Circuit Court for Carroll County
Case No. C-06-CR-20-000379

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND**

No. 1127

September Term, 2021

CHRISTOPHER MICHAEL SNYDER

v.

STATE OF MARYLAND

Wells, C.J.,
Friedman,
Albright,

JJ.

Opinion by Friedman, J.
Concurring Opinion by Friedman, J.
Dissenting Opinion by Albright, J.

Filed: February 3, 2023

** At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

In this case, appellant Christopher Snyder appeals the denial of his motion to suppress evidence recovered after a traffic stop. Because we conclude that there was no reasonable suspicion to extend the traffic stop into a criminal investigation, we hold that the search violated the Fourth Amendment[1] and thus the Circuit Court for Carroll County erred in denying Snyder's motion to suppress the evidence that was seized. In the absence of that evidence, Snyder's conviction must be reversed.

BACKGROUND

On August 11, 2020, Sheriff's Deputy Nicholas Sherman was parked perpendicular to MD-140 observing traffic in the Finksburg area of Carroll County. Shortly after noon, Snyder drove by Deputy Sherman's parked police car. As Snyder passed by, Deputy Sherman observed that neither Snyder nor his front-seat passenger, Matthew Nagy, looked over at him and that they both sat "stiff as a board." Deputy Sherman noted that this was a "different reaction than [he had] received from the hundreds of other cars that had passed [him] that day." Based on that observation, Deputy Sherman merged into traffic and "began

[1] Article 26 of the Maryland Declaration of Rights also protects us against unreasonable searches and seizures:

> That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted.

MD. DECL. OF RTS. art. 26. The Supreme Court of Maryland (formerly known as the Court of Appeals of Maryland) has generally treated the protections of Article 26 as coterminous with those of the Fourth Amendment. *See, e.g.*, *Parker v. State*, 402 Md. 372, 386 (2007). Moreover, in the case Snyder has not advanced any argument to suggest a different result under the Maryland provision.

to follow [Snyder] and look for a motor vehicle violation." Eventually, Deputy Sherman observed Snyder move in front of a truck towing a trailer in a way that "[i]t almost appeared that the weight shifted forward as the [truck] had to apply its brakes as [Snyder] moved his vehicle from the outside lane to the inside lane in front of [the] truck." Deputy Sherman then activated his lights and siren to initiate a traffic stop for an allegedly unsafe lane change.

After Deputy Sherman activated his lights, Snyder entered the right turn lane to exit MD-140 onto Suffolk Road. Once on Suffolk Road, Snyder turned left into the parking lot of a Jiffy Mart and stopped his car at the gas pumps. Deputy Sherman got out of his police car and walked over to ask Snyder to move to the other side of the Jiffy Mart's parking lot. Snyder complied. After Snyder moved his car, Deputy Sherman approached again and advised Snyder that he had pulled him over for an improper lane change and asked for Snyder's documents. Deputy Sherman testified that he observed "high levels of nervousness, those indicators to be Mr. Snyder's arm was trembling as he provided me with his documents. I observed [the passenger's] arms to be trembling and his chest rising and falling rapidly as he provided his documents." Snyder offered to provide his insurance information but stated that he would need to charge his cellular phone briefly because his insurance card was digital. Deputy Sherman told Snyder to wave out the window when he was ready with his insurance information, and then returned to his patrol car.

After returning to his police car, Deputy Sherman conducted what he described as "a routine license and wanted check" on both Snyder and Nagy. While waiting for the

results, Deputy Sherman also ran a judiciary case search,[2] which showed that Snyder had pending charges for possession with intent to distribute a controlled dangerous substance. A judiciary case search on Nagy showed that he had previous charges related to possession of controlled dangerous substances and marijuana. In addition, after calling out Snyder and Nagy's names over the radio, another assistant sheriff's deputy responded that he'd had a recent drug contact with Nagy, and that Nagy fled during that contact. Deputy Sherman then requested a K-9 officer to come to the Jiffy Mart parking lot to determine whether a narcotics violation was occurring.

Shortly thereafter, Snyder waived Deputy Sherman back over and displayed his insurance information on his cellphone. Deputy Sherman noticed that Snyder's arm was shaking as he held up his phone. Deputy Sherman then asked Snyder to get out of his car to discuss the insurance information. Deputy Sherman told Snyder that his insurance was going to expire in a few days and instructed Snyder to make sure he renewed it. Deputy Sherman noted that Snyder didn't seem to be aware of the expiration date, and issued Snyder a written warning about renewing his insurance.

After he issued the warning, Deputy Sherman continued to question Snyder. In response to Deputy Sherman's questioning, Snyder informed Deputy Sherman that he had driven Nagy to a friend's house in Reisterstown. Snyder could not provide any information about the friend they had visited, but said that he and Nagy had met in a drug rehabilitation

[2] The Maryland Judiciary, pursuant to MD. R. 16-901, *et seq*., maintains a website that allows the user to retrieve judicial records, including records of past and pending criminal charges.

program and had known each other for about one year. Deputy Sherman next questioned Nagy separately and noted that Nagy's answers were inconsistent with what Snyder had just told him.

After questioning Snyder and Nagy, Deputy Sherman returned to his police car to await the K-9 unit. Once the K-9 unit arrived, the K-9 scanned the exterior of Snyder's car and gave a positive alert. A search of the car resulted in the recovery of a plastic sandwich bag containing five capsules containing a white powdery substance, a red shoestring that Sherman suspected was a makeshift tourniquet, a metal tin cap, five hypodermic syringes, and an empty clear capsule with white residue. Following the search, Snyder was taken into custody and informed that he would be searched once he arrived in central booking. Snyder then retrieved from his groin area a sandwich bag filled with thirteen capsules of a white powdery substance. Later testing showed that the white powdery substance in the capsules was a combination of Fentanyl and Tramadol.

Snyder was charged with two counts of possession with intent to distribute a controlled dangerous substance, and two counts of possession of a controlled dangerous substance. Prior to trial, Snyder filed a motion to suppress the evidence obtained following the traffic stop. Snyder's motion was denied after a pretrial hearing. Snyder proceeded to a bench trial and was convicted of all counts.

STANDARD OF REVIEW

When we review a circuit court's ruling on a motion to suppress, we are limited to only the evidence and testimony presented at the suppression hearing. *Nathan v. State*, 370 Md. 648, 659 (2002); *Ferris v. State*, 355 Md. 356, 368 (1999). We give deference to the

hearing judge's first-level findings of fact—who did what and when—unless those findings appear to be clearly erroneous. *Holt v. State*, 435 Md. 443, 458 (2013); *Charity v. State*, 132 Md. App. 598, 606 (2000); *Ferris*, 355 Md. at 368. Where the hearing judge did not make explicit findings of fact, we consider the evidence presented in the light most favorable to the prevailing party. *Charity*, 132 Md. App. at 606. We do not, however, defer to the hearing judge's legal conclusions regarding whether a search was valid. *Ferris*, 355 Md. at 368. It is our responsibility to apply the law to the specific facts of the case and make our own independent constitutional appraisal. *Holt*, 435 Md. at 458; *Nathan*, 370 Md. at 659; *Charity*, 132 Md. App. at 607.

Deputy Sherman was the only witness presented at the suppression hearing. In addition to his testimony, the parties also introduced an aerial photograph of the intersection at MD-140 and Suffolk Road, and the location of the Jiffy Mart on the corner. At the conclusion of the suppression hearing, the court gave its ruling orally. In total, it stated:

> First, let me say that I find the officer very credible, and I think what this boils down to really is how you view the totality of the circumstances. The Defense's major argument, at least from my observation, is the fact that there is what is arguably an inconsistency in a report.[3]
>
> That said, does that make all of the totality of the circumstances negative to the State and positive for the Defense? It does not.

[3] At the suppression hearing, Snyder cross-examined Deputy Sherman extensively about alleged inconsistencies between his report and his testimony at the hearing. We understand that these are the inconsistencies to which the hearing court referred.

> I find, from the totality of the circumstances, that there is reasonable articulable suspicion in this case. I, therefore, will deny the motion to dismiss.

In making its ruling, the suppression court stated a legal conclusion but made no specific first-level findings of fact to explain that conclusion. As a result, there are no specific findings of fact to which we must defer. *Holt*, 435 Md. at 458. We instead rely on the version of Deputy Sherman's testimony that is most favorable to the State as the prevailing party. *Ferris*, 355 Md. at 368; *Charity*, 132 Md. App. at 606. In doing so, we will give full credit to Deputy Sherman's testimony establishing the first-level facts, but we are not bound by his characterization of those facts. Moreover, while we will "give due deference to [Deputy Sherman's] training and experience," reasonable suspicion cannot be based on any officer's mere assertion "that innocent conduct was suspicious to [them]."[4] *Crosby v. State*, 408 Md. 490, 508 (2009) (cleaned up). As with the hearing judge's legal conclusions, "the reasonableness of [Deputy Sherman's] characterization of what he saw is a question of law for this Court to decide." *Id*. at 510.

[4] We note that the line of cases cited above, *Holt*, *Ferris* and *Charity*, holding that to determine whether there was an objective basis for the law enforcement officer's suspicions, courts should give deference to the officer's experience and training that allows them to "[draw] inferences and [make] deductions that might well elude an untrained person," all can be traced back to precedents that predate the *Whren* decision. *See, e.g.*, *U.S. v. Cortez*, 449 U.S. 411, 418 (1981) (requiring courts to defer to factual observations of law enforcement officers). In the post-*Whren* era, however, such deference may not be appropriate because, in a pretextual stop authorized by *Whren*, the law enforcement officer is looking for evidence to support preexisting suspicions, not engaging in a neutral evaluation of the facts.

ANALYSIS

A traffic stop is considered "a 'seizure' within the meaning of the Fourth Amendment, even though the purpose of the stop is limited and the resulting detention is brief." *Nathan*, 370 Md. at 661. A traffic stop is lawful so long as there is probable cause to believe that the driver has committed a violation of the vehicle laws. *Brice v. State*, 225 Md. App. 666, 695 (2015). "[T]he tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop and attend to related safety concerns." *Rodriguez v. United States*, 575 U.S. 348, 354 (2015) (citation omitted). "Authority for the seizure … ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." *Id*.

"Once the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention." *Nathan*, 370 Md. at 661 (quoting *Ferris*, 355 Md. at 372). The continued detention of the driver is constitutionally permissible "only if either (1) the driver consents to the continuing intrusion or (2) the officer has, at a minimum, a reasonable, articulable suspicion that criminal activity is afoot." *Ferris*, 355 Md. at 372 (citation omitted).

Given this legal framework, it is clear that Deputy Sherman's actions must be analyzed in two phases: *first*, the initial stop, and *second*, the continued detention.

As to the initial stop, the parties agree that it was valid based on Deputy Sherman's observation of Snyder's allegedly improper lane change. The parties further agree that Deputy Sherman's "mission" in this initial stop ended when he issued Snyder a written

warning to renew his insurance and declined to issue him a citation for an improper lane change. We agree that Deputy Sherman's activities in this initial stop were constitutional.[5]

After Deputy Sherman issued the written warning to Snyder to renew his insurance and declined to issue a citation for an improper lane change, however, the analysis changes and the parties no longer agree. As noted above, a continued detention is constitutionally permissible only if it is consented to or if it is supported by reasonable articulable suspicion. *Ferris*, 355 Md. at 372. There is no suggestion that Snyder gave consent, so the sole question in this case is whether Deputy Sherman had reasonable articulable suspicion for the continued detention.

"Reasonable suspicion" for the continuation of a traffic stop must be based on the specific facts and circumstances of each case and cannot be determined by referring to a standardized list of factors. *Crosby*, 408 Md. at 507. While the level of evidence required to establish reasonable suspicion is less than that required for probable cause, it must nonetheless be "more than an inchoate and unparticularized suspicion or 'hunch.'" *Id*. at 507 (cleaned up) (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)). We must evaluate the totality of the circumstances "to see whether the officer had a particularized and objective basis for suspecting illegal activity." *Nathan*, 370 Md. at 660 (citing *United States v. Arvizu*, 534 U.S. 266, 273 (2002)). Whether the facts establish reasonable suspicion is based on a "common sense, nontechnical" consideration of the "factual and practical

[5] The concurrence agrees that this initial stop was constitutional under the governing framework established by *Whren v. United States*, 517 U.S. 806 (1996), but urges the Supreme Court of Maryland to change that framework.

aspects of daily life and how reasonable and prudent people act." *Crosby*, 408 Md. at 507 (cleaned up) (quoting *Bost v. State*, 406 Md. 341, 356 (2008)).

The State relies on six observations to establish reasonable suspicion: Snyder and his passenger did not look over at Deputy Sherman's police car as they drove by; Snyder made an improper lane change after Deputy Sherman merged into traffic; after being instructed to pull over, Snyder drove very slowly and passed "multiple safe locations" before stopping at a gas pump at the Jiffy Mart; Deputy Sherman observed movement inside the car by both the passenger and the driver; Snyder appeared nervous when interacting with Deputy Sherman; and, finally, that the judiciary case search revealed that Snyder had pending charges related to the possession and distribution of a controlled dangerous substance. The State argues that these details, taken together, created reasonable suspicion for Deputy Sherman to detain Snyder to await the arrival of the K-9 unit.[6] We disagree.

1. *Failure to Look Over*

Although it is only the extension of the traffic stop that is at issue here, the State argues that the impetus for the initial stop is one of the factors that contributes to reasonable suspicion. In his testimony, Deputy Sherman acknowledged that the stop was pretextual and that Snyder came to his attention not because of a violation of the traffic laws but because, unlike every other driver who had passed Sherman's location, Snyder did not

[6] We note that the dissenting opinion largely adopts the State's reasoning, particularly with respect to Snyder's conduct at the Jiffy Mart.

glance in his direction. Deputy Sherman testified that he believed Snyder intentionally directed his gaze away from the parked police car because he wished to avoid attracting attention to himself, and in doing so, attracted Deputy Sherman's attention. Deputy Sherman stated that he considered it suspicious that a passing driver would so conspicuously try to avoid looking in his direction and had a hunch that the driver must have something to hide. Deputy Sherman decided to follow the car until he could justify making a traffic stop.

Although Deputy Sherman placed great significance on Snyder's failure to glance over as he drove by on MD-140, an action as commonplace as looking in the direction of a police officer or not looking is of questionable value to the determination of reasonable articulable suspicion. While here Deputy Sherman considered it suspicious that Snyder did not look over at him, under other circumstances, law enforcement officers have asserted that it was suspicious for someone to look over at them. *See, e.g.*, *Ransome v. State*, 373 Md. 99, 101 (2003) (noting that the police officer considered it suspicious that the suspect had turned to look at an unmarked police car as it drove past). Taken together, the unacceptable result is that a driver can raise suspicion either by looking at a police officer and by not looking at a police officer. "[A]llowing both a factor and its opposite to support a finding of reasonable suspicion impermissibly allows the police to detain an individual for 'suspiciously innocent' behavior." *Ferris*, 355 Md. at 390 (citing *Gonzalez–Rivera v. Immigr. & Naturalization Serv.*, 22 F.3d 1441, 1446-47 (9th Cir.1994)). When either looking or not looking at a police officer could be relied on as creating reasonable

suspicion, that factor as a whole should be afforded little, if any, importance to the determination of reasonable suspicion. *See Ferris*, 355 Md. at 390.

The Fourth Amendment "does not allow a law enforcement official to simply assert that innocent conduct was suspicious to [them]." *Crosby*, 408 Md. at 508 (cleaned up). A police officer must be able to "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." *Crosby*, 408 Md. at 508 (citing *Ransome v. State*, 373 Md. 99, 105 (2003)). Deputy Sherman offered no explanation beyond his belief that Snyder must have had "something" to hide. Under the governing standard of review previously discussed, we give full credit to Deputy Sherman's testimony establishing the first-level fact that as Snyder drove by, both Snyder and his passenger sat stiffly and did not look over at Deputy Sherman's parked police car. We are not bound, however, by Deputy Sherman's characterization of that fact, and we conclude that Snyder's failure to look over at Deputy Sherman's police car does not create reasonable suspicion to detain Snyder.

2. Improper Lane Change

The State next argues that Snyder's improper lane change combined with his purposeful effort to not look over at Deputy Sherman's police car supported a "reasonable inference that [Snyder] may have been trying to evade police." Contrary to the State's assertion, we see nothing in the record connecting the lane change to Snyder's failure to look at Deputy Sherman's stationary police car.

An improper lane change can indeed be a violation of the road safety regulations, but it is hardly one uniquely committed by drivers who are involved in criminal activity or

who are trying to evade the police. Moreover, the State presented no evidence to connect Snyder's lane change with Deputy Sherman's presence. At the time that Snyder allegedly made the improper lane change, Deputy Sherman had not yet activated his lights and sirens to alert Snyder that he was to pull over, and there is nothing to indicate that Snyder was aware of or reacting to Deputy Sherman's presence. Apart from Deputy Sherman's unsupported belief that Snyder was trying to get away from him, the State presented no evidence that would distinguish Snyder's lane change from any other. We note additionally that Deputy Sherman did not issue a citation for this lane change or even give Snyder a verbal warning. This suggests that it was not a particularly egregious violation. We fully accept Deputy Sherman's testimony establishing the first-level fact that Snyder made an improper lane change, causing another vehicle to apply its breaks. We disagree, however, with Deputy Sherman's characterization of the lane change as a suspicious attempt to evade the police.

3. Slow Speed & Parking at the Gas Pumps

The State next argues that Snyder's behavior after he was alerted to pull over contributes to a finding of reasonable suspicion. We find no evidence in the record, however, to support the State's assertion.

At the suppression hearing, Deputy Sherman testified that after Snyder turned onto Suffolk Road, he drove very slowly "past multiple safe locations" before eventually turning into the parking lot and up to the gas pumps of the Jiffy Mart. Deputy Sherman identified three places that he believed Snyder could have safely stopped after exiting MD-140: he could have turned right onto an unmarked lane; he could have stopped in the right-hand

turn lane leading to that unmarked lane; or he could have turned left into the parking lot of the Jiffy Mart. Deputy Sherman testified that he considered it suspicious that Snyder decided to turn left in the Jiffy Mart because he believed people involved in criminal activity were more likely to pull into a public business to try to avoid contact with the police. Deputy Sherman further testified that he considered it significant that Snyder pulled up the gas pump rather than into a parking space because he believed that it was yet another attempt by Snyder to avoid contact with the police.

We give credit to Deputy Sherman's testimony establishing the first-level facts that Snyder drove very slowly after exiting MD-140, that he turned left into the Jiffy Mart, and that he parked at the gas pump. There is no evidence in the record, however, to support Deputy Sherman's characterization of these actions as suspicious.

Based on Deputy Sherman's description of the area and the aerial photograph admitted into evidence, there was no singularly obvious place for Snyder to have pulled over after Deputy Sherman activated his lights and siren. It does not strike us as strange or suspicious for Snyder, or any other driver in his position, to have driven slowly while trying to decide on a safe place to stop. In addition, Deputy Sherman's claim that pulling into the Jiffy Mart was suspicious because criminals often turn into a public area to avoid contact with police simply defies common sense. To adopt such a presumption could cast suspicion upon anyone entering a public area in the presence of police. We can conceive of no rational basis for attaching criminal significance to Snyder pulling up to the gas pump rather than into a parking space.

4. Movement Inside the Vehicle

The State further asserts that Deputy Sherman's observation of movement inside Snyder's car supports a finding of reasonable suspicion. Contrary to the State's assertion, however, this is not a case where the occupants of the car were making furtive movements in an apparent effort to hide or retrieve something illicit. The evidence in the record simply does not support the State's position.

We fully credit Deputy Sherman's testimony establishing the first-level facts that as Snyder was slowly driving into the parking lot of the Jiffy Mart, the passenger, Nagy, repeatedly turned around to look behind them and that Snyder shrugged his shoulders several times. While we accept these facts, we do not agree with Deputy Sherman's characterization of these actions as suspicious. Rather, "when confronted with a traffic stop, it is not uncommon for drivers and passengers alike to turn to look at an approaching police officer." *Ferris*, 355 Md. at 390 (cleaned up). We further note that, similar to Snyder's failure to look over at Deputy Sherman's police car, depending on the circumstances police officers have asserted that it is suspicious both when the occupants of a car look back at them and when they do not. When a factor and its opposite can both be used as evidence to establish reasonable suspicion, neither should be accorded significant weight. *Id*. at 390. Such commonplace gestures are "hardly evidence of criminal activity." *Id*., 389-90. There must be something more to distinguish Snyder's behavior from the vast majority of other travelers who find themselves in a similar situation. But here, Snyder's actions were well "within the range of normal, ordinary behavior given the circumstances of this case." *Id*.

5. Nervousness

The State next cites Deputy Sherman's observation that Snyder and his passenger appeared to be nervous and that Snyder's hand was shaking when he showed Deputy Sherman the insurance card on his cellular phone. The nervousness of an individual pulled over by the police is frequently cited as a factor supporting reasonable suspicion, and almost as frequently, courts have cautioned against according too much weight to the State's "routine claim that garden variety nervousness accurately indicates complicity in criminal activity." *Sellman v. State*, 449 Md. 526, 553-54 (2016); *see also Ferris*, 355 Md. at 389 (citing cases). Indeed, this Court has explicitly held that

> nervousness, or lack of it, of the driver pulled over by a [law enforcement officer] is not sufficient to form the basis of police suspicion that the driver is engaged in the illegal transportation of drugs. There is no earthly way that a police officer can distinguish the nervousness of an ordinary citizen under such circumstance from the nervousness of a criminal who traffics in narcotics.

Whitehead v. State, 116 Md. App. 497, 505 (1997).

We fully credit Deputy Sherman's testimony establishing the first-level facts that Snyder and Nagy both appeared nervous, and that Snyder's hand was shaking when he held out his cellular phone. For Snyder's nervousness to be relevant to the determination of reasonable suspicion, however, there must be something to distinguish it from the nervousness that any traveler might experience when unexpectedly stopped by the police.

Moreover, although Deputy Sherman believed that Snyder appeared nervous, Snyder was nevertheless cooperative. He moved his car to away from the gas pumps when asked to do so, he answered Deputy Sherman's questions, he exited the car when requested,

and he volunteered his insurance information. There was nothing about Snyder's behavior that created an objective basis to suspect that he was involved in criminal activity.

6. Pending Charges

Finally, the last factor the State relies upon to establish reasonable suspicion is Deputy Sherman's discovery that Snyder had pending charges related to the possession and distribution of a controlled dangerous substance. The State argues that even if all of the other factors taken together were insufficient for Deputy Sherman to be able to articulate an objective basis for his suspicions, the discovery of Snyder's pending charges provided Deputy Sherman with an identifiable crime and the foundation he needed to justify detaining Snyder. The State's argument, however, is precisely the problem.

Prior to the discovery of Snyder's pending charges, Deputy Sherman had only a general hunch that Snyder had "something" to hide. Beyond this inchoate suspicion, however, Deputy Sherman could not articulate any objective basis for his suspicions or connect Snyder's actions with suspicion of any specific criminal activity. There was nothing about Snyder's behavior that reasonably distinguished him from any other motorist that Deputy Sherman could have pulled over. It was only upon discovery of the pending charges that Deputy Sherman could attribute his suspicions to the possible concealment of drugs. While previous involvement in criminal activity is relevant to evaluating the existence of reasonable suspicion, to allow it to serve as the sole basis for characterizing otherwise neutral behavior as suspicious "would be tantamount to holding that a person with a prior criminal history may be detained at will." *Munafo v. State*, 105 Md. App. 662, 676 (1995). This we will not do. Thus, while we fully credit the first-level fact that at the

time he was pulled over Snyder had pending charges, we conclude that the discovery of those charges neither provided reasonable suspicion to detain Snyder nor retrospectively justified characterizing his other actions as suspicious.

CONCLUSION

It is not enough for a police officer to note that a driver stood out because their behavior differed from the other travelers around them. The constitutional test is not whether actions are peculiar or unusual, but whether they suggest criminal activity. *Brice*, 225 Md. at 695-96. For Snyder's continued detention to have been constitutional, Deputy Sherman had to be able to explain with some particularity not only why he chose to detain Snyder, but also how those factors, "when viewed in the context of all the other circumstances known to [him], [were] indicative of criminal behavior." *Crosby*, 408 Md. at 508. Having reviewed the record of the suppression hearing and evaluated the totality of the circumstances, we conclude that "the combination of factors, viewed in their totality, are no more indicative of criminal activity than any one factor assessed individually." *Id.* at 511. Deputy Sherman had no more than an inchoate hunch that Snyder was involved in any sort of criminal activity. "A hunch, without more, does not rise to the level of reasonable suspicion." *Munafo*, 105 Md. App. at 676. We, therefore, conclude that the evidence should have been suppressed.

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

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Concurring Opinion by Friedman, J.

Filed: February 3, 2023

* 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. R. 1-104.

** At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

As noted in the majority opinion, neither below nor in this Court has Snyder challenged the constitutionality of the initial stop based on the pretext of an allegedly improper lane change. That's because of a case called *Whren v. United States*.[1] In *Whren*, the unanimous United States Supreme Court held that a law enforcement officer may constitutionally stop a motorist on a pretext. 517 U.S. at 814. Deputy Sherman's testimony was very clear that this was a *Whren*-style stop. He testified that he didn't like that Snyder and Nagy didn't look over at him when they drove by his perpendicularly parked police car. He pulled out after them, not because they had done anything wrong to that point, but solely in the hope that they would commit a minor infraction and that would give him a pretext to investigate further.

Snyder then changed lanes.

I don't know whether Snyder's lane change was improper or not. It may have been. It may not have been. I note that Deputy Sherman didn't write Snyder a citation for an improper lane change. Deputy Sherman didn't give Snyder a written or verbal warning for an improper lane change. The allegedly improper lane change simply disappears from the story. I'm not calling Deputy Sherman a liar. I'm saying, rather, that the law—as interpreted by *Whren*—doesn't care whether Deputy Sherman was lying about the allegedly improper lane change.

In my view, *Whren* was wrong when it was decided in 1996 and remains both wrong and dangerous today. I offer only a sketch of these views:

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[1] 517 U.S. 806 (1996).

- *First*, the *Whren* decision allows law enforcement officers to stop motorists solely on the basis of a pretextual reason. When a law enforcement officer can stop us—any of us—for a pretextual reason, we are saying that they can stop us for any reason or, effectively, for no reason at all. Because of that, *Whren* makes us all less free.

- *Second*, academic comment has been consistent that *Whren*'s result was not compelled by the text or history of the Fourth Amendment and was a significant departure from prior precedents, under which a neutral judicial officer determines the reasonableness of law enforcement activities.[2] *Whren* was wrongly decided.

- *Third*, *Whren* leads, almost inexorably, to discriminatory policing. *Whren* has directly led to disproportionate harms to drivers of color.[3] That is not the case

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[2] Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of Whren v. United States*, 83 GEO. WASH. L. REV. 882, 889 (2015); Wayne R. LaFave, *The Routine Traffic Stop from Start to Finish: Too Much Routine, Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1852-61 (2004); Diana Roberto Donahoe, *"Could Have," "Would Have:" What the Supreme Court Should Have Decided in Whren v. United States*, 34 AM. CRIM. L. REV. 1193, 1196 (1997); *see also* Jonathan Witmer-Rich, *Arbitrary Law Enforcement is Unreasonable: Whren's Failure to Hold Police Accountable for Traffic Enforcement Policies*, 66 CASE W. RSRV. L. REV. 1059, 1064-66 (2016).

[3] *See* David A. Harris, *Driving While Black and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 547 (1996-1997) ("*Whren* represents a clear step in the other direction—toward authoritarianism, toward racist policing, and toward a view of minorities as criminals, rather than citizens."); Phyllis W. Beck & Patricia A. Daly, *State Constitutional Analysis of Pretext Stops: Racial Profiling and Policy Concerns*, 72 TEMP. L. REV. 597 (1999) ("The primary concern with pretext stops is that they facilitate racial profiling, the process of singling out drivers based on their race."); Abraham Abramovsky & Jonathan I. Edelstein, *Pretext Stops and Racial Profiling after Whren v. United States: the New York and New Jersey Responses Compared*, 63 ALB. L. REV. 725, 726 (2000) ("In other words, the *Whren* Court validated one of the most common methods by which racial profiles are put into effect—the pretext stop."); I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 33-34 (2011) (*Whren* "essentially green-lighted the police practice of singling out minorities for pretextual traffic stops in the hope of discovering contraband"); Kami Chavis Simmons, *Beginning to End Racial Profiling: Definitive Solutions to an Elusive Problem*, 18 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 25, 28-29 (2011) (describing the *Whren* holding and

here: Snyder is white. But the disproportionate harm that *Whren* causes to drivers of color provides another basis for abandoning that failed doctrine.

- *Fourth*, *Whren* may create more and more adversarial interactions between law enforcement and the citizenry, which may in turn add to increased dangers to both groups.[4]

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concluding that "highly discretionary [investigatory] stops permit racial bias, either explicit or implicit, to go unchecked and unpunished"); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271; Mark M. Dobson, *Police, Pretextual Investigatory Activity, and the Fourth Amendment: What Hath Whren Wrought*, 9 ST. THOMAS L. REV. 707 (1997); Jennifer A. Larrabee, *"DWB (Driving While Black)" and Equal Protection: The Realities of an Unconstitutional Police Practice,* 6 J.L. & POL'Y 291 (1997); David O. Markus, *Whren v. United States: A Pretext to Subvert the Fourth Amendment*, 14 HARV. BLACKLETTER L. J. 91 (1998); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999); Adero S. Jernigan, *Driving While Black: Racial Profiling in America*, 24 LAW & PYSCHOL. REV. 127 (2000); Alberto B. Lopez, *Racial Profiling and Whren*: *Searching for Objective Evidence of the Fourth Amendment on the Nation's Roads*, 90 KY. L.J. 75 (2001); Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002); Margaret M. Lawton, *The Road to Whren and Beyond: Does the "Would Have" Test Work?,* 57 DEPAUL L. REV. 917 (2008); M. K. B. Darmer, *Teaching Whren to White Kids*, 15 MICH. J. RACE & L. 109 (2009); Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land*: *United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005 (2010); SARAH A. SEO, POLICING THE OPEN ROAD: HOW CARS TRANSFORMED AMERICAN FREEDOM (2019); Anthony J. Ghiotto, *Traffic Stop Federalism: Protecting North Carolina Black Drivers from the United States Supreme Court*, 48 U. BALT. L. REV. 323 (2019); Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN. L. REV. 637 (2021).

[4] *See* Jordan Blair Woods, *Autonomous Vehicles and Police De-Escalation*, 114 NW. U.L. REV. ONLINE 74, 98 (2019) ("In allowing officers to initiate pretextual traffic stops without adequate information about an unrelated crime, pretextual traffic stops distort and obfuscate the true dangers of vehicle stops in ways that undermine both officer and civilian safety."); Jordan Blair Woods, *Policing, Danger Narratives, and Routine Traffic Stops*, 117 MICH. L. REV. 635, 703-04 (2019) (discussing the danger risks to law enforcement officers during routine traffic stops and how those risks are exacerbated during pretextual criminal enforcement stops); Ekow N. Yankah, *Pretext and Justification: Republicanism, Policing, and Race*, 40 CARDOZO L. REV. 1543 (2019) (discussing how pretextual stops result in "countless unjustified and tense stops inevitably leading to explosive violence").

The Supreme Court of Maryland has signaled that in situations in which federal constitutional doctrine is hopelessly confused and deadlocked it is willing to develop independent state constitutional doctrine to replace the failed federal doctrine. *Leidig v. State*, 475 Md. 181, 209, 237-39 (2021) (declining to follow federal Confrontation Clause jurisprudence regarding authors of scientific reports because the federal jurisprudence is hopelessly confused and deadlocked); *see also Jedlicka v. State*, 481 Md. 178, 201 (2022) (describing *Leidig*). In my view, the U.S. Supreme Court's *Whren* case represents a similarly failed federal constitutional doctrine and, as a result, in an appropriate case,[5] the Supreme Court of Maryland should adopt an independent interpretation of Article 26 of the Maryland Declaration of Rights,[6] free from the malign influence of the *Whren* doctrine.[7]

[5] It is fair to wonder why I raise this in a concurring opinion in a case in which the issue was so clearly not preserved. The answer is threefold. *First*, it is obvious that the problems here did not begin with the initial stop for the allegedly improper lane change or with its extension. Rather, they began when Deputy Sherman chose to follow Snyder merely because he didn't like that Snyder didn't look over at him. That is the root of all that followed. *Second*, I raise the issue to point out that merely because it is constitutional, does not make this type of policing necessary, safe, appropriate, or consistent with our democratic values. Law enforcement can voluntarily decide to forgo these tactics. *Third*, I raise the point to encourage defense counsel to preserve the issue in an appropriate, future case.

[6] Slip Op. at 1 n.1 (discussing Article 26 of the Maryland Declaration of Rights).

[7] Several of our sister state courts have rejected *Whren* and developed new, better doctrine under their respective state constitutions. *State v. Gonzales*, 257 P.3d 894, 896 (N.M. 2011) (holding that a pretextual traffic stop violates the New Mexico Constitution unless there is probable cause or reasonable suspicion for the real purpose for the stop); *State v. Ladson*, 979 P.2d 833, 838 (Wash. 1999) (rejecting pretextual stops as violating Washington State Constitution); *State v. Ochoa*, 206 P.3d 143, 148 (N.M. App. 2008) (finding the "federal analysis [under *Whren*] unpersuasive and incompatible with [New

Mexico]'s distinctively protective standards for searches and seizures of automobiles"); *see also* Margaret M. Lawton, *State Responses to the Whren Decision*, 66 CASE W. RES. L. REV. 1039 (2016); Michael Sievers, Note, *State v. Ochoa: The End of Pretextual Stops in New Mexico?*, 42 N.M. L. REV. 595 (2012).

Circuit Court for Carroll County
Case No. C-06-CR-20-000379

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND**

No. 1127

September Term, 2021

CHRISTOPHER MICHAEL SNYDER

v.

STATE OF MARYLAND

Wells, C.J.,
Friedman,
Albright,

JJ.

Dissenting Opinion by Albright, J.

Filed: February 3, 2023

* 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. R. 1-104.

** At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Respectfully, I dissent.

Even if Mr. Snyder's behavior is susceptible to the innocent explanation the Majority posits, another reasonable interpretation is that Mr. Snyder was involved in criminal activity. This was particularly apparent when Mr. Snyder drove into the gas station and parked at the gas pump—a location not well-suited to a traffic stop, and that would likely prompt further instructions to Mr. Snyder to move his vehicle. By that time, Mr. Snyder knew Deputy Sherman was behind him because the deputy had already signaled Mr. Snyder to pull over, but Mr. Snyder nevertheless had "slow rolled" past a spot or two that he could have pulled in to, and was shrugging his shoulders. Mr. Nagy had also repeatedly turned around to look behind. Taken with all of Deputy Sherman's other observations, that is under the "totality of the circumstances," these observations reasonably suggest that Mr. Snyder and Mr. Nagy were buying time in order to conceal contraband from Deputy Sherman. Even if this interpretation is not the only one reasonably possible, *Terry* permitted Deputy Sherman to detain Mr. Snyder in order to resolve the ambiguity between whether Mr. Snyder's behavior was the result of innocent or criminal behavior. *Illinois v. Wardlow*, 528 U.S. 119, 125-26 (2000).

Accordingly, I would affirm the circuit court's denial of Mr. Snyder's motion to suppress evidence.