Circuit Court for Talbot County
Case No. C-20-CR-18-000214

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0860

September Term, 2019

DIONTAE LAMONT POTTER

v.

STATE OF MARYLAND

Nazarian,
Beachley,
Ripken,

JJ.

Opinion by Nazarian, J.

Filed: October 6, 2021

On October 12, 2018, the State of Maryland indicted Diontae Potter on sixteen drug-related crimes and traffic violations that arose from an August 19, 2018 traffic stop on Route 50 in Talbot County. Mr. Potter moved to suppress the evidence on the ground that the officers lacked reasonable articulable suspicion that he was driving the vehicle on a suspended license. The court denied the motion. Mr. Potter later entered a conditional guilty plea in the Circuit Court for Talbot County to possession, intent to distribute narcotics, and for driving on a suspended license.

On appeal, Mr. Potter argues the court erred in denying his motion to suppress evidence because the evidence represents the tainted fruit of an unlawful traffic stop. We agree and reverse Mr. Potter's conviction on the ground that officers lacked reasonable articulable suspicion to initiate the traffic stop.

I. BACKGROUND

A. The Moments Leading Up To The Traffic Stop.

On August 19, 2018, Talbot County Sheriff's Office Deputies Justin Aita and Logan LeCompte were on a routine traffic enforcement assignment in Easton. At approximately 10:51 p.m., Deputy Aita, driving an unmarked car, saw a black Nissan Altima traveling east on Route 50 at thirty-five miles per hour. The speed limit on that stretch of Route 50 is fifty-five miles per hour.

Based exclusively on that information, Deputy Aita ran the vehicle's registration through the on-board electronic ticketing system and learned law enforcement had stopped the Altima several times since 2017. The search also revealed that one month prior, in July 2018, Easton Police stopped the vehicle in question and identified Mr. Potter as the

driver, and that Mr. Potter was not the registered owner. Deputy Aita also used the electronic ticketing system to run driver information through the National Criminal Information Center ("NCIC") database and learned that Mr. Potter's driving privileges were suspended.

While traveling in "lane two" behind the Altima, Deputy Aita radioed to Deputy LeCompte requesting he pull alongside and relay a description of the driver to him. Deputy LeCompte, who was traveling behind Deputy Aita, positioned his fully-marked patrol vehicle in "lane one" and approached the car from the left side. He got three looks at the driver: one from thirty feet away, one from ten feet away, and one from alongside the vehicle. Deputy LeCompte then radioed Deputy Aita and described the driver to him as a "black male, short hair, covered by a ball cap with a short beard" who "act[ed] nervously" and "looked over his shoulder" several times. When questioned on cross-examination, Deputy LeCompte acknowledged that the cap covered the driver's head down to his ears and that he couldn't see the driver's hair underneath it.

Based on the description of the driver, Deputy Aita activated his visual emergency lights and initiated a traffic stop "based on [his] suspicion that the driver was Mr. Potter and he was driving on a suspended Maryland driver's license."

B. The Traffic Stop And The Aftermath.

The vehicle pulled immediately to the side of the road. As Deputy Aita approached the vehicle, he could smell the odor of marijuana emanating from it. But as Deputy Aita approached and asked the driver to step out of the vehicle, the car drove away. The officers

pursued him, and the chase ended when the driver lost control and got stuck in a ditch. The driver then ran from the vehicle into a cornfield and was not apprehended; Mr. Potter turned himself in a few days later. The officers searched the vehicle and found a plastic baggie with marijuana residue. They also called in K-9 units who led them to a nearby beach, where they found a backpack containing two pounds of marijuana and 150 wax folds of heroin. Deputy LeCompte testified that during the initial traffic stop, he had seen a backpack on the back seat of the car, and that when the driver climbed out of the car to run away "his hands weren't swinging almost as if he was carrying something." He identified the backpack at the suppression hearing as the one he saw in the back seat, and the items found in that backpack comprise the evidence underlying the charges in this case.

Mr. Potter moved to suppress the evidence obtained as a result of the traffic stop. On February 8, 2019, the circuit court held a suppression hearing, and after the hearing the court denied the motion. On February 22, 2019, Mr. Potter entered a conditional guilty plea that preserved his right to appeal the lawfulness of the traffic stop. The court later sentenced him to seven years of incarceration with all but twenty-seven months suspended, followed by three years of supervised probation.

Mr. Potter filed a timely appeal. We supply additional facts as necessary below.

II. DISCUSSION

Mr. Potter raises a single issue on appeal: whether the court erred in denying his motion to suppress. He offers several reasons outlining why the deputy did not have reasonable articulable suspicion to initiate the August 19, 2018 traffic stop. *First*, he notes

that traveling approximately twenty miles below the speed limit is not a citable offense under Maryland Code (1977, 2020 Repl. Vol.), § 21-804(a) of the Transportation Article ("TR").[1] *Second*, he contends that the description of the driver as a "black male, short hair, covered by a ball cap with a short beard" was too generic to allow the deputy to conclude reasonably that Mr. Potter was the driver. *Third*, he argues a driver appearing nervous when a police cruiser pulls next to their car does not indicate criminal activity. *Fourth*, he observes that the fact that he (who is not the registered owner of the vehicle) was pulled over while driving the Altima several weeks earlier does not create reasonable suspicion that he was the driver on the night in question.

In response, the State argues that reasonable suspicion turns on "'the degree of suspicion that attaches to particular types of noncriminal acts.'" *State v. Ofori*, 170 Md. App. 211, 248 (2006) (emphasis omitted) (*quoting United States v. Sokolow*, 490 U.S. 1, 9–10 (1989)). When viewed under the totality of the circumstances, the State argues, the deputy had reasonable articulable suspicion that Mr. Potter was the driver and the court denied the motion to suppress correctly.

When we review the denial of a motion to suppress, we review the record before the court at the suppression hearing. *Jones v. State*, 139 Md. App. 212, 219 (2001). We "accept[] the findings of fact made by the suppression court unless they are clearly

[1] TR § 21-804(a) states: "Unless reduced speed is necessary for the safe operation of the vehicle or otherwise is in compliance with law, a person may not willfully drive a motor vehicle at such a slow speed as to impede the normal and reasonable movement of traffic."

erroneous and review[] those findings in the light most favorable to the prevailing party, in this case, the State." *Angulo-Gil v. State*, 198 Md. App. 124, 137 (2011). "The suppression court's legal conclusions, however, are subject to our independent constitutional review." *Id.*

A. The Deputy Did Not Have Reasonable Articulable Suspicion To Initiate The Traffic Stop.

This case turns on whether the deputy had a basis to initiate the traffic stop that ultimately led to the discovery of the evidence. In most cases, the traffic stop follows a discernible violation of the rules of the road; here, that predicate is disputed. The officers have to observe something in order to pull over a car—"[a] traffic stop is valid under the Fourth Amendment if the officer has probable cause to believe that the driver has committed a traffic violation or if the officer has a reasonable, articulable suspicion that either criminal or motor vehicle laws are being violated." *McCain v. State*, 194 Md. App. 252, 264 (2010) (*citing Smith v. State*, 182 Md. App. 444, 462 (2000)); *see also Whren v. United States*, 517 U.S. 806, 819 (1996) (traffic stops were constitutional where the police had probable cause to believe the driver violated a traffic code). Once effected, a traffic stop entails a seizure of the driver, *Delaware v. Prouse*, 440 U.S. 648, 663 (1979), so "the officer's action must be justified at its inception." *Kansas v. Glover*, 589 U.S. __, 140 S. Ct. 1183, 1191 (2020) (cleaned up).

A traffic stop based on reasonable suspicion is valid when the police provide "'specific and articulable facts, which taken together with the inferences from those facts,' create a reasonable articulable suspicion for suspecting legal wrongdoing." *Smith v. State*,

161 Md. App. 461, 476 (2005) (*quoting Terry*, 392 U.S. at 21). Because reasonable suspicion is a "'common sense, nontechnical conception that considers factual and practical aspects of daily life and how reasonable and prudent people act,'" *Crosby v. State*, 408 Md. 490, 507 (2009) (*quoting Bost v. State*, 406 Md. 341, 356 (2008)), it "'is not readily, or even usefully, reduced to a neat set of legal rules.'" *Williams v. State*, 231 Md. App. 156, 179 (2016) (*quoting Holt v. State*, 435 Md. 443, 459 (2013)). Reasonable articulable suspicion "embraces something more than an 'inchoate and unparticularized suspicion or "hunch."'" *Crosby*, 408 Md. at 507 (*quoting Terry*, 392 U.S. at 27). When analyzing whether there was reasonable articulable suspicion to support an investigative stop, we consider the following factors:

> (1) the particularity of the description of the offender or the vehicle in which he fled; (2) the size of the area in which the offender might be found, as indicated by such facts as the elapsed time since the crime occurred; (3) the number of persons about in that area; (4) the known or probable direction of the offender's flight; (5) observed activity by the particular person stopped; and (6) knowledge or suspicion that the person or vehicle stopped has been involved in other criminality of the type presently under investigation.

Sykes v. State, 166 Md. App. 206, 217 (2005) (*quoting* 4 Wayne R. Lafave, *Search & Seizure* § 9.5(g) (4th ed. 2004)). "To satisfy the reasonable suspicion standard, the above factors, considered together, 'must serve to eliminate a substantial portion of innocent travelers.'" *Id.* (*quoting Cartnail v. State*, 359 Md. 272, 291 (2000)).

Importantly, the reasonable suspicion standard "'does not allow [a] law enforcement official to simply assert that innocent conduct was suspicious . . . .'" *Crosby*, 408 Md. at

508 (alteration in original) (*quoting Bost*, 406 Md. at 357). "Rather, the officer must explain how the observed conduct, when viewed in the context of all of the other circumstances known to the officer, was indicative of criminal activity." *Id.* "[I]t is 'impossible for a combination of wholly innocent factors to combine into a suspicious conglomeration unless there are concrete reasons for such an interpretation.'" *Id.* at 512 (*quoting United States v. Wood*, 106 F.3d 942, 948 (10th Cir. 1997)). When a deputy testifies that they believed the observed behavior to be suspicious without explaining how their training and experience caused them to believe criminal activity was afoot, and acknowledges they did not observe any traffic violations, the court is without a basis to evaluate objectively the decision to stop the suspect. *Id.* at 511–12. Facts of that kind "do not constitute ingredients that are sufficiently potent . . . to enrich the porridge to the constitutionally required consistency of reasonable suspicion. It remains a thin gruel." *Id.* at 513.

The State seeks to combine five observations—the vehicle's slow speed, the July 2018 traffic stop, suspicion that the driver had previously been involved in criminal activity similar to that being investigated, the description of the driver, and driver nervousness. This particular combination fell short of establishing reasonable articulable suspicion.

1. Slow speed.

At the suppression hearing, Deputy Aita testified that the Nissan Altima traveling at thirty-five miles per hour in a fifty-five mile per hour zone drew his attention. On redirect, the defense confirmed that the detaining deputy did not believe traveling below the speed limit violated Maryland traffic laws:

> [COUNSEL FOR MR. POTTER]: You would agree you were asked about statutes at slow speeds, you would agree there's no statute that says, you know, anything specific about slow speeds like it does with high speeds?
>
> [DEPUTY AITA]: No, ma'am, there's not.
>
> [COUNSEL FOR MR. POTTER]: Right, in fact the language is more like, may not willfully drive at such a slow speed as to impede traffic.
>
> [DEPUTY AITA]: Yeah, there's nothing that says you can't go 15 mph under the posted speed limit, no.

Traffic stops based on reasonable suspicion that criminal activity is afoot require the court to determine "'whether the detaining officer ha[d] a "particularized and objective basis" for suspecting legal wrongdoing.'" *Holt*, 435 Md. at 460 (*quoting United States v. Arvizu*, 534 U.S. 266, 273 (2002)). The testimony at the suppression hearing established the deputy did not. *First*, the State's witness testified that there is nothing wrong with traveling slower than the speed limit where the driver isn't impeding. Therefore, slow speed by itself didn't indicate that the driver was violating TR § 21-804(a).[2] *Second*, when the deputy approached the stopped vehicle's driver, he did not mention anything about slow speed. The only words he said at the time were, "Mr. Potter, you're suspended." *Third*, when asked whether the statement of charges included citations for slow speed, the deputy testified that he did not believe there were any citations for slow speed in the application.

Twenty-one years ago, the Court of Appeals held that a police officer was not

[2] TR § 21-804(a) states: "(a) Unless reduced speed is necessary for the safe operation of the vehicle or otherwise is in compliance with law, a person may not willfully drive a motor vehicle at such a slow speed as to impeded the normal and reasonable movement of traffic."

justified, under the reasonable suspicion standard, in conducting an investigative traffic stop of a suspect who "appeared to be operating his vehicle in compliance with the apparent rules of the road" and where "no suspicious activity had been personally observed." *Cartnail*, 359 Md. at 290. The State provided no evidence at the suppression hearing establishing that the deputy observed anything other than a vehicle operating in compliance with Maryland traffic rules. The vehicle's slow speed was not, therefore, a sufficient basis to initiate the traffic stop.

2. The July 2018 traffic stop.

Next, the State argues that because Mr. Potter was driving the Nissan Altima when police pulled it over in July 2018, it is reasonable to infer that Mr. Potter was the driver on the night in question. The State relies on an argument similar to that advanced in *Kansas v. Glover*, 589 U.S. __, 140 S.Ct. 1183. In *Glover*, a Kansas deputy sheriff initiated a traffic stop after running a registration check on a vehicle that revealed the registered owner's driver's license was revoked. *Id.* at 1186. The trial court granted Mr. Glover's motion to suppress all evidence from the stop, finding the deputy lacked reasonable suspicion to initiate the traffic stop. *Id.* at 1187. The United States Supreme Court disagreed and held that the officer had reasonable suspicion based on his running the vehicle's license plate through the Kansas Department of Revenues file service and learning that the registered owner has a revoked license. *Id.* The Court held further that "[t]he fact that the registered owner of a vehicle is not always the driver of the vehicle does not negate the reasonableness of [the deputy's] inference." *Id.* at 1188.

In this case, the State contends that it was reasonable for the deputies to suspect Mr. Potter was driving the Altima because the deputy ran its registration and learned that Mr. Potter had been driving the vehicle when it was stopped in July 2018. The constitutionality of the traffic stop in *Glover* turned on the "commonsense inference" that the owner of a vehicle is likely the person driving the vehicle and the absence of information that the owner wasn't. 589 U.S. at ___, 140 S.Ct at 1188. This helps to limit suspects from the possible suspect pool and thus the potential for unlawful searches and seizures. The deputy there knew the owner's driver's license was revoked, and the commonsense belief that the driver likely is driving with a revoked license flows from the belief that the owner of a car is most likely to be driving it.

But that inference doesn't flow here. *First*, the registered owner, who deputies knew was someone other than Mr. Potter, didn't report the Altima stolen on the night in question. *Second*, Mr. Potter's only other connection to the vehicle is that he was the driver when the car was stopped in July 2018. The drivers in all the other instances before the July 2018 stop were people other than him. And the State did not present evidence establishing that the Altima's registered owner, presumed to be Mr. Potter's sister, has a suspended license. The reasonableness of the traffic stop in *Glover* turned on the common identity between the driver and the owner. *Id.* at 1185. Here, the officer knew the driver was *not* the owner, so the registration check revealed nothing about the driver's license status.

3. The suspicion that the driver was involved in other criminality of the type being investigated.

Third, the State argues that the deputies stopped Mr. Potter based on their

knowledge of his criminal history, *i.e*., using the same vehicle to commit the same offense weeks earlier. The State contends that the deputies had "knowledge or suspicion that the person or vehicle stopped has been involved in other criminality of the type presently under investigation." *Sykes*, 166 Md. App. at 217 (*quoting* 4 Wayne R. Lafave, *Search & Seizure* § 9.5(g)). Again, testimony at the suppression hearing contradicts this claim. *First*, Deputy Aita testified that he did not know anything about Mr. Potter other than the fact that in July 2018, Mr. Potter was driving the Nissan Altima when Easton Police pulled him over. *Second*, Deputy Aita testified he never had any contact with Mr. Potter prior to August 19, 2018. *Third*, the record contained no evidence that Mr. Potter had a criminal history of driving on a suspended license.

Comparing this case with *Cartnail* demonstrates how the time between the July and the August traffic stops attenuated the earlier stop from the later one. In *Cartnail*, the Court of Appeals relied on LaFave's discussion about the significant difference between spotting a suspect within minutes of a crime as opposed to an hour later:

> "[T]he time and spatial relation of the 'stop' to the 'crime' is an important consideration in determining the lawfulness of the stop. The elapsed time indicates the minimum distance it would be possible for the offender to have covered since the crime, and this in turn supplies the radius of the area in which he might be found."

Cartnail, 359 Md. at 295 (*quoting* 4 Wayne R. Lafave, *Search & Seizure* § 9.5(g) (3d ed. 1996 and 2000 Supp.)).

Cartnail involved a relatively large geographic area, a range of possible escape routes, and enough elapsed time so that there was no valid or logical reason why the

suspects would remain in the general area after the robbery, and thus it was not reasonable for the police to detain the defendants. 359 Md. at 295. The same factors lead to the same conclusion here. In this case, a month elapsed between the July 2018 stop and the August 19, 2018 stop. Route 50 is an approximately 3,073 mile-long interstate highway connecting Ocean City, Maryland, and West Sacramento, California.[3] The circumstances of the earlier stop are far too remote from this one to create reasonable articulable suspicion that Mr. Potter, rather than the Altima's registered owner, was driving the car.

4. The description of the driver.

The State points *fourth* to the deputy's description of the unknown driver as a "black male, short hair, covered by a ball cap with a short beard." The law in Maryland about the sufficiency of suspect descriptions has evolved over the last four decades. A traffic stop can't be based entirely on a description using the subject's race and gender. *See Alfred v. State*, 61 Md. App. 647, 661 (1985) (holding that description of suspects as 'black males' was insufficient to support a traffic stop). But a description that combines physical characteristics such as "race, gender, ethnicity, hair color, facial features, age, body build, or apparel of a suspect permits winnowing of innocent travelers," and "the more detailed and unique the description of the suspect[], the more likely the police will have authority under the Fourth Amendment to make a *Terry* stop because the potential persons on the

[3] Albert Edlund, Jr., *A Brief History of America's Backbone*, Colorado Central Magazine at 16, Central Colorado Publishing Co. (Jan. 1999), http://Route50.com/history.htm; *see also* The Tillers, *There Is A Road (Route 50), on* LUDLOW STREET RAG (Chestnut Tree Records 2008) ("that old Route 50 road [is] about three thousand miles or more, coast to coast and shore to shore").

road matching the description will be fewer." *Cartnail*, 359 Md. at 291–92. For example, in *Collins v. State*, the officers had reasonable suspicion to stop the suspect where they grounded their decision on a more detailed physical description that included height, weight, and type of clothing, as well as their ability to see him as he stood in a parking lot. 376 Md. 359, 362 (2003). That stands in contrast to two cases in which reasonable suspicion was not found: *Cartnail*, where the suspect's description included only gender and race, 359 Md. at 293, and *Stokes v. State*, where the suspect was described as a black male wearing dark clothing. 362 Md. 407, 411 (2001).

When "assessing both the quality and quantity of details in the description, 'the most important consideration is whether the description is sufficiently unique to permit a reasonable degree of selectivity from the group of all potential suspects.'" *Id.* at 422 (*quoting* 4 Wayne R. Lafave, *Search & Seizure* § 9.5(g)). Here, the description of the driver included only three characteristics: black male, short hair (which was covered by a hat), and a short beard. Those characteristics do not provide enough detail to distinguish Mr. Potter from the many possible drivers with similar features. Further, the ball cap is an irrelevant descriptor because Mr. Potter is not wearing that hat or any other hat in his driver's license picture, nor is there evidence in the record showing that he wore the same hat when he was pulled over the previous month.

5. Driver nervousness.

The State points *fifth* to Deputy LeCompte's observation that Mr. Potter appeared nervous because he looked over his shoulder. "[I]t is common for most people to exhibit

signs of nervousness when confronted by a police officer, whether or not the person is currently engaged in illegal activity." *Ferris v. State*, 355 Md. 356, 388 (1999); *see Madison-Sheppard v. State*, 177 Md. App. 165, 181 (2007) ("Becoming nervous when confronted by a police officer is, however, common even for innocent people who confront the police and is not determinative in whether reasonable suspicion exists.") Therefore, we are cautioned against "'placing too much reliance upon a suspect's nervousness when analyzing a determination of reasonable suspicion.'" *Longshore v. State*, 399 Md. 486, 518 (2007) (*quoting Ferris*, 355 Md. at 389).

The State argues that because Mr. Potter's driver's license was suspended, the driver turning around several times to look at the approaching deputy provided reasonable articulable suspicion that Mr. Potter was the driver. We disagree. *First*, this theory required the deputies to know that Mr. Potter was the driver, which they didn't. *Second*, "turn[ing] around three or four times to look back at [an approaching officer] is hardly evidence of criminal activity." *Ferris*, 355 Md. at 389–90. *Third*, in *Carter v. State*, we recognized that "'nervous, *evasive behavior is a pertinent factor in determining reasonable suspicion*.'" 143 Md. App. 670, 681 (2002) (emphasis in original) (*quoting Illinois v. Wardlow*, 528 U.S. 119, 124–25 (2000)). Here, the vehicle's driver—Mr. Potter—pulled over immediately to the side of the road after the deputy activated his emergency lights, and thus wasn't evasive at all. Nervousness in the presence of law enforcement or looking over one's shoulder at approaching law enforcement is common, and "'[a] search based on such common gestures and movements is a mere "hunch," not an articulable suspicion that

satisfie[s] the Fourth Amendment.'" *Ferris*, 355 Md. at 390 (*quoting State v. Schlosser*, 774 P.2d 1132, 1138 (Utah 1989)).

* * *

The Fourth Amendment "does not allow the law enforcement [officer] to simply assert that apparently innocent conduct was suspicious to him or her; rather, the officer must offer 'the factual basis upon which [they] base[] [their] conclusion.'" *Id.* at 391–92 (*quoting Derricott v. State*, 327 Md. 582, 591 (1992)). "'[A]n assessment of the whole picture must yield a particularized suspicion is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing.'" *Cartnail*, 359 Md. at 288 (*quoting United States v. Cortez*, 449 U.S. 411, 418 (1981)). And the State's evidence in this case, whether viewed individually or collectively, did not generate reasonable articulable suspicion that the Altima's driver was engaged in wrongdoing. The slow speed was not a traffic violation under Maryland law. Mr. Potter was not the vehicle's registered owner, and the fact that he was driving the car when it was stopped in July 2018 did not make it meaningfully more likely he was the driver on the night in question, nor was there any evidence that he was stopped in July 2018 for driving with a suspended license. Nor did the officers consider information negating the inference that Mr. Potter was the driver. Notably, Mr. Potter was not the only person who had been pulled over while driving this particular vehicle. The registered owners had not reported the vehicle stolen, and there is no allegation that Mr. Potter came to possess the vehicle illegally. The presumption on August 19, 2018 that Mr. Potter was the driver,

and if so, was driving on a suspended license, was based on an unparticularized hunch that Mr. Potter *could* be the driver. And as a result, the traffic stop was unreasonable under the Fourth Amendment, and the circuit court erred in denying Mr. Potter's motion to suppress the evidence.

JUDGMENT OF THE CIRCUIT COURT FOR TALBOT COUNTY REVERSED. COSTS TO BE PAID BY TALBOT COUNTY.