

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 1458

September Term, 2016

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STATE OF MARYLAND

v.

JASON BERNARD SCOTT

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Arthur,  
Leahy,  
Friedman,

JJ.

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Opinion by Friedman, J.

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Filed: January 4, 2017

\*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. Rule 1-104.

Courts allow evidence seized in warrantless searches only if (1) the search falls within a recognized exception to the warrant requirement; or (2) police failure to obtain a proper warrant is attributable to, at most, simple negligence. Conversely, courts suppress evidence seized in warrantless searches if (1) the circumstances of the search require a warrant (i.e., there is no exception to the warrant requirement); or (2) if the police failure to obtain a proper warrant was the result of deliberate, reckless, *grossly* negligent conduct. In this case it is uncontroverted that the police searched Jason Bernard Scott without a warrant and seized illegal drugs that were hidden in his underpants. The trial court found that no exception to the warrant requirement applied and that the police's failures were based on gross (rather than ordinary) negligence. The trial court, therefore, suppressed the evidence. While we agree that no exception to the warrant requirement applies, we disagree with the trial court that the police's failures were occasioned by gross negligence and, therefore, reverse the trial court's decision and remand the case to the Circuit Court for Prince George's County for trial.

### **BACKGROUND**

Prince George's County Police Officer Curtis Hamm stopped a vehicle because he saw that it had a broken headlight. Officer Hamm approached the vehicle and smelled "a strong odor" that he suspected was marijuana. Officer Hamm asked the driver of the vehicle to produce his driver's license. The driver produced a Texas driver's license for Jason *Bernard* Scott. Officer Hamm used his radio to call Prince George's County police dispatch. From the driver's license, Officer Hamm provided dispatch the license holder's

“first name, middle name, last [name], date of birth, and race.” Dispatch informed Officer Hamm that the driver had “an outstanding failure to appear warrant” and that he “did not have a valid license.” Both of these statements turned out not to be true. *First*, the arrest warrant was not for Jason *Bernard* Scott but for Jason *Michael* Scott, a man with whom the defendant shared a birthday but few physical characteristics. Jason *Bernard* Scott is a 6’5” African-American man; Jason *Michael* Scott is a 5’11” white man. *Second*, it appears (although the fact remains contested) that Jason *Bernard* Scott’s Texas driver’s license was and is valid.

Based on the information received from dispatch, Officer Hamm arrested the driver, Jason *Bernard* Scott, and took him to the police station. There police officers searched him and found illegal drugs secreted in his underpants. Scott was indicted for possession and possession with intent to distribute these illegal drugs. Scott moved to suppress the drugs seized. The trial court granted that motion and the State, pursuant to Maryland Code, Courts & Judicial Proceedings (“CJP”) Article, § 12–302(c),<sup>1</sup> appealed.

### **LEGAL FRAMEWORK**

Before reaching the merits here, we set forth the framework for analyzing Fourth Amendment violations. The Fourth Amendment, applicable to the states through the Fourteenth Amendment, prohibits unreasonable searches and seizures. *See, e.g., Lewis v.*

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<sup>1</sup> “In a criminal case, ... the State may appeal from a decision of a trial court that excludes evidence offered by the State ... alleged to have been seized in violation of the Constitution of the United States.” CJP § 12-302(c)(4)(i).

*State*, 398 Md. 349, 360-61 (2007). “Subject to a few exceptions, warrantless searches, seizures, and arrests are unreasonable and violate the Fourth Amendment.” *McCain v. State*, 194 Md. App. 252, 264 (2010). The remedy for a search or seizure in violation of the Fourth Amendment is suppression of evidence obtained as a result of that search or seizure. *Kelly v. State*, 436 Md. 406, 421 (2013). This is known as the exclusionary rule. *Id.*

The exclusionary rule, however, does not necessarily apply to every Fourth Amendment violation. *Id.* In *Herring v. United States*, the United States Supreme Court explained that suppression of evidence is not an individual right, but rather a judicial tool to deter future misconduct by law enforcement. 555 U.S. 135, 139-40 (2009). Moreover, the Supreme Court explained that:

To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.

*Herring*, 555 U.S. at 144. Thus, absent deliberate, reckless, or grossly negligent conduct by police, the exclusionary rule does not apply to searches in violation of the Fourth Amendment.<sup>2</sup>

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<sup>2</sup> Scott rests his argument exclusively on the Fourth Amendment to the United States Constitution as interpreted by *Herring* and its progeny. He makes no argument that the

## DISCUSSION

The issue in this case is whether the exclusionary rule should apply to suppress illegal drugs found in Scott's possession. The State has conceded that arresting Scott on another person's warrant was grossly negligent conduct.<sup>3</sup> Therefore, the exclusionary rule applies on that issue and—without an alternative lawful reason to arrest Scott—suppression of illegal drugs found on Scott would be warranted. Instead, the State focuses its appeal on Scott's allegedly invalid Texas driver's license. In suppressing the illegal drugs found in Scott's possession, the trial court noted that, in its view, there was a discrepancy about

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result might be different under Article 26 of the Maryland Declaration of Rights, which provides:

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. Const. Decl. of Rts. art. 26. In the absence of such an argument, we decline to reach the issue, but note that *Herring* has been the subject of significant criticism. *See, e.g.*, Albert W. Alschuler, *Herring v. United States: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 463 (2009); Thomas K. Clancy, *The Irrelevancy of the Fourth Amendment in the Roberts Court*, 85 CHI.-KENT L. REV. 191, 191-92 (2010); George M. Dery, III, *Good Enough for Government Work: The Court's Dangerous Decision, In Herring v. United States, to Limit the Exclusionary Rule to Only the Most Culpable Police Behavior*, 20 Geo. Mason U. C.R. L.J. 1, 27-28 (2009). Some of our sister states have found that *Herring* is not consistent with the protections afforded by their respective state constitutions, and thus have declined to follow it. *See, e.g.*, *Com. v. Johnson*, 624 Pa. 325 (2014); *State v. Handy*, 206 N.J. 39 (2011).

<sup>3</sup> We, therefore, will not address this finding.

whether the license check indicated that Jason *Bernard* Scott's Texas driver's license was invalid, or that the driver's license of Jason *Michael* Scott—the subject of the outstanding warrant—was invalid. As the trial court stated:

The second part about the license was valid, I think is not clear. Again, it wasn't clear whether dispatch knew or was talking about his license or the Virginia license of the wrong person. Well, of the other person in the other warrant in this case.

The State raises two challenges to the trial court's ruling: (1) that the trial court was clearly erroneous in finding that Scott was not lawfully arrested for driving without a valid license; and (2) that regardless of that finding, the exclusionary rule should not apply.

For the reasons discussed below, we do not think the trial court's finding—that Scott was not lawfully arrested—was clearly erroneous. Consequently, we hold that arrest and the subsequent search violated the Fourth Amendment. We also hold, however, that dispatch was not grossly negligent in informing Officer Hamm that Scott's Texas driver's license was invalid and, therefore, hold the Fourth Amendment's exclusionary rule does not apply. Accordingly, suppression of the illegal drugs found in Scott's possession is not warranted.

### **I. The Trial Court's Factual Finding**

We begin with the State's argument that the trial court made a clearly erroneous finding that Scott was not lawfully arrested for driving without a valid license. We then discuss the Fourth Amendment ramifications of that finding.

The trial court found that there was insufficient evidence that Scott’s Texas driver’s license was invalid. The State argues that it was clear that dispatch was referring to Scott’s Texas driver’s license when it informed Officer Hamm that Scott “did not have a valid license.” And, therefore, the State argues Officer Hamm had probable cause to arrest Scott for driving on a suspended or revoked license.<sup>4</sup> Thus, the Fourth Amendment was not violated. Scott responds that the State failed to produce sufficient evidence that his license was invalid and that the trial court’s finding, therefore, was not clearly erroneous.

We defer to a trial court’s factual findings unless those findings are clearly erroneous. *Grant v. State*, 449 Md. 1, 31 (2016) (citations omitted). “Under the ‘clearly erroneous’ standard, ‘if there is any competent evidence to support the factual findings below, those findings cannot be held to be clearly erroneous.’” *Johnson v. State*, 440 Md. 559, 568 (2014) (quoting *Washington v. State*, 424 Md. 632, 651 (2012)).

Here, the trial court had competent evidence to support its factual finding. In its ruling, the trial court explained that dispatch might have been reporting that the individual with the open arrest warrant (Jason *Michael* Scott) had an invalid license, rather than Jason *Bernard* Scott. The trial court’s concern is evident from the dialogue between the trial court and Officer Hamm at the suppression hearing:

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<sup>4</sup> See Md. Code Transportation (“TR”) Article, § 26-202(a)(2)(i) (“A police officer may arrest without a warrant a person for a violation of the Maryland Vehicle Law, including ... driving or attempting to drive a motor vehicle while the driver’s license or privilege to drive is suspended or revoked.”).

THE COURT: Just so I'm clear, you took the information that he gave, meaning his driver's license, you called in everything that was on the driver's license.

Well, not everything, but you used the name on the driver's license, date of birth[,] and race that was on the driver's license.

THE WITNESS: Yes, sir.

THE COURT: Did you call in the driver's license number? Did you say Jason Scott, date of birth, blahzay, blahzay,<sup>5</sup> black male, or did you call in Jason Scott, Texas driver's license number dot, dot, dot[?]

THE WITNESS: It would have been both. The name, date of birth, the race, as well as the license number. The only time we wouldn't call in the license number is if they didn't have an I.D. with them.

THE COURT: And based upon that, dispatch told you, simply, he has an outstanding warrant for failure to appear?

THE WITNESS: Right. As well as, his license number was not valid.

THE COURT: **All right. Do you know if[,] when they said the license is not valid, they were talking about the license that goes with this [arrest] warrant or that goes with his actual physical license that he handed you?**

THE WITNESS: The physical license he handed me was not valid. And –

THE COURT: How do you know that?

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<sup>5</sup> “Blahzay, blahzay” is a variation of “blah, blah, blah,” which is “[u]sed to represent words that have been used too many times before or you feel are not worth hearing.” Cambridge Academic Content Dictionary, “blah blah blah,” available at <https://perma.cc/94QF-CJBE> (link captured Dec. 27, 2016).



THE WITNESS: That's what dispatch advised me.

THE COURT: **But how do you know which license? They also told you that he was a white male. So...**

THE WITNESS: They didn't tell me he was a white male.

THE COURT: I know, but I'm saying, based upon what they saw –

THE WITNESS: Right.

THE COURT: **How do you know the information they gave you was not based upon this gentleman, this white gentleman, and not based upon the actual driver's license that he handed you?**

THE WITNESS: Well, the information I gave them was based on I.D. he gave me.

THE COURT: Okay. So they didn't say one way or the other[?] They didn't say [“]Texas license is not valid[?”]

THE WITNESS: Yes.

THE COURT: They just said his license is not valid.

THE WITNESS: Yes, they said his -- because the license I gave them was through Texas. They told me his license through Texas was not valid.

THE COURT: They said Texas was not valid[?]

THE WITNESS: Right. As well as, he's not showing anything for the State of Maryland.

THE COURT: **But they didn't mention a Virginia driver's license?**

THE WITNESS: No.

THE COURT All right ...

(emphasis added). Thus, the court believed it was possible that dispatch ran an inaccurate license check. Further, the trial court mentioned that the open arrest warrant for Jason *Michael* Scott was “for a traffic matter and listed a Virginia license” and that dispatch may have been referring “to the Texas license or just the warrant as a whole.” Dispatch may have meant that Jason *Michael* Scott, who had an open arrest warrant also had an invalid license, not that Jason *Bernard* Scott himself had an invalid license. Ultimately, the trial court believed dispatch may have ran both an inaccurate warrant check and an inaccurate license check, and thus the court made its finding that Scott was not lawfully arrested for driving without a valid license. We see no clear error in that finding.

Because we hold the trial court was not clearly erroneous, we now turn to whether the search of Scott violated the Fourth Amendment. As mentioned earlier, subject to few exceptions, warrantless searches violate the Fourth Amendment. One such exception that does not violate the Fourth Amendment is a warrantless search of a defendant conducted after a lawful arrest. *See Conboy v. State*, 155 Md. App. 353, 364 (2004).

Because we uphold the trial court’s finding that Scott was not lawfully arrested for driving without a license, the State must have an alternative basis to arrest and search Scott.

It does not.<sup>6</sup> Therefore, Scott’s arrest and subsequent search violated the Fourth Amendment.

## **II. The Exclusionary Rule**

Our conclusion that the arrest and subsequent search of Scott violated the Fourth Amendment, however, doesn’t end our inquiry. We next turn to whether the Fourth Amendment’s exclusionary rule will operate to suppress the illegal drugs found in Scott’s possession. The trial court did not make a specific finding regarding whether dispatch was deliberate, reckless, or grossly negligent in informing Officer Hamm that Scott’s Texas driver’s license was invalid, which would trigger the exclusionary rule. The State focuses on gross negligence, arguing that even if dispatch was mistaken, there is no evidence that its mistake was the product of gross negligence. Although the trial court did not make a finding as to whether dispatch was grossly negligent, we hold that dispatch was not grossly negligent as a matter of law. Thus, we hold that the exclusionary rule is inapplicable. Consequently, suppression of the illegal drugs found in Scott’s possession is unwarranted.

As explained above, the Supreme Court in *Herring* ruled that courts would suppress evidence when the reason for the lack of a warrant, or a warrant exception, was gross negligence. We note that, since *Herring*, Maryland courts have not defined “gross

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<sup>6</sup> The State argues in its brief that the smell of marijuana provided an alternative basis to arrest Scott. We agree with Scott that this argument was not presented to the trial court and is thus unpreserved for our review. Md. Rule 8-131(a) (“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.”).

negligence” in a Fourth Amendment context. Other courts, however, have adopted the civil definition of gross negligence. *See, e.g., United States v. Raymonda*, 780 F.3d 105, 123 (2d Cir. 2015). We choose to do the same. The Court of Appeals of Maryland has explained that gross negligence is:

an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another, and also implies a thoughtless disregard of the consequences without the exertion of any effort to avoid them. Stated conversely, a wrongdoer is [liable for] gross negligence or acts wantonly and willfully only when he inflicts injury intentionally or is so utterly indifferent to the rights of others that he acts as if such rights did not exist.

*Barbre v. Pope*, 402 Md. 157, 187 (2007) (citations omitted); *see also Shoemaker v. Smith*, 353 Md. 143, 164 (1999) (explaining that gross negligence is akin to “reckless or wanton conduct”). Therefore, to find that dispatch was grossly negligent, dispatch must have had a reckless disregard for Scott’s rights when it informed Officer Hamm that Scott’s Texas driver’s license was invalid.

Applying that standard, we conclude, as a matter of law, that there are no facts in this record that suggest dispatch was grossly negligent. Officer Hamm testified that he read to dispatch the license number, name, date of birth, and race of Scott. Dispatch told Officer Hamm that Scott’s “license through Texas was not valid.” Dispatch also informed Officer Hamm that Scott was “not showing anything for the State of Maryland,” meaning he did not have a Maryland driver’s license on file. Relying on this information, Officer Hamm arrested Scott and transported him to the Department of Corrections, where he was

searched.<sup>7</sup> Dispatch may have been wrong about the validity of Scott's Texas driver's license, but there is no evidence that it was wrong due to a reckless disregard for Scott's rights. To the extent, as the trial court found, that there was some evidence of confusion regarding the license check, there is no suggestion that it rose to the level of gross negligence.

Mistakes happen. And, while we urge caution, mistakes will continue to happen. As the Supreme Court held in *Herring*, exclusion of evidence won't prevent mistakes. Accordingly, suppression of the drugs found after Scott's arrest was not warranted, and we reverse the trial court.

**JUDGMENT OF THE CIRCUIT COURT  
FOR PRINCE GEORGE'S COUNTY  
REVERSED. COSTS TO BE PAID BY  
APPELLEE.**

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<sup>7</sup> We note for Fourth Amendment purposes, it does not matter whether Scott was searched on the street next to his car or later at the jail. As we have previously explained:

[S]earches and seizures that could be made on the spot at the time of arrest may be legally conducted later at the place of detention. ... This includes both the person and the property in his immediate possession.

*Fontaine v. State*, 135 Md. App. 471, 478 (2000).