Circuit Court for Worcester County
Case No. C-23-CR-18-000367

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1228

September Term, 2019

JOSHUA WHALEY

v.

STATE OF MARYLAND

Fader, C.J.
Arthur,
Gould,

JJ.

Opinion by Gould, J.

Filed: July 28, 2020

Appellant Joshua Whaley appeals from his convictions for possession of marijuana with intent to distribute, possession of more than ten grams of marijuana, and carrying a concealed dangerous weapon. The charges against Mr. Whaley arose from a traffic stop while he was speeding on Route 113 in Worcester County. Mr. Whaley contends on appeal that the trial court erred in denying his motion to suppress the evidence seized during the traffic stop. Finding no error, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Mr. Whaley initially moved to suppress all physical evidence. The motion contained eleven numbered paragraphs, each of which alleged, in conclusory terms, a violation of Mr. Whaley's constitutional rights. After receiving discovery from the State, Mr. Whaley filed an amended motion to suppress all evidence seized from his vehicle, alleging a lack of probable cause for the traffic stop.

At the suppression hearing, the sole witness was Officer Gary Bratten of the Berlin Police Department. Officer Bratten testified that in the late evening of July 22, 2018, he was using a "stationary radar at Route 113 southbound and Branch Street," in Worcester County, when he observed a black Chrysler driving 58 miles per hour in a 45 mile per hour zone.[1] He followed and then moved behind the vehicle when it was stopped at a red light. Officer Bratten's car window was down, and he smelled the odor of "burnt marijuana" and

[1] Officer Bratten was able to determine the speed of the Chrysler after activating his "Stalker Dual Band radar unit."

saw a "cloud" wafting from the driver's side of the vehicle. Officer Bratten activated the emergency lights of his car and stopped Mr. Whaley's vehicle.

Officer Bratten testified that after Mr. Whaley's car stopped, he saw "furtive movements inside the vehicle" that looked like he was trying to conceal something. When he approached the driver's side of the car, he observed two occupants in the vehicle and could still detect the odor of marijuana. Mr. Whaley was in the driver's seat. Officer Bratten informed Mr. Whaley that he was stopped for speeding and told Mr. Whaley that he smelled the odor of marijuana. Mr. Whaley appeared nervous. In response to Officer Bratten's direct question, Mr. Whaley admitted that he had been smoking marijuana in the vehicle.[2] Officer Bratten asked Mr. Whaley to step out of the car, and when he did, Officer Bratten smelled marijuana coming from the "passenger compartment and/or his breath or person." The police searched Mr. Whaley's vehicle and found brass knuckles, approximately 478 grams of marijuana, $5,098 in cash, a measuring scale with the residue of marijuana, clear plastic bags containing marijuana, glass mason jars containing marijuana, a zip-locked bag containing multiple mini zip lock baggies of marijuana, and four cell phones. The police then arrested Mr. Whaley. Officer Bratten was not asked and did not testify about the search of Mr. Whaley's pants pocket.

[2] At trial, Officer Bratten testified that, at this point, he asked Mr. Whaley if there was marijuana in his vehicle, and Mr. Whaley answered that he had "a little [marijuana] in [his] right pant[s] pocket." The police recovered a plastic baggie containing less than ten grams of marijuana from Mr. Whaley's pants pocket. At the suppression hearing, however, there was no testimony on this issue.

After the evidence closed, the State argued that the odor of marijuana provided probable cause to search the vehicle. Mr. Whaley argued that the stop was unlawful, that Officer Bratten improperly extended the duration of the stop, and that the odor of marijuana did not provide probable cause to search the car.

The circuit court denied the motion to suppress. The court found that the initial stop was lawful. The court also found that the odor of burnt marijuana provided probable cause to search the vehicle. On that issue, the court found Officer Bratten's testimony to be credible.

Four days later, Mr. Whaley filed a motion requesting a supplemental hearing on his motion to suppress. He alleged that the warrantless seizure of his person was not a lawful Terry stop. He reasoned that Officer Bratten "went into the Defendant's pocket to seize a small amount of unburnt marijuana and no proper frisk ever goes into pants or pockets." He also argued that he did not consent to the search of his person, and therefore his arrest was based solely on the "alleged 'smell' of burnt marijuana." The State opposed Mr. Whaley's request, and the court denied it.

At trial, Mr. Whaley renewed his motion to suppress based on the traffic stop and proffered that "[n]ew evidence would be additional witnesses and a separate issue regarding cameras and what those cameras might show." He made no argument about the search of his person. The court found no reason to revisit the issue and denied that motion.

A jury subsequently found Mr. Whaley guilty on all charges. The court sentenced him to three years with all but six months suspended for possession of marijuana with intent to distribute; three years, with all but six months suspended for carrying a concealed

dangerous weapon, with the sentence to run concurrently, and merged the possession of more than ten grams of marijuana into the possession of marijuana with intent to distribute.

Mr. Whaley timely filed his notice of appeal, and presents us with two questions:

1. Was the police officer's search of Mr. Whaley's pocket supported by probable cause that he had committed either a felony or a misdemeanor in the officers' presence?

2. Did the trial court err in finding that the search incident to Mr. Whaley's arrest was lawful?

We hold that Mr. Whaley failed to preserve a challenge to the search of his person and therefore waived the first question. Further, we conclude that the premise of the second question misstates the record because the State argued at the motions hearing that the search of the vehicle was supported by probable cause, not that it was a search incident to arrest. Accordingly, we affirm the judgments of the Circuit Court for Worcester County.

DISCUSSION

A. The Parties' Contentions

Mr. Whaley argues that the searches of his person and vehicle violated the Fourth Amendment[3] to the United States Constitution. Mr. Whaley contends that the "only rationale" provided by the State for the search of his vehicle was that it was a lawful search incident to arrest.

Mr. Whaley argues that there was no probable cause for his arrest, which he claims was based on the odor of marijuana and the one gram of marijuana seized from his pocket.

[3] The Fourth Amendment of the United States Constitution provides that, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]"

He also contends that the seizure of the one gram of marijuana from his pocket resulted from an unlawful search incident to arrest. Citing Maryland v. Pringle, 540 U.S. 366 (2003), Mr. Whaley argues that because the search of his pants was unlawful, his arrest was unlawful, and because his arrest was unlawful, the search of his vehicle incident to the arrest was unlawful.

The State counters that it did not defend the search of the vehicle as a search incident to arrest. The State points out that it argued at the motions hearing, as it does here, that the odor of burnt marijuana provided probable cause to search Mr. Whaley's vehicle. The State further contends that Mr. Whaley waived his right to challenge the search of his pocket by failing to raise that issue at the motions hearing. On the merits, the State contends that the search of Mr. Whaley's person was supported by probable cause based on the initial smell of burnt marijuana, the sight of the smoke cloud coming from the vehicle, Mr. Whaley's furtive movements, his nervous behavior, his admissions that he had just smoked marijuana in his car and that he had some in his pocket, and the subsequent smell of marijuana as Mr. Whaley exited the car. Based on these facts, according to the State, Officer Bratten had probable cause to believe that Mr. Whaley "possessed more than ten grams of marijuana." Finally, the State contends that any error in admitting the marijuana from Mr. Whaley's pocket was harmless.

B. Standard of Review

"When reviewing a hearing judge's ruling on a motion to suppress evidence under the Fourth Amendment, we consider only the facts generated by the record of the suppression hearing." Thornton v. State, 465 Md. 122, 139 (2019) (quotation omitted).

"We review the evidence and the inferences drawn therefrom in the light most favorable to the prevailing party." Id. Because the "[hearing] court is in the best position to resolve questions of fact and to evaluate the credibility of witnesses," Swift v. State, 393 Md. 139, 154 (2006), we defer to the hearing court's findings of fact unless they are clearly erroneous. Bailey v. State, 412 Md. 349, 362 (2010) (citation omitted). We review the trial court's legal conclusions without deference, and we make "our own independent constitutional evaluation as to whether the officer's encounter with the defendant was lawful." Sizer v. State, 456 Md. 350, 362 (2017) (citation omitted).

C. Waiver of Challenge to the Search of Mr. Whaley's Person

Under Rule 4-252(a)(3), claims of "unlawful search, seizure, interception of wire or oral communication, or pretrial identification" must be raised "in conformity with [Rule 4-252] and if not so raised are waived unless the court, for good cause shown, orders otherwise." The motion must be filed within 30 days after the "earlier of the appearance of counsel or the first appearance of the defendant before the court under Rule 4-213(c). However, when discovery discloses the basis for a motion, the motion may be filed within five days after the discovery is furnished," Rule 4-252(b), and "shall state the grounds upon which it is made, and shall set forth the relief sought." Rule 4-252(e). The motion must be decided before trial, and the court must put its findings of fact on the record. Rule 4-252(g). If the court denies the motion, the "ruling is binding at the trial unless the court, on the motion of a defendant and in the exercise of its discretion, grants a supplemental hearing or a hearing de novo and rules otherwise." Rule 4-252(h)(2)(C).

"The obvious and necessary purpose of [Rule 4-252(e)[4]] 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." Sinclair v. State, 444 Md. 16, 29 (2015) (quotation omitted). The motion must identify the evidence to be suppressed and the factual and legal support for the request. Id. Applying these principles here, we hold that Mr. Whaley waived his right to challenge the search of his person and the discovery of marijuana in his pants pocket.

In his initial suppression motion, Mr. Whaley listed, in rote fashion, a laundry list of boilerplate violations of his Fourth Amendment rights. The motion failed to include a single fact unique to his case. Moreover, even in his amended motion to suppress, Mr. Whaley made no specific argument regarding the search of his pocket.

At the suppression hearing, when asked to identify the issues at the beginning of the hearing, defense counsel stated that Mr. Whaley was challenging the lawfulness of the initial stop and the continued detention. Mr. Whaley did not raise the search of his pocket either during Officer Bratten's testimony or during closing arguments. Accordingly, under Md. Rule 2-425(a), Mr. Whaley waived his right to challenge the search of his person. See Sinclair, 444 Md. at 34; Ray v. State, 435 Md. 1, 14 (2013).

[4] Rule 4-252(e) provides that: "A motion filed pursuant to this Rule shall be in writing unless the court otherwise directs, shall state the grounds under 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."

Mr. Whaley's attempt to raise this issue in his request for a de novo supplemental hearing, just four days after the court denied the motion to suppress, was unavailing. Under Rule 4-252(h)(2)(C), the court has the discretion to grant or deny a request for a supplemental hearing. See Marr v. State, 134 Md. App. 152, 179-80 (2000). Mr. Whaley does not contend, and we have no basis to conclude, that the court abused its discretion in denying his request. Accordingly, we will not address the merits of Mr. Whaley's challenge to the search of his person and the discovery of marijuana in his pants pocket.

D. The Search of Mr. Whaley's Vehicle

Mr. Whaley argues that "[i]t is undisputed that the only rationale offered by the State in support of the search of Mr. Whaley's vehicle was that it was a proper search incident to his arrest." This is demonstrably untrue.[5] The State didn't proceed, and the court didn't base its decision, on this theory. Rather, Officer Bratten specifically testified under cross-examination that he had probable cause to search the vehicle from the odor of the burnt marijuana, and the State made that same argument at the close of the evidence. Accordingly, the premise of Mr. Whaley's argument—that the State justified the search as a search incident to arrest—is false. Because Mr. Whaley's premise is false, his conclusion—that the search was not a lawful search incident to arrest—is a non sequitur.

[5] Mr. Whaley cites the State's Disclosure and Request for Discovery in support of his contention. However, the State's disclosure justified only the search of Mr. Whaley's person as a search incident to his arrest. The disclosure provided no rationale for the search of his vehicle and stated only that "[t]he vehicle the Defendant was traveling in was searched and contraband was located and seized."

Although Mr. Whaley does not address the issue, for the sake of completeness, we will briefly address whether, as the State argued in the circuit court, the vehicle search was supported by probable cause. "Probable cause [to conduct a warrantless search] exists where, based on the available facts, a person of reasonable caution would believe 'that contraband or evidence of a crime is present.'" Robinson v. State, 451 Md. 94, 109 (2017) (quoting Florida v. Harris, 568 U.S. 237, 243 (2013)).

In Robinson, the Court of Appeals articulated probable cause as follows:

> The test for probable cause is not reducible to precise definition or qualification. Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence have no place in the probable-cause decision. All we have required is the kind of fair probability on which reasonable and prudent people, not legal technicians, act.
>
> In evaluating whether the State has met this practical and common-sensical standard, we have consistently looked to the totality of the circumstances. We have rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach . . . .

451 Md. at 110 (quoting Harris, 568 U.S. at 243-44).

The Court in Robinson also held that the odor of marijuana coming from a defendant's vehicle constituted probable cause for a vehicle search because "marijuana in any amount remains contraband, notwithstanding the decriminalization of possession of less than ten grams of marijuana." Id. at 137; see also State v. Johnson, 458 Md. 519, 533 (2018) (citing United States v. Ross, 456 U.S. 798, 799 (1982)) (police may search a vehicle without a warrant if, at the time of the search, the police have developed "probable cause to believe the vehicle contains contraband or evidence of a crime"). Here, the court ruled that Mr. Whaley's speeding provided a lawful basis for the traffic stop, and that the

odor of burnt marijuana provided probable cause for the search of the vehicle. Under Robinson, therefore, the search of the car was lawful.

JUDGMENTS OF THE CIRCUIT COURT FOR WORCESTER COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/1228s19cn.pdf