UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1422

September Term, 2014

STEVE AUDIGE

v.

STATE OF MARYLAND

Woodward,
Kehoe,
Arthur,

JJ.

Opinion by Woodward, J.

Filed: August 25, 2015

Steve H. Audige, appellant, was convicted by a jury sitting in the Circuit Court for Harford County of possession of marijuana with the intent to distribute. The trial court sentenced appellant to seven years of imprisonment as a subsequent offender. Appellant asks one question on appeal: Did the lower court err in denying the motion to suppress? Under the circumstances presented, we believe that the court did not err, and we shall affirm the judgment.

FACTUAL BACKGROUND

Appellant was indicted on criminal drug charges relating to the discovery by the police of roughly 341 grams of marijuana in the trunk of the rental car that he was driving. Prior to trial, appellant moved to suppress the marijuana.[1]

On October 22, 2013, around 4:45 p.m., a Maryland State Trooper, Sgt. Michael Smart, a 30-year police veteran, was sitting in his marked police car around the 82-mile marker on I-95 in Harford County watching the northbound traffic. Sgt. Smart's attention was drawn to an approaching Ford Fusion with Massachusetts tags because the driver looked at the officer as the car passed and as it continued north. Sgt. Smart pulled out into traffic and followed the Ford. Sgt. Smart ran the tags through the computer in his patrol car, but the system had no information on the car. At 4:46 p.m., Sgt. Smart initiated a traffic stop

[1] "In reviewing the ruling on a motion to suppress evidence, we consider only the evidence contained in the record of the suppression hearing." *Bost v. State*, 406 Md. 341, 349 (2008).

of the Ford for following the car in front of it too closely, within a car's length while traveling around 70 miles per hour in a 65 miles per hour zone.

Sgt. Smart walked up to the passenger side of the Ford, noting that both the driver and passenger side windows were "completely down"– both windows had been closed when the car had passed him. When Sgt. Smart came to the passenger side window, he noted a strong odor of cologne or air freshener coming from inside the Ford, as if "it had just been sprayed[.]" Sgt. Smart quickly scanned the interior of the car and observed some "packing tape" lying on the rear seat. Sgt. Smart testified, without further elaboration, that packing tape "sometimes is used in the packaging of materials that are used for criminal type activity[.]" A minute into the traffic stop, at 4:47 p.m., the dispatcher advised that the Ford was a rental.

Sgt. Smart asked the driver, appellant, and front seat passenger for identification. Appellant produced a New York driver's license, and the passenger produced a New Jersey identification card. Sgt. Smart asked the men several questions about the vehicle and their trip. Appellant explained that the car was a rental. According to Sgt. Smart, every time he asked the men about their trip, "the conversation would go to something else about the rental car. . . . So I wasn't able to get a straight answer about the trip." Sgt. Smart noticed that the passenger was trying "to avoid any contact with me at all. He was nervous. He wouldn't look at me." In contrast, the driver was "overly polite." Sgt. Smart asked appellant to step to the back of the Ford, which he did. Sgt. Smart then asked appellant whether he had any

weapons on him. Appellant said he did not and consented to a pat down search. Nothing of note was found.

At this point, Sgt. Smart returned to his police car and called for a K-9 unit. The parties stipulated that the K-9 unit was requested at 4:51 p.m. and arrived at 5:00 p.m. During the interim, Sgt. Smart processed the traffic violation. He explained:

> I had to run the information on both subjects that I had, run the information on the vehicle, look over the rental contract, see the dates and times and make sure the vehicle was not overdue or otherwise going to be listed as stolen, and continue proceeding with the business of the traffic stop, typing the information, et cetera, that needs to go into the computer.

Sgt. Smart further explained that it can take longer to get information from more populous states like New York. One or two other officers arrived during this time and spoke to appellant and the passenger.

At 5:00 p.m., before Sgt. Smart had received all the requested information, the K-9 unit arrived and approached Sgt. Smart. Sgt. Smart explained that he "stopped" and "suspended" the processing of the traffic violation to assist with the scan. He testified that he informed the K-9 officer of the situation, removed the passenger from the Ford, and placed the passenger and appellant away from the car while the K-9 handler scanned the car. Sgt. Smart did not know what time the K-9 gave a positive alert but explained that it "*was only a matter of a couple of minutes* to have the K-9 handler go back, retrieve his dog, get the subjects out of the vehicle, put them in a safe area. He ran the dog around the vehicle

and advised me of the positive alert." (Emphasis added). Additionally, there was no evidence as to when Sgt. Smart received the awaited for information from the dispatcher. Following the alert, appellant was arrested and taken to the barracks where, according to Sgt. Smart, he was given a traffic warning or a citation for following too close.

Appellant testified in support of his motion. He explained that following his stop on the highway, he had rolled both front side windows down because he had expected Sgt. Smart to approach the driver's side window, but Sgt. Smart had instead approached the passenger's side window. Appellant testified that he told Sgt. Smart that his brother had rented the car, but that he was an authorized driver. When asked by his attorney why he was not forthcoming about the details of his trip, appellant testified that he was. Appellant explained that he told the police that he was coming from Pratt Street in Baltimore where he was visiting his baby's mother. Appellant testified that at the time of the stop one of the officers told him that there was a conflict between his and his passenger's explanation of their trip. Appellant explained at the suppression hearing that his passenger had "never been to Baltimore before" didn't know the address of where he was coming from. Contrary to Sgt. Smart's testimony, appellant testified that he never received a citation or warning.

After the above testimony, the parties presented their arguments. The State argued that the initially valid traffic stop was not abandoned but was still continuing when the K-9 scan occurred and the dog alerted. Therefore, the K-9 scan did not cause any undue delay in completing the traffic stop. In contrast, defense counsel contended that the stop became

illegal when Sgt. Smart exited the vehicle to assist with the K-9 scan because at that moment Sgt. Smart abandoned the traffic stop. Defense counsel asserted that the dispatcher could have relayed the requested information the moment Sgt. Smart exited the vehicle. Defense counsel said: "[Sgt. Smart's] duty [wa]s to pursue the purpose of the traffic stop, not conduct the secondary investigation. And I believe that is where the problem lies in the fact that there is nothing to indicate otherwise in terms of whether that information came in."

After the above arguments, the suppression court concluded that the scan was made during a reasonable traffic stop. In reaching that conclusion, the court stated:

> Now, what I don't have and what I would like to have had was exactly when the information came back because now I'm going to have to make an assumption that I will make and that is during the next three minutes, until the dog alerted, that the information had not come back. And even if it had come back during that three minute period of time, it would have taken more than three minutes to write the citation and complete the stop. It would have been nice to have a copy of the citation.

The suppression court also ruled that there was no reasonable articulable suspicion to support the search of the car for drugs independent of the dog alert. The court found:

> The factors that were recited today in support of articulable suspicion, that the Defendant paid close attention to the police at the side of the road. I pay close attention to the police at the side of the road to make sure I'm not speeding. Of course I never am, but I pay close attention to them. That there was a strong odor of air freshener and that the windows were down. Well, there [are] cases that say air fresheners in and of themselves are not indication of anything. And if all of the windows were down and they weren't up before, I might have put some weight on that but just the passenger window and drivers window which would actually be rolled down unless the

> officer is approaching. Leave it up one time and see what happens. That is guilty behavior. Rental vehicle. I would find that the rental vehicle had his name on as a licensed driver. And the officer, if he didn't remember, probably saw that. The fact that he has a New York driver's license in and of itself doesn't create reasonable articulable suspicion. If he is nervous and overly polite. Any time I have ever been stopped unjustifiably I was nervous and I was polite. Didn't mean I was carrying drugs. . . . It may give you a real good hunch. . . . but not going to give you probable cause or sufficient suspicion to search that car.

In ruling on the motion to suppress, the court stated:

> So I'm going to find that in fact the scan was made during a reasonable traffic stop and I'm going to deny the motion for suppression.

Additional facts will be recounted as they become relevant to our discussion.

STANDARD OF REVIEW

When reviewing the denial of a motion to suppress "[w]e extend great deference to the fact finding of the suppression judge and accept the facts as found, unless clearly erroneous." *Wallace v. State*, 142 Md. App. 673, 679 (2002). Additionally, "we review the evidence in the light most favorable to the prevailing party, in this case, the State." *Gilmore v. State*, 204 Md. App. 556, 560 (2012); *Brown v. State*, 397 Md. 89, 98 (2007); *Myers v. State*, 395 Md. 261, 274 (2006); *State v. Green*, 375 Md. 595, 607 (2003). "Although we extend great deference to the motion court's findings of fact, determinations regarding witness credibility, and weighing of the evidence, we make our own independent

constitutional appraisal of the law as it applies to the facts of the case." *Cooper v. State*, 163 Md. App. 70, 84-85 (2005); *Wengert v. State*, 364 Md. 76, 84 (2001).

DISCUSSION

Appellant argues that the suppression court erred in denying his motion to suppress and makes the same argument that he made below–Sgt. Smart impermissibly delayed the traffic stop when he "abandoned" it to carry out the K-9 drug scan of the car that appellant was driving. Additionally, appellant argues that Sgt. Smart "lacked reasonable [articulable] suspicion that drug activity was afoot" to support the K-9 scan independent of the traffic stop. The State responds that Sgt. Smart did not impermissibly abandon or delay the traffic stop but diligently pursued it, but in any event, Sgt. Smart had reasonable articulable suspicion that appellant was engaged in drug activity to delay the traffic stop for the K-9 scan.

The Fourth Amendment to the United States Constitution, which is applicable to the States through the Fourteenth Amendment, protects against unreasonable government searches and seizures. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). From its plain language, the Constitution does not forbid all searches and seizures, just unreasonable ones. *Maryland v. Buie*, 494 U.S. 325, 331 (1990). Although a traffic stop does implicate the Fourth Amendment, a law enforcement officer may temporarily detain a vehicle and a person whom the officer has probable cause to believe has violated a traffic law "'to enforce the laws of the roadway, and ordinarily to investigate the manner of driving with intent to issue a

citation or warning.'" *State v. Green*, 375 Md. 595, 609 (2003) (quoting *Ferris v. State*, 355 Md. 356, 369 (1999)). The Supreme Court has made clear, however, that the detention "'must be temporary and last no longer than is necessary to effectuate the purpose of the stop.'" *Ferris*, 355 Md. at 369 (quoting *Florida v. Royer*, 460 U.S. 491, 500 (1983)). Accordingly, once that purpose has been satisfied, the continued detention of the occupants and vehicle constitutes a second stop that must be independently justified by reasonable articulable suspicion or probable cause. *McKoy v. State*, 127 Md. App. 89, 99 (1999).

Appellant does not contest the validity of his initial stop based on the traffic violation, nor does he contest his removal from the Ford and subsequent pat-down for weapons.[2] The narrow question before us is whether, under the circumstances presented, Sgt. Smart prolonged the processing of the traffic violation by assisting with the K-9 drug scan.

The Supreme Court has provided some general guidance in determining when a traffic stop ends. The Court has stated that "[a]uthority for the seizure [] ends when tasks tied to the traffic infraction are–*or reasonably should have been*–completed." *Rodriguez v. United States*, 135 S.Ct. 1609, 1614 (2015) (emphasis added) (citation omitted). To determine whether a stop is reasonable in duration, the Court has emphasized that "it [is]

[2] In *Pennsylvania v. Mimms*, 434 U.S. 106, 111-12 (1977), the United States Supreme Court held that police may order the driver out of an automobile during a stop for a traffic violation and may frisk that person for weapons, if there is a reasonable belief that he or she is armed and dangerous. The holding rested in part on the "inordinate risk confronting an officer as he approaches a person seated in an automobile." *Id*. at 110.

appropriate to examine whether the police diligently pursued [their] investigation[.]" *United States v. Sharpe*, 470 U.S. 675, 686 (1985). We have stated that "[t]here is no set formula for measuring in the abstract what should be the reasonable duration of a traffic stop" and that we "must assess the reasonableness of each [stop] on a case-by-case basis and not by the running of the clock." *Charity v. State*, 132 Md. App. 598, 617, *cert. denied*, 360 Md. 487 (2000). Moreover, "[u]sing a dog is accepted as a perfectly legitimate utilization of a free investigative bonus as long as the traffic stop is still genuinely in progress. The emphasis in that statement is on the word 'genuinely.'" *State v. Ofori*, 170 Md. App. 211, 235 (citation omitted), *cert. denied*, 396 Md. 13 (2006).

Clearly, absent reasonable articulable suspicion, a K-9 scan is improper after the officer has issued the ticket or completed the traffic violation portion of the traffic stop. *See Graham v. State*, 119 Md. App. 444, 468-69 (1998) (holding that K-9 scan of vehicle for drugs was improper where it occurred after the driver was arrested for a traffic violation); *cf. Munafo v. State*, 105 Md. App. 662, 672-73 (1995) (stating that where stopping officer had received information that the driver's license and rental agreement were valid, he impermissibly detained the driver when he waited for several minutes for a second officer to arrive and then one officer engaged the driver in further conversation while the second officer scanned the inside of the vehicle with a flashlight). Additionally, a K-9 scan is improper if it detains a person stopped for a traffic violation for "longer than it takes–*or reasonably should take*–to issue a citation for the traffic violation that the motorist

committed." *Pryor v. State*, 122 Md. App. 671, 675 (emphasis added), *cert. denied*, 352 Md. 312 (1998). In contrast, a K-9 drug scan of a vehicle does not impermissibly extend the duration of the traffic stop if the scan is done contemporaneously with processing the traffic violation. *See Wilkes v. State*, 364 Md. 554, 570 (2001) (upholding a K-9 scan where the "K-9 unit arrived on the scene and conducted the scan of petitioner's [vehicle] *prior to* Trooper Graham receiving radio verification of the validity of petitioner's driver's license, vehicle registration card, and warrants check"); s*ee also McKoy*, 127 Md. App. at 101 (holding that, because the trooper had not completed writing the citation and had not yet received a response to his request regarding the validity of appellant's license at the time of the positive alert by the K-9 unit, the trooper did not impermissibly detain appellant or violate his rights).

The recent case of *Rodriguez v. United States*, is instructive. In that case, the United States Supreme Court was asked to decide whether the police may extend an otherwise completed traffic stop, absent articulable suspicion, to conduct a dog sniff that was only a few minutes long and was arguably "only a *de minimis* intrusion." 135 S.Ct. at 1610-11. While the facts of *Rodriguez* are sufficiently different to suggest that it adds nothing to our analysis (the traffic stop had been completed by the time the K-9 scan began), *id.* at 1612, *Rodriguez* nevertheless highlights some important considerations.

In *Rodriguez*, a K-9 officer stopped a car traveling on the highway for violating state traffic laws. *Id.* at 1610. After checking the driver's license of both the driver and passenger

and issuing a warning for the traffic offense, the officer asked Rodriguez for permission to walk his dog around the vehicle. *Id.* When Rodriguez refused, he was detained until a second officer arrived, at which time the dog was deployed and alerted to the presence of drugs in the vehicle. *Id.* Seven to eight minutes elapsed from the time the written warning was issued until the dog alerted. *Id*.

The Eighth Circuit affirmed the denial of the motion to suppress filed by the driver, concluding that the delay was a "'*de minimis* intrusion on Rodriguez's personal liberty.'" *Id*. at 1614 (citation omitted). In Rodriguez's appeal to the United States Supreme Court, the Government likewise argued that a police officer may "'incremental[ly]' prolong a stop to conduct a dog sniff so long as the officer is reasonably diligent in pursuing the traffic-related purpose of the stop, and the overall duration of the stop remains reasonable in relation to the duration of other traffic stops involving similar circumstances." *Id*. at 1616. The Supreme Court rejected those arguments.

The Court held that a "seizure justified only by a police-observed traffic violation [] 'become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a ticket for the violation." *Id*. at 1612 (citation omitted). The Court added that an officer "may conduct certain unrelated checks during an otherwise lawful traffic stop. But . . . he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." *Id*. at 1615. The Court stated: "The critical question, then, is not whether the dog sniff occurs before or after the

officer issues a ticket . . . but whether conducting the sniff 'prolongs'–*i.e.*, adds time to – 'the stop[.]'" *Id*. at 1616 (citation omitted). The Court distinguished between police activity incident to a traffic stop and connected to roadway safety, such as inquiries involving drivers' licenses, outstanding warrants, automobile registration, proof of insurance, and requiring a driver to exit a vehicle for officers' safety, all of which are permitted as *de minimis* intrusions, and a drug scan, which lacks "the same close connection to roadway safety" and "is not fairly characterized as part of the officer's traffic mission." *Id*. at 1615. Because the Court held that the traffic stop had been prolonged by the drug sniff, the Court vacated the judgment and remanded to the circuit court to review the lower court's determination that there was no reasonable suspicion of criminal activity to justify detaining Rodriguez beyond completion of the traffic infraction investigation. *Id.* at 1616-17.

Applying the above law to the facts of our case, we are persuaded that the suppression court committed no error in denying appellant's motion to suppress. Here, Sgt. Smart stopped the processing of the traffic violation when the K-9 unit arrived in order to assist in the scan of appellant's vehicle. At that time, Sgt. Smart had not received all of the requested information from the computer, nor had he written or delivered a traffic warning or citation to appellant. Under *Rodriquez*, the trial court was required to determine when the tasks tied to the traffic citation are, or "reasonably should have been [ ] completed," 135 S.Ct. at, 1614 and whether or not the K-9 scan prolonged that time period. *Id.* at 1616.

The suppression court first found that the K-9 gave a positive alert within three minutes of arrival at the location of the stop. Such finding is supported by Sgt. Smart's testimony that it "was only a matter of a couple of minutes to have the K-9 handler go back, retrieve his dog, get the subjects out of the vehicle, put them in a safe area. He ran the dog around the vehicle and advised me of the positive alert." The court next found that "it would have taken more than three minutes to write the citation and complete the stop." This finding is supported by the tasks needed to complete the stop–receiving the information from the computer, writing the traffic citation or warning, and delivering the citation or warning to appellant–and by a common sense understanding of the time required for the completion of such tasks. Moreover, because there was no evidence of when Sgt. Smart's requested information came back from the computer, the court assumed that all of the requested information had come back during that three-minute time period.

Therefore, the suppression court concluded that the K-9 gave a positive alert before Sgt. Smart would have completed the processing of the traffic stop, even if the requested information came back from the computer while Sgt. Smart was assisting with the K-9 scan. We hold that the court's conclusion was reasonable under the circumstances and supported by the evidence adduced at the suppression hearing. Because we are persuaded that the scan did not impermissibly prolong the traffic stop, we need not reach the question of whether

the police had reasonable articulable suspicion to support the K-9 scan independent of the traffic stop. Accordingly, we shall affirm the judgment.

JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.