UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1171

September Term, 2014

JAMES COLLICK

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Hotten,
Nazarian,

JJ.

Opinion by Hotten, J.

Filed: September 23, 2015

On June 27, 2014, the Circuit Court for Baltimore City held a hearing on appellant's motion to suppress evidence seized pursuant to a warrantless search of his person. The court denied appellant's motion and, thereafter, a jury convicted James Collick, appellant, of possession of cocaine.[1] *See* Maryland Code (Repl. Vol. 2012), § 5-601 of the Criminal Law Article. Appellant was sentenced to four years of incarceration for possession of cocaine.

On appeal, appellant presents two questions for review, as follows:

> [I]. Did the trial court abuse its discretion when it refused [appellant] counsel's request to proceed to administrative court to seek a postponement, and did the administrative court abuse its discretion when it refused to allow [appellant's] counsel to proceed to administrative court to seek a postponement?
>
> [II]. Did the trial court err when it denied [appellant]'s motion to suppress?

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

PROCEDURAL BACKGROUND

The evidence presented at trial is not relevant to a review of either question raised on appeal, so we only address the facts related to appellant's pre-trial postponement request and appellant's pre-trial motion to suppress. *See Washington v. State*, 180 Md. App. 458, 461 n.2 (2008) ("Appellant has not challenged evidentiary sufficiency. Therefore, we recite only the portions of the trial evidence necessary to provide a context for our discussion of the issues presented.").

[1] The jury found appellant not guilty of possession with intent to distribute cocaine.

DISCUSSION

I . Postponement Request

On June 27, 2014, prior to the suppression hearing, the parties appeared before Judge Howard, the administrative judge, to discuss the status of the case. Appellant's counsel informed the court that, other than appellant not having street clothes available, they were prepared to go to trial. The administrative judge indicated that he would "grant a postponement to [appellant], because you don't want him showing up like that in front of a jury." Appellant, however, opposed the postponement and stated that he wanted to go to trial. As a result, the case was referred to the trial judge for the parties to address any outstanding motions.

The parties appeared before Judge Brown, the trial judge, and the court asked whether there had been any plea negotiations between the parties. Appellant's counsel responded that there had not been any discussions because appellant had a pending violation of probation before Judge Doory, who was on vacation. The court asked the parties why they did not request a postponement and appellant's counsel responded that appellant "did not wanna be hit with a postponement." Appellant's counsel explained to appellant the option of continuing the case in order to speak to Judge Doory regarding a combined plea and appellant responded, "I know, but I thought you said it wasn't no guarantee he was gonna do anything." Appellant's counsel confirmed that there was no guarantee, but explained that the postponement "would've allowed us to understand where Judge Doory was within the context of what we are doing." Appellant indicated that he understood.

The conversation with the court, continued, as follows:

> THE COURT: Sir, do you wish to talk to Judge Doory about whether or not he is willing to work out a . . . combined plea, which means that if, in fact, you pled to this as well as to the VOP, he may certainly do something. I don't know if he will or not, but do you wish to have a conversation or have your lawyer have a conversation with Judge Doory concerning what he would do if, in fact, you were found guilty of this case and if he was willing to work out a combined plea?
>
> [APPELLANT]: I mean, I understand that, but –
>
> THE COURT: I just asked you if you want to. I don't really – if you don't want to, you don't. I'm not trying to press you to do one way or the other.
>
> [APPELLANT]: No, no, no. I'm just not guilty of this.
>
> THE COURT: What do you want to do? What do you want to do?
>
> [APPELLANT]: Go for – I don't think I'm guilty of this, so go forward.

The court took a brief recess to give the State's witnesses time to appear. When the parties returned to court, the following colloquy occurred:

> [STATE]: Your Honor, it's my understanding that [appellant] would like to postpone this motion and trial in order for [his counsel] and I to speak with Judge Doory.
>
> THE COURT: Now, see, I just looked at him and he did like this, like maybe you all are lying.
>
> [APPELLANT]: No. I mean, that's –
>
> THE COURT: Stand up when you're talking to me.
>
> [APPELLANT]: I'm sorry. That's what they said. I – I mean, I don't like it, but I'm listening to –
>
> THE COURT: No, no. The question is, this is your – this is not [your counsel's] life. This is not [the prosecutor's] – Am I right?
>
> [STATE]: Yes.

THE COURT: – life. This is not Officer Duffie's life. This is yours. So my question to you is, what do you want to do? You're a grown man. What do you want to do?

[APPELLANT]: I'm gonna take the advice of my attorney.

THE COURT: I have to see if Judge Doory, I mean Judge Howard will have you back. I don't know whether he will or he won't. I don't know, because I understand from him, because I talked to him earlier when I stepped down, and he said he offered you the opportunity to have a postponement because you don't have any clothes here. And he said that you said no, you didn't want a postponement. So I don't know if he'll take you back now or not. I'll ask him, but we'll see. He may or may not. I can't make him take you back, so let me see if my staff can get him on the phone.

(On telephone) Will you see if Judge Howard can speak with me, please. Mm-hmm.

(On telephone) Would you call and see when does Judge Howard, I mean Judge – look on the list and see when Judge Doory returns from vacation. Mm-humm.

(Pause in proceedings.)

(On telephone) He's not back until Tuesday? Okay. Thanks. Mm-hmm.

(On telephone) Yes? Thank you. Of course, you know the guy wants a postponement. He wants to talk to Judge Doory and see what Judge Doory – mm-hmm. I know, and I told – I made it very clear on the record that I would only send him back if you say yay, but if you say no, they're going to be going to trial. Okay. Thank you so much. Thank you. Bye-bye. Sure.

Well, Judge Howard says he's not willing to accept it back for a postponement. He said you had that opportunity upstairs and he was not going to allow it. So I can't send it back to 45 without permission. So now we're ready to begin with the motion; is that correct?

Thereafter, the court heard and denied appellant's motion to suppress, which will be discussed in greater detail, *infra*. Trial began the next day the court was in session, on Monday, June 30, 2014. The following colloquy occurred before the jury panel was sworn:

> [STATE]: Your Honor, before you took the bench, [appellant's counsel] indicated that they had a request and I just want to make sure that it's on the record and –
>
> THE COURT: What request?
>
> [APPELLANT'S COUNSEL]: It was, my client brought to my attention that Friday was a bit of a misunderstanding before Judge Howard upstairs. He thought that the only postponement was due to clothes, not that we were trying to negotiate something and because the State that was up there, it wasn't [this prosecutor], it was someone standing in there for her and so there was –
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> THE COURT: And Judge Howard and I talked about that.
>
> [APPELLANT'S COUNSEL]: Right. And and –
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> THE COURT: No, no, we talked about that.
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> [APPELLANT'S COUNSEL]: – so that was a misfire or however you want to put it.
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> THE COURT: I don't know whether it was a misfire or not but I know that when I discussed with Judge Howard, I knew about the clothes issue and he wasn't saying that you had discussed this issue with him, meaning talking to Judge Howard, all he is saying is that you all were before him and that issue could have come up . . . in front of Judge Howard and it did not, and so therefore he is indicating he is not – was not going to take it back . . . for a postponement request, so I can't send it back unless he receives it. Okay? All right. Let's stand back. Let's stand back. Thank you.

The case proceeded to trial and appellant was convicted and sentenced, as discussed, *supra*.

Appellant contends that "[a] review of the circumstances of this case reveals that Judges Howard and Brown, separately and jointly, abused their discretion when they refused to allow [him] to return to administrative court for a hearing on his motion to postpone." The State responds that, on the day of trial, appellant "never renewed his

request for a postponement and indeed, acquiesced in the court's earlier denial." The State argues that even if the issue were preserved, "[t]he court was not required to grant a last-minute postponement for plea negotiations when that could easily have been accomplished well in advance of the trial date."

"An appellate court reviews for abuse of discretion a trial court's ruling on a motion to postpone." *Howard v. State*, 440 Md. 427, 441 (2014). We also review for abuse of discretion a trial court's decision not to send a case to an administrative judge for a hearing on a motion to postpone. *See Jones v. State*, 403 Md. 267, 301 (2008). The "'party challenging the discretionary ruling on a motion for a postponement has the burden of demonstrating a *clear* abuse of discretion[.]'" *State v. Taylor*, 431 Md. 615, 646 (2013) (quoting *State v. Frazier*, 298 Md. 422, 452 (1984)) (emphasis in original). "We have described such an abuse of discretion as occurring only where no reasonable person would take the view adopted by the [trial] court, or where the court acts without reference to any guiding rules or principles." *Prince v. State*, 216 Md. App. 178, 203-04 (2014) (internal quotation marks and citations omitted).

Here, appellant stated on the record twice, once before Judge Howard and once before Judge Brown, that he did not want a postponement and that he wanted to proceed with the trial. While appellant rejected Judge Howard's postponement offer only on the basis of his clothes, when the parties appeared before Judge Brown, the option of postponing the case to discuss a plea agreement with Judge Doory was presented to appellant, and appellant still indicated that he wished to go forward with the trial. Then, as the court was about to start the motions hearing, after rejecting the opportunity for a

postponement twice, appellant changed his mind and stated that he wished to "take the advice of [his] attorney" and have the case postponed.

Judge Brown, the trial judge, did not have authority to grant appellant's motion to postpone, so she contacted Judge Howard, the administrative judge, to determine whether he would have the parties back for another postponement hearing. *See Howard*, 440 Md. at 435-37 (holing that any circuit court judge may deny a motion to postpone, but only a county administrative judge or that judge's designee may grant a motion to postpone). Judge Brown explained to Judge Howard that appellant wanted a postponement to talk to Judge Doory. Knowing appellant's reason for the postponement request, Judge Howard refused to accept the case back for a second postponement hearing because appellant already had an opportunity. Under these circumstances, Judge Brown did not abuse her discretion in failing to send the case back to Judge Howard because Judge Howard, who was the only one that had authority to grant the postponement, indicated that he would not accept the case back for another postponement hearing.

Judge Howard, likewise, did not abuse his discretion in denying appellant's request for a second postponement hearing. The parties were already aware that appellant was on probation and that a guilty finding would cause him to violate Judge Doory's probation. Appellant's counsel had plenty of time to talk to the prosecutor and Judge Doory about a potential joint plea agreement prior to the scheduled trial date. Further, appellant's counsel could have, but did not, encourage appellant, while they were in front of Judge Howard, to accept the postponement so they could discuss a possible plea agreement with Judge Doory.

More importantly, as appellant acknowledged when he was before Judge Brown, there was no guarantee that Judge Doory would grant appellant any leniency for the violation of probation and no guarantee that they would even be able to come to a combined plea agreement. The postponement was not requested for the purpose of securing witnesses or gathering evidence, but rather for a reason wholly unrelated to trial preparations. Under these circumstances, neither Judge Brown nor Judge Howard, collectively or individually, abused their discretion in denying appellant's postponement request.

II. Motion to Suppress

At the suppression hearing, Detective Carnest McDuffie ("Detective McDuffie"), was accepted as an expert in the field of identification and packaging of controlled dangerous substances ("CDS"). Detective McDuffie testified that, as a result of his training, he was familiar with the identification, sale, packaging, look, and smell of marijuana. He explained that marijuana smells differently depending on the THC count and that marijuana with higher THC levels will have a more potent smell. In some instances, he explained, the smell is so potent that "[y]ou don't even have to . . . have it on your person and you can smell it." Detective McDuffie also noted that if he got close enough, he would be able to pinpoint where the smell of marijuana was coming from.

On October 21, 2013, around 9:30 p.m., Detective McDuffie was parked at the intersection of McHenry and Catherine Streets in Baltimore City, with his windows down, when he observed a gray minivan driving Southbound on Catherine Street. The minivan drove through the intersection where Detective McDuffie was positioned with the windows down and Detective McDuffie "smelled the odor of unburnt marijuana coming from the

direction of where the – the van rode past."[2] Detective McDuffie pulled behind the vehicle, activated his lights and sirens, and conducted a traffic stop of the vehicle.

As Detective McDuffie approached the driver's side of the vehicle, the odor of marijuana became stronger. Appellant was the only person inside the vehicle and he complied with Detective McDuffie's request to exit the vehicle. Once appellant stepped outside of the vehicle, Detective McDuffie smelled the odor of marijuana emanating from appellant's person and, accordingly, detained appellant and performed a pat-down search looking for marijuana. During the pat-down search, Detective McDuffie did not find any marijuana, but instead, recovered suspected cocaine from appellant's front right pants pocket. Appellant was placed under arrest, Detective McDuffie performed an inventory search of the vehicle, wherein he recovered suspected CDS from the ashtray, and then the vehicle was towed.

The court, relying on *Ford v. State*, 37 Md. App. 373 (1977), held that the smell of marijuana gave Detective McDuffie probable cause to arrest appellant, and accordingly, denied appellant's motion to suppress.[3] In doing so, the court credited Detective McDuffie's testimony and acknowledged that although the detective initially testified that he smelled unburnt marijuana, he later clarified that the smell was burnt marijuana.

[2] Detective McDuffie later corrected himself and stated that the odor was of burnt marijuana.

[3] In *Ford*, this Court held "that knowledge gained from the sense of smell alone [i.e. the smell of marijuana] may be of such character as to give rise to probable cause for a belief that a crime is being committed in the presence of the officer." 37 Md. App. at 379.

On appeal, appellant contends that "because the officer searched [him] before he was arrested and because the search did not qualify as a search incident to arrest, the trial court erred when it denied [his] motion to suppress." Appellant also argues that the court's factual finding relating to the officer's credibility was clearly erroneous. Appellant admits that his first argument is not preserved for review, but argues that this Court should address the merits on appeal because the prosecutor raised the issue and it was decided on by the court.

The State responds that appellant's argument that he was not arrested before he was searched was not preserved for review, but that even if it were preserved, the search was proper because Detective McDuffie had probable cause to arrest before he conducted the search. The State argues that credibility determinations are to be made by the trial court and, further, that the supposed inconsistencies "in Detective McDuffie's testimony are really not inconsistencies at all, and do not remotely suggest that the court committed clear error in finding the detective credible."

The Court of Appeals has articulated the following standard of review:

> When reviewing an appeal from the denial of a motion to suppress evidence, an appellate court looks only to the evidence that was presented at the suppression hearing. The reviewing court views the evidence in the light most favorable to the prevailing party and defers to the motions court with respect to its first level factual findings. The ultimate determination of whether there was a constitutional violation, however, is an independent determination that is made by the appellate court alone, applying the law to the facts found in each particular case.

Belote v. State, 411 Md. 104, 120 (2009) (internal citations omitted).

We address each of appellant's arguments on appeal, in turn, *infra*.

Search incident to arrest

First, we must address the threshold issue of preservation. Maryland Rule 4-252 governs the mandatory motions that must be raised in circuit court and provides, in pertinent part:

> (a) **Mandatory motions.** In the circuit court, the following matters shall be raised by motion in conformity with this Rule and if not so raised are waived unless the court, for good cause shown, orders otherwise:
>
> * * *
>
> (3) An unlawful search, seizure, interception of wire or oral communication, or pretrial identification
>
> * * *
>
> (e) **Content.** A motion filed pursuant to this Rule shall be in writing unless the court otherwise directs, shall state the grounds upon which it is made, and shall set forth the relief sought. A motion alleging an illegal source of information as the basis for probable cause must be supported by precise and specific factual averments. Every motion shall contain or be accompanied by a statement of points and citation of authorities.

"The purpose of [Md.] Rule 4-252 is 'to alert both the court and the prosecutor to the precise nature of the complaint, in order that the prosecutor have a fair opportunity to defend against it and that the court understand the issue before it.'" *Ray v. State*, 435 Md. 1, 14 (2013) (quoting *Denicolis v. State,* 378 Md. 646, 660 (2003)). "Therefore, the word 'raise,' as used in subsection (a) of [Md.] Rule 4-252, is properly defined as meaning '[t]o bring up for discussion or consideration; to introduce or put forward.'" *Id.* (quoting Black's Law Dictionary 1373 (9th ed. 2009)).

At the suppression hearing, appellant's counsel argued that the evidence should be suppressed because Detective McDuffie was not a credible witness and because there was

no probable cause to arrest appellant. Appellant did not argue before the trial court, as he does now on appeal, that Detective McDuffie conducted a search incident to arrest before he actually arrested appellant. Because this argument was not made at the motions hearing or introduced in appellant counsel's written motion to suppress, this issue is waived on appeal. *See Savoy v. State,* 218 Md. App. 130, 141 (2014) (footnote omitted) ("It is well established that, absent good cause, [Md.] Rule 4-252 prohibits a criminal defendant from raising a theory of suppression on appeal that was not argued in the circuit court."); *Johnson v. State*, 138 Md. App. 539, 560 (2001) ("The failure to argue a particular theory in support of suppression constitutes a waiver of that argument on appeal.").

Nonetheless, appellant argues that this Court should engage in plain error review and address the merits of this issue. Maryland Rule 8-131(a), which allows for plain error review, provides: "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."

In *Savoy*, we explained that "[t]here is tension, however, between [Md.] Rule 8-131, which allows for plain error review, and [Md.] Rule 4-252, which provides that grounds for suppression not argued at the suppression hearing are *affirmatively waived.*" 218 Md. App. at 142 (emphasis in original). This is because "[t]he language of affirmative waiver suggests that plain error review is unavailable, and that an appellant seeking review must instead show good cause for the failure to raise the issue in the circuit court." *Id.* at 142-43. Ultimately, "we held that [Md.] Rule 4-252 trumps [Md. Rule] 8-131, and that plain

error review is not available to a defendant who fails to conform to the requirements of [Md. Rule] 4-252." *Id.* at 143.

Appellant argues that this case is distinguishable from *Savoy* "[b]ecause the search incident to arrest issue was decided by the trial court[.]" Appellant admits that he did not raise the issue before the trial court, and provides no explanation as to why, but contends that the issue was raised when the prosecutor stated:

> . . . [Detective] McDuffie testified that [appellant] was not "placed under arrest" until after the pat-down, but I would argue to the Court that that is a legally [sic] term arrest. It's a legal term in the field of when exactly a person is placed under arrest.
>
> But the State would argue that before the [sic] handcuffing him, before the actual determination that, that [appellant] would not be free to go, [Detective] McDuffie, [Detective] McDuffie could have and did have probable cause to place [appellant] under arrest at the time of the traffic stop.

Appellant argues that in denying his motion to suppress, the court "implicitly accepted the prosecutor's argument that the search was valid because Detective McDuffie had probable cause to arrest [appellant] at the time he searched him." We disagree.

While the prosecutor's statements addressed the timing of the arrest, there was no connection made to the timing of the search. The focus of the argument was on whether Detective McDuffie had probable cause to arrest appellant, not whether the search of appellant's person was properly conducted as a search incident to arrest. As such, the court found that there was probable cause to arrest appellant, and denied the motion to suppress without ever considering or deciding whether the search occurred prior to appellant's arrest. Accordingly, there was no point in dispute and no controversy for the court to

decide. *See Ray,* 435 Md. at 20 (quoting Black's, *supra,* at 907) (defining "issue" as "'a point in dispute between two or more parties'"); *Id.* at 22 (quoting Merriam-Webster's Collegiate Dictionary 322 (10th ed. 1999)) (defining "decide" as "'previous consideration of a matter causing doubt, wavering, debate, or controversy.'").

In accordance with *Savoy*, we hold that plain error review is not warranted in this instance where appellant failed to comply with the requirements of Md. Rule 4-252 and the issue was not raised in or decided by the trial court. Accordingly, we decline to address the merits of this argument on appeal.

Credibility of Detective

Appellant also argues that "the court's credibility determination was clearly erroneous" and that "[o]nce the officer's testimony of the smell of marijuana is discarded, there was no reasonable suspicion for the stop and thus all that flowed from it should have been suppressed."

On appeal, "'[w]e defer to the motions court's factual findings and uphold them unless they are shown to be clearly erroneous.'" *Gonzalez v. State*, 429 Md. 632, 647 (2012) (quoting *Lee v. State*, 418 Md. 136, 148 (2011)). "The credibility of the witnesses, the weight to be given to the evidence, and the reasonable inferences that may be drawn from the evidence come within the province of the suppression court." *Id.* at 647-48. "[W]hen there is a conflict in the evidence, an appellate court will give great deference to a hearing judge's determination and weighing of first-level findings of fact. It will not disturb either the determinations or the weight given to them, unless they are shown to be clearly erroneous." *Longshore v. State*, 399 Md. 486, 498 (2007).

Appellant contends that Detective McDuffie's testimony should have been discredited due to the inconsistency in his testimony regarding whether he smelled burnt or unburnt marijuana. Appellant also argues that having the windows down in late October "seems at odds with the probable weather conditions." Finally, appellant argues that had Detective McDuffie's testimony been true, the officers would have recovered some quantity of marijuana.

The motions court addressed appellant's credibility concerns and acknowledged that while the detective initially testified that he smelled unburnt marijuana, he later corrected his statement and clarified that the smell was actually of burnt marijuana. The court noted that neither party objected when Detective McDuffie was received as an expert in the field of identification and packaging of CDS and that there was no evidence that Detective McDuffie did not have the requisite training to detect the smell of marijuana. As such, the court credited Detective McDuffie's testimony.

The court's credibility determination in this case was not clearly erroneous. We give great deference to the court's conclusion that Detective McDuffie resolved any inconsistency in his testimony by clarifying that the smell was of burnt marijuana. The court certainly did not abuse its discretion in crediting the testimony of a sworn law enforcement officer who was accepted as an expert in the field of narcotics. Regardless of the evidence that was ultimately recovered in this case, the factual conclusion that Detective McDuffie smelled marijuana has not been shown to be clearly erroneous. Accordingly, we uphold the court's credibility determination and, as a result, Detective McDuffie had probable cause to arrest appellant.

The trial court, therefore, did not err in denying appellant's motion to suppress.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY IS AFFIRMED. COSTS TO BE PAID BY APPELLANT.