the handgun in the car.

Mr. Bogan filed a pre-trial motion to suppress evidence of the handgun, the ammunition, and his statement about the handgun. Halsey, Meushaw, and both of the Bogans testified.

Much of the hearing was concerned with whether the dealership frame around Bogans’ car’s license plate obstructed Halsey’s view of the plate. During the hearing, Halsey conceded that he could read the numbers and letters on the license plate, that he could see the license plate’s registration stickers, and that he could tell it was a Virginia plate. But he noted that the dealership frame covered the very top of the three “Is” of the word Virginia. Halsey also stated, however, that he pulled the Bogan vehicle over, not for the issue with the license plate alone, but also because he noticed that neither man was wearing his seatbelt, and he saw Darnell litter when he threw his blunt out the car’s window. For their part, the Bogans testified that they were wearing their seatbelts and that neither threw anything out of their car before they were stopped.

The circuit court denied the motion to suppress. The court found that the police officers were credible and that the Bogans were not. He concluded that the officers had reasonable, articulable suspicion to stop the car for three reasons. First, Darnell had littered when he

threw his blunt to the ground. Second, neither Mr. Bogan nor Darnell was wearing his seatbelt. And third, the frame around the car's license plate covered a "very small portion of the lettering of the word Virginia." As a result of these findings, the court denied Mr. Bogan's motion to suppress the evidence.

The State indicted Mr. Bogan on five counts: Count 1 was possession of a regulated firearm after being convicted of a disqualifying crime; Count 2 was possession of a regulated firearm by a person under the age of 21; Count 3 was wear/carry/transport of a handgun in an automobile; Count 4 was wear/carry/transport of a handgun on his person; and Count 5 was possession of ammunition as a prohibited person.[3] Prior to the trial at issue in this appeal, the State *nol prossed* count 4 (wear/carry/transport of a handgun on his person), and the jury returned verdicts of guilty as to counts 1, 2, 3, and 5.[4] At sentencing the circuit court stated,

> So as to Count VII, its three years, suspend all but 18 months. All right. Take that back, to Count I—I mean count VI, three years suspended all but 18 months, and all the remaining counts will be three years suspended, and they're going to run current [sic] with Count VI, as well as the supervision.

But there were only five counts in the indictment, and both the docket entries and commitment record showed that the sentence of three years with all but eighteen months

[3] Respectively, the citations for each count are Md. Code, Pub. Safety, § 5-133(b)(1); Md. Code, Pub. Safety, § 5-133(d)(1); Md. Code, Crim. Law § 4-203(a)(1)(ii); Md. Code, Crim. Law § 4-203(a)(1)(i); Md. Code, Pub. Safety, § 5-133.1(b).

[4] The State *nol prossed* Count 4 (wearing, carrying or transporting a handgun on his person) during the first trial in this matter, which ended in mistrial.

suspended was imposed under Count 1. The docket entries and commitment record also show Counts 4 and 5 merging with Count 1.

Analysis

The standard of review in cases such as the present one is well-established:

> When we review a circuit court's grant or denial of a motion to suppress evidence alleged to have been seized in contravention of the Fourth Amendment, we view the evidence adduced at the suppression hearing, and the inferences fairly deduced therefrom, in the light most favorable to the party that prevailed on the motion. We defer to the circuit court's fact-finding at the suppression hearing, unless the circuit court's findings were clearly erroneous. Nevertheless, we review the ultimate question of constitutionality de novo and must 'make our own independent constitutional appraisal by reviewing the law and applying it to the facts of the case.

Grant v. State, 449 Md. 1, 31 (2016) (cleaned up).

A. Preservation

In his brief, Mr. Bogan concedes that he failed to object to the introduction of evidence as to the handgun, the ammunition, and his statement about the handgun at trial, but that we should still consider this appeal by invoking our discretion under Rule 8-131(a).[5]

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[5] Rule 8-131(a) states:

> The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

However, as the State points out in its brief, the suppression court's ruling denying the motion to suppress is preserved for appellate review. *See* Md. Rule 4-252(h)(2)(C) ("A pretrial ruling denying the motion to suppress is reviewable on a motion for a new trial or an appeal of a conviction.").

B. The validity of the stop

Before addressing Mr. Bogan's contentions, we point out that he is not challenging the decisions of the police to require them to exit their vehicle or to search it. His focus is solely on the initial stop.

In essence, Mr. Bogan argues that evidence of the handgun, the ammunition, and his statement should have been suppressed because the police had no right to pull the vehicle over in the first place. According to him, the frame around the license plate complied with Md. Code Transp. § 13-411(c).[6] From this premise, he reasons that the police had no basis

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[6] Section 13-411(c) states in pertinent part:

> (1) At all times, each registration plate shall be:
> (i) Maintained free from foreign materials, including registration plate covers as defined in § 13-411.1 of this subtitle, and in a condition to be clearly legible; and
> (ii) Securely fastened to the vehicle for which it is issued:
> 1. In a horizontal position;
> 2. In a manner that prevents the plate from swinging; and
> 3. In a place and position to be clearly visible.
>
> * * *

to pull alongside the vehicle while it was stopped at the traffic light. If the police had not been next to the Bogan vehicle, Halsey would not have noticed that the Bogans were not wearing their seatbelts. Finally, Mr. Bogan asserts that "the littering violation [was] so minor an infraction that it should not be a factor in search-and seizure-law."

We see things differently: Even if the license frame did not violate the law, the police violated no right of Mr. Bogan by pulling up next to his vehicle at the traffic light. Nor did Halsey violate the Fourth Amendment by looking at the car next to him. Not wearing seatbelts is a violation of Maryland law. Transp. § 22-412.3(b) and (c). So is littering. Transp. § 21-1111(d) and (e).

The Fourth Amendment prohibits "unreasonable searches and seizures." Under the Fourth Amendment, even an officer's "[t]emporary detention" of a person during a vehicle stop "constitutes the 'seizure' of 'persons.'" *Whren v. United States*, 517 U.S. 806, 809–

Mr. Bogan also asserts that the license plate border did not violate Transp. § 13-411.1. That statute prohibits the sale or offering for sale of

> any tinted, colored, painted, marked, clear, or illuminated object that is designed to:
> (1) Cover any of the characters of a vehicle's registration plate; or
> (2) Distort a recorded image of any of the characters of a vehicle's registration plate recorded by a traffic control signal monitoring system under § 21-202.1 of this article.

But § 13-411.1 has nothing to do with this case; no one ever has asserted that Mr. Bogan or his brother was selling license plate covers or offering them for sale.

810 (1996). And this seizure extends to any passengers in the vehicle. *Brendlin v. California*, 551 U.S. 249, 253 (2007).

To justify a seizure like this, officers must have "a particularized and objective basis for suspecting the particular person stopped of breaking the law." *Heien v. North Carolina*, 574 U.S. 54, 60 (2014) (cleaned up). Because this is an objective test, ordinarily an officer's "[s]ubjective intentions play no role in" a Fourth Amendment seizure analysis. *Whren*, 517 U.S. at 813. Finally, "a police officer's observation of an actual violation of the Maryland Vehicle Law is sufficient basis for a traffic stop." *Johnson v. State*, 242 Md. App. 588, 616 (2019).

When the police pulled up next to the Bogan vehicle Halsey noticed that neither Mr. Bogan nor Darnell was wearing his seatbelt. As it was a "clear violation of state traffic laws" for Darnell to drive a car without wearing his seatbelt and for Mr. Bogan to be in the front passenger seat without wearing a seatbelt, the officers had sufficient justification to pull the car over and conduct a traffic stop. *See Johnson*, 242 Md. App. at 616. Similarly, when Halsey saw Darnell throw something out of the driver's window onto the street, he had a reasonable suspicion to investigate for littering. *Sizer v. State*, 456 Md. 350, 374 (2017).

We hold that the officers had reasonable suspicion to believe that Darnell and Mr. Bogan had violated the law and thus the officers were justified in stopping the vehicle. If the stop was constitutionally valid—and it was—then the police could conduct a limited search of the passenger compartment of the vehicle once they detected the odor of burnt

marijuana. *See, e.g.*, *Pacheco v. State*, 465 Md. 311, 330 (2019); *Robinson v. State*, 451 Md. 94, 125 (2017).

C. The Sentences

Both the State and Mr. Bogan agree that the sentences to either Count 1 (possession of a regulated firearm after being convicted of a disqualifying crime) or Count 2 (possession of a regulated firearm by a person under the age of 21) should be vacated. Further, both parties agree that of the two counts, the one with the lesser penalty should be vacated.[7] We agree.

The Fifth Amendment's Double Jeopardy Clause protects against, among other things, multiple punishments for the same offense. *Purnell v. State*, 375 Md. 678, 691 (2003) (citation omitted). Given this, a single statute that creates "multiple units of prosecution for conduct occurring as a part of the same criminal transaction" can in some cases violate the clause. *Id*. 692 (citation omitted). So it is important to know whether a statute has multiple units of prosecution—which would bring it under Fifth Amendment scrutiny—or whether a statute has a single unit of prosecution—which would avoid the need for a Fifth Amendment analysis. *See id*. And whether a statute has multiple units of prosecution or only one usually turns on the type of conduct that the General Assembly was seeking to prohibit under the statute. *See id*.

[7] Mr. Bogan also asserts that we should vacate Count 1 under the rule of lenity. We need not address this contention.

In Maryland, it is generally illegal for a person who is under twenty-one years old to possess a regulated firearm under Md. Code, Pub. Safety § 5-133(d)(1). Under the same statute, it is also generally illegal for a person convicted of a disqualifying crime to possess a regulated firearm. Md. Code, Pub. Safety § 5-133 (b)(1). But the "unit of prosecution" for § 5-133 is the "illegal possession of a regulated firearm" because that is "the vice sought to be remedied by the statute." *Clark v. State*, 218 Md. App. 230, 252–53 (2014). For this reason, the statutes at issue do not "support multiple convictions . . . where there [was] only a single act of possession." *Id.* (holding that only one of the appellant's three convictions under Pub. Safety § 5-133 based on a single act of possession of a regulated firearm could stand) (citation omitted). Thus, when a court convicts a defendant for multiple violations under § 5-133, we affirm the conviction with the greatest penalty and vacate the rest. *Id*. at 253.

Mr. Bogan was convicted for possessing a regulated firearm while under twenty-one years old and after being convicted of a disqualifying offense under § 5-133. The parties agree that both crimes carry the same penalty. Md. Code, Pub. Safety § 5-144(b); *Jones v. State*, 420 Md. 437 (2011) (explaining that when a person is convicted of a gun offense under § 5-133 that does not have its own penalty provision, the penalty provision under former § 5-143 (now § 5-144) controls)). And the parties agree that the circuit court sentenced Mr. Bogan to three years all but eighteen months suspended under one of the counts and three years all suspended under the other count. Finally, sentencing Mr. Bogan to both crimes constitutes an illegal sentence, and the count that carries the lesser sentence

must be vacated. This points to the conclusion that the count with the three years suspended sentence must be vacated. But it is unclear to the parties, and to us, which sentence applies to which count.

At sentencing, the court stated as follows:

> So as to Count VII, it's three years, suspend all but 18 months. All right. Take that back, to Count I – I mean Count VI, three years, suspend all but 18 months, and all the remaining counts will be three years suspended, and they're going to run current with Count VI, as well as the supervision.

As the parties note in their briefs, there were only five counts in the indictment, and both the docket entries and commitment record show the sentence of three years with all but 18 months suspended as having been imposed under Count 1. Because of the discrepancy between the trial court's sentences as announced from the bench, and the sentences as recorded in the docket entries and the commitment record, the appropriate step is for us to remand the case for resentencing.[8]

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[8] In his brief, Mr. Bogan points to two additional anomalies: First, the transcript of the sentencing proceeding reflects concurrent sentences of three years suspended as to Count 3 (wearing/carrying/transporting a handgun in an automobile) and Count 5 (possession of ammunition by a prohibited person), but the docket sheet and commitment record show these convictions as merging with Count 1. Second, while it does not appear that these sentences are subject to merger, the sentence under Count 5 should have been limited to one year under Public Safety Article, § 5-133.1(c). The State appears to concede that there may be substance to each of these contentions. Mr. Bogan is free to raise either or both of them to the sentencing court.

THE JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY ARE AFFIRMED. THE CASE IS REMANDED FOR RESENTENCING IN ACCORD WITH THIS OPINION. COSTS TO BE DIVIDED EQUALLY BETWEEN APPELLANT AND PRINCE GEORGE'S COUNTY.