UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1636

September Term, 2014

CHRISTOPHER JOPPY

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Hotten,
Nazarian,

JJ.

Opinion by Nazarian, J.

Filed: August 17, 2015

Christopher Joppy was convicted by a jury in the Circuit Court for Montgomery County of negligent driving, reckless driving, driving while impaired by a controlled dangerous substance, and driving while impaired by drugs. On appeal, he argues that the circuit court erred by: (1) admitting two statements he made to the police, (2) denying his motion for a continuance, and (3) convicting and sentencing him for *both* reckless and negligent driving, which should have merged. We and the State agree with his third argument, so we vacate the fine for negligent driving, but otherwise affirm.

I. BACKGROUND

On November 10, 2013, Gail Kropf was driving on Bel Pre Road when she noticed a car driving erratically. She saw the car speed and slow and drive up onto the curb a few times, then hit a sign, before she called the police. She continued to follow the car until the police arrived.

Three units responded to Ms. Kropf's call, including Officer Bill Sidel. Officer Sidel and his narcotics dog, Lambert, searched the vehicle and found a cup that was later identified as containing PCP and a cigarette. Another cigarette was recovered from the center console of the car.

Officer Jeffrey Straumburg and his partner, Officer Dawn Cutright, performed standard field sobriety tests on Mr. Joppy. Officer Straumburg noted that Mr. Joppy was "unable to maintain his balance." Officer Cutright noted that as she spoke to him, Mr. Joppy looked at her "as if he didn't, couldn't process exactly what [she] was saying." After she spoke to Ms. Kropf, Officer Cutright returned and "asked Mr. Joppy what may not be making him perform these tests as a sober person would perform the tests." He nodded

instead of responding, and then said that he had smoked a cigarette dipped in PCP. Officers Cutright and Straumburg then arrested Mr. Joppy for suspected DUI and transported him back to the police station.

At the station, Mr. Joppy was processed and asked to take a breathalyzer test. While waiting for the officer to administer the test, Mr. Joppy asked Officer Cutright "if there were cameras on Bel Pre that would have caught him driving erratically." She told him that there were speed cameras on that street, not cameras that recorded a live feed, but that a witness had observed him and called the police. Mr. Joppy seemed not to believe her, then stated that he had "smoked PCP a bunch of times and drove, and never had any problems." The breathalyzer test ultimately revealed "zero" alcohol in his system.

Mr. Joppy contended at trial that his erratic behavior was due to prescription medication, Vicodin, which had been legally prescribed by a doctor and filled five days earlier. On November 9, 2013, he rented a car to "see [his] girlfriend and pick her up and take her out places," and he contended the night he was pulled over "[she] and her friends [were] in [the car] also." He testified that he did not smoke PCP that night, but had taken Vicodin as prescribed by the doctor. He believed that he performed poorly on the field tests administered by Officer Straumburg because:

> I'm 300 some pounds and, you know, I got small ankles. And I'm not, you know, when I walk, I walk funny. And [y]ou know, I'm off balance. I mean, I'm not, I'm 47, you know, years old. I'm old. I mean, at the time I was 46. I'm not a young guy. My balance is off.

The case originally was scheduled for trial in the District Court for Montgomery County on March 28, 2014, but was postponed until June 30, 2014. On the day of the trial,

Mr. Joppy, in open court, requested an instant jury trial, and the Clerk issued subpoenas for his appearance in circuit court that afternoon. Although he was represented in the district court by a public defender, two new public defenders were assigned to represent him in the circuit court, and they moved for a continuance. The motion was denied and the trial proceeded as scheduled.

After a two-day trial, Mr. Joppy was convicted of negligent driving, reckless driving, driving while impaired by a controlled dangerous substance, and driving while impaired by drugs. He was sentenced on September 2, 2014 to one year of incarceration for driving while impaired by a controlled dangerous substance, a concurrent two months for driving while impaired by drugs, and two $50 fines for reckless and negligent driving. He noted a timely appeal.

II. DISCUSSION

Mr. Joppy presents three questions for our review: *first*, whether the trial court erred in allowing testimony of the two incriminating statements, which he contends were the product of unconstitutional custodial interrogation; *second*, whether the trial court erred in denying Mr. Joppy's motion for a continuance; and *third*, whether his reckless driving and negligent driving convictions should be merged.[1] The State contests the first two points,

[1] Mr. Joppy phrased his questions as follows in his brief:

> 1. Did the trial court err in allowing testimony from Officer Cutright concerning two incriminating statements made to her by Mr. Joppy?

(continued…)

but concedes that Mr. Joppy's convictions should be merged and the redundant punishment vacated.

A. Mr. Joppy Did Not Make Either Incriminating Statement While Under Custodial Interrogation.

A person in custody has the right to remain silent until he has consulted counsel. *See Miranda v. Arizona*, 384 U.S. 436 (1966). *Miranda* protects "a defendant's Fifth and Fourteenth Amendment privilege against compulsory self-incrimination" by not allowing the prosecution to benefit from "statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant" unless he has been given the proper warnings and safeguards. *Rhode Island v. Innis*, 446 U.S. 291, 297 (1980) (quoting *Miranda*, 384 U.S. at 444). The Supreme Court held in *Miranda* that warnings must be given before custodial interrogation, which is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444. A defendant must prove three elements to suppress a statement under *Miranda*: (1) that the statement was made while the defendant was in *custody*, (2) that the statement was made while the defendant was being *interrogated*, and (3) that no *Miranda* warnings were given. *Id.*

(…continued)

2. Did the trial court abuse its discretion in refusing to postpone the trial?

3. Are separate sentences for reckless driving and negligent driving improper?

Mr. Joppy contends that he made the two statements to Officer Cutright while he was in custody, while under constructive interrogation and before he was *Mirandized*, and therefore that the statements should have been suppressed.[2] We find that the first statement

[2] Officer Cutright testified to both contested statements. In the first contested statement she said that Mr. Joppy admitted smoking a cigarette dipped in PCP:

> [OFFICER CUTRIGHT]: I asked Mr. Joppy what may not be making him perform these tests as a sober person would perform the tests well. And he started nodding along to my questions, unable to understand what I was saying. He said that he had smoked a cigarette, and I asked him if that cigarette had been dipped in PCP.
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> * * *
>
> [COUNSEL FOR THE STATE]: How did he respond?
>
> [OFFICER CUTRIGHT]: He responded that it was.

The second contested statement also involved an admission that he previously had smoked PCP and driven:

> [COUNSEL FOR THE STATE]: Was there any conversation between you and [Mr. Joppy] – [Mr. Joppy] make any statements before the breath operator arrived?
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> [OFFICER CUTRIGHT]: Yes he did.
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> * * *
>
> [OFFICER CUTRIGHT]: He asked me if there were cameras on Bel Pre that would have caught him driving erratically, which he asked a couple times why he was being arrested even though we explained it to him. When he asked again if there were cameras on Bel Pre road, I stated that there were not but there were speed cameras on Bel Pre Road. But they did not record live feed of people driving. He didn't seem to believe this, and I told him that a witness had been (continued…)

occurred while Mr. Joppy was being field-tested for sobriety and not in custody, and the second statement was made while he was in custody but not being interrogated.

We "accept the findings of fact made by the circuit court, unless they are clearly erroneous," limiting our review exclusively to the suppression hearing record, although we review the legal conclusions *de novo*. *Conboy v. State*, 155 Md. App. 353, 361-62 (2004). We "view the evidence and inferences that may be reasonably drawn therefrom in a light most favorable to the prevailing party on the motion." *Robinson v. State*, 419 Md. 602, 611 (2011) (citing *Owens v. State*, 399 Md. 388, 403 (2007)). We look *first* at whether the factual findings of the trial judge were clearly erroneous and, *second*, at whether the incriminating statements were made while Mr. Joppy was subject to custodial interrogation.

(…continued)

> following him and that's the reason that we initially were called there. And that witness was willing to state that she was following him for quite some time when he was driving.
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> * * *
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> [OFFICER CUTRIGHT]: [S]o he said that he didn't believe that, and that he's smoked PCP a bunch of times –
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> * * *
>
> [OFFICER CUTRIGHT]: For the exact quote, he stated. I'd smoked PCP a bunch of times and drove, and never had any problems.

1. The first statement was made before Mr. Joppy was in custody.

Mr. Joppy contends that when he made his first statement to Officer Cutright, it was obvious he was not free to leave: "given Mr. Joppy's poor performance on the field tests, coupled with the information provided to Officer Cutright by Ms. Kopf, it was obvious to all present, including Mr. Joppy, that a formal arrest of Mr. Joppy for driving under the influence was inevitable and imminent." We disagree.

As a preliminary matter, Mr. Joppy asserts that he made the statement after his sobriety test was completed, not during the test. Whether Mr. Joppy made the statement *during* or *after* the conclusion of the test is a factual question. And the answer matters because, as Mr. Joppy concedes, a person is generally not in custody under *Miranda* while detained for field sobriety testing. *See McAvoy v. State*, 314 Md. 509, 514 (1989); *State v. Rucker*, 374 Md. 199, 221 (2003); *Brown v. State*, 171 Md. App. 489, 526 (2006). It's true that a person does not have to be arrested to be in custody. But the key lies in whether "a reasonable person in the suspect's position would have understood" that he was in custody, *Rucker*, 374 Md. at 217, and we have previously "disagree[d] with [the] contention that the conduct of field sobriety tests constitutes custodial interrogation implicating the Fifth Amendment," regardless of whether the particular field sobriety test in question "involved significant effort" or an increased number of tests. *Brown*, 171 Md. App. at 525-27.

The trial judge found, as a matter of fact, that Mr. Joppy made the first statement during the test:

> Okay, it's my understanding that in this context where he's basically still being administered field sobriety tests. She says

> this is immediately following the walk and turn, and she's asking if there [*sic*] some reason you can't do the walk and turn. So he really, to his knowledge, hasn't been placed under arrest yet. I believe that was that was pretty much just implicated, and therefore the objection's overruled.

We review the circuit court's finding for clear error, and in the light most favorable to the prevailing party below—in this case, the State. And on this record, Officer Cutright's testimony provided a sufficient basis for the trial judge to find that the tests were still underway at the time the statement was made. Mr. Joppy stated that he had smoked a cigarette dipped in PCP—a statement consistent with the liquid and cigarette found in his car—in response to the officer's question about whether he could explain his poor performance on the field sobriety tests. Mr. Joppy argues that we should find as a matter of law that the tests had concluded, presumably because he had completed (and failed) the physical components. We decline to draw that sort of legal bright line here. Mr. Joppy's statement related directly to the just-completed physical tests, and came in response to the officer's question about whether he could explain his inability to complete those tests, and had he been able to offer a persuasive explanation, the officers might have decided against arresting him at all. In any event, though, we discern no clear error in the circuit court's finding that the testing was still under way, and thus that Mr. Joppy was not in custody.

2. Mr. Joppy's second statement was not made during an interrogation.

The second statement Mr. Joppy contests occurred at the police station, while Officer Cutright was waiting with Mr. Joppy for a technician to arrive and conduct an alcohol breathalyzer test. Mr. Joppy contends correctly he was in custody at the time of the

statement, as he had already been processed, so we question only whether he was being interrogated.

We have recognized that "not every question constitutes 'interrogation.'" *Prioleau v. State*, 411 Md. 629, 641 (2009). The context of the question or comment is important. *Id.* at 644. Observational statements and conversations with another person, even within the clear earshot of the suspect, are not "constructive interrogation." *Innis*, 446 U.S. at 301; *Conboy v. State*, 155 Md. App. 353, 373 (2004). In *Conboy*, we held that a trooper's statement was not constructive interrogation because the "statement was merely an observation made without inviting a response" and "there [was] no evidence that the trooper intended to elicit an incriminating response from appellant or should have known that appellant would respond to his remark." 155 Md. App. at 373.

Moreover, an officer's response to a defendant's question does not constitute constructive interrogation. *See Gaynor v. State*, 50 Md. App. 600, 607 (1982). In *Gaynor*, we held that police answering a suspect's question about how they were able to find him did not constitute "interrogation" under *Miranda*. As here, the police in *Gaynor* responded to the question with a statement about their source of information on the suspect's criminal activities—there, they informed the suspect they knew where to find him because "they had received a telephone call from his wife informing them of his whereabouts." *Id.* We drew a distinction between that situation and *Brewer v. Williams*, 430 U.S. 387 (1977), where the police "deliberately elicit[ed] incriminating evidence from the defendant by urging him to point out the location of the girl's body because adverse weather conditions would make it impossible to find it at a later date, and because her parents were entitled to

give her a 'Christian burial.'" *Gaynor*, 50 Md. App. at 606-07 (citing *Brewer*, 430 U.S. 387).

The essential question is whether Officer Cutright knew or should have known that her statement would elicit an incriminating response. The trial court did not fully elucidate its reasoning for denying Mr. Joppy's objection, but we again see no error in the decision to overrule it:

> [COUNSEL FOR MR. JOPPY]: He is now under arrest at the station. There has been no testimony his *Miranda* rights were given to him. A DR-15 is just about the rights that he loses for the license. It is not the right that he has to speak to an attorney.
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> [THE COURT]: But this is not the product of any questioning.
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> [COUNSEL FOR MR. JOPPY]: She's asking him.
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> [THE COURT]: No, she didn't. Because this is --
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> * * *
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> [THE COURT]: He's asking her about cameras and there's no interrogation.

The trial judge found that Officer Cutright was responding to questions Mr. Joppy posed to her, without intending or knowing that her statements would elicit an incriminating response from him. As in *Gaynor*, Officer Cutright was offering an answer to questions asked by Mr. Joppy regarding the weight of the evidence against him. *Innis* requires that the officer knew or should have known the probable consequence of his statement. We see no reason to overturn the trial judge's finding that Officer Cutright did not, and thus that she was not interrogating him (constructively or otherwise) at the time of his second statement.

B. The Trial Court Did Not Abuse Its Discretion In Denying Mr. Joppy's Motion For A Continuance.

Mr. Joppy contends that a continuance was necessary, and that the court abused its discretion in denying one, because (1) he had moved for an instant jury trial that morning in the district court, and had only met his two new public defenders shortly before lunch the same day, (2) both his new counsel had trials scheduled the following day, and (3) he needed time to procure a witness to validate his Vicodin prescription and speak to the effects of the drug. He agrees, as he must, that a court's decision to grant or deny a continuance is a matter of discretion. *See Jackson v. State*, 288 Md. 191, 194 (1980) (finding that "the granting of a continuance to locate a defense witness rests within the sound discretion of the trial judge and such discretion will not be disturbed absent a showing of abuse prejudicial to the defendant" (citations omitted)); *Wilson v. State*, 345 Md. 437, 451 (1997) (we accord the trial judge "a significant amount of discretion whether to grant the necessary continuance to allow the missing witness to be located, subpoenaed, or apprehended, and reversal of a judgment of conviction is appropriate only upon a finding that that discretion has been abused."). *Jackson* laid out three criteria for determining whether an abuse of discretion occurs in this context: (1) whether the defendant showed a reasonable expectation that the absent witness will be secured in a *reasonable time*, (2) whether the testimony is *competent* and *material*, and (3) whether the defendant made a *diligent* and *proper effort* to secure the witness. *Id.; see also Wilson*, 345 Md. at 449 (a defendant must "show, among other things, an ability to locate the witness within a reasonable time" and that he "made a diligent effort on his … own to obtain the witness

through available court process.") (citations omitted). Moreover, "[a] court is not ordinarily obliged to continue or interrupt a trial because of a missing defense witness when the defendant has failed to subpoena the witness in a proper *and timely* manner." *Id.* (citations omitted) (emphasis added).

This is a tough standard. In other cases, we have not considered the inability of counsel to prepare within the time allotted a compelling reason, in and of itself, to compel a continuance. "Our reticence to find an abuse of discretion in the denial of a motion for continuance has not been ameliorated, nor have we found it to be an 'exceptional situation,' when the denial has had the effect of leaving the moving party without the benefit of counsel." *Touzeau v. Deffinbaugh*, 394 Md. 654, 674 (2006). And the same is true for scheduling concerns:

> In *Cruis Along Boats, Inc. v. Langley*, 255 Md. 139 (1969), the defendant requested a continuance the day before trial because one of his counsel … was scheduled to be in court in another matter on the trial date. The trial judge refused to grant a continuance and, on appeal, the defendant argued that the denial of his motion constituted a denial of his constitutional right to have effective assistance of counsel because Mr. Blatt was his primary counsel in the matter. *Id.* at 142. We held that there was no abuse of discretion in the trial court's ruling because defendant had at least four days' notice that Mr. Blatt would not be available, and therefore the defendant 'should have made other arrangements, perhaps adopting the suggestion of the trial judge that an associate [of the same] firm handle the trial.' *Id.* at 142-43. *See also Travelers Indem. Co. v. Nationwide Const. Corp.*, 244 Md. 401, 407 (1966) (affirming the trial judge's denial of the defendants' motion for continuance made the morning of the day set for trial on the ground that counsel had a scheduling conflict with another proceeding, and the denial resulted in the defendants' lack of representation at trial); *Clarke Baridon, Inc. v. Union Asbestos & Rubber Co.*,218 Md. 480, 482-83 (1958) (affirming entry of

> summary judgment by default against defendant where defendant's attorney requested a continuance in absentia on the date set for hearing because of a scheduling conflict with another case).

Id. at 674-675. Under *Touzeau*, a defendant must show two elements to warrant reversal: (1) the defendant must show that he "experienced an unforeseen circumstance … that []he reasonably could not have anticipated," and (2) the defendant must have "acted with due diligence to mitigate the consequences" of the surprise. 394 Md. at 678. The trial court found that Mr. Joppy satisfied neither, and we see no abuse of discretion in those conclusions.

A defendant may demand a jury trial under Rule 4-301, "in open court on the trial date." Md. Rule 4-301(b)(1)(B). But, as happened here, demanding a jury trial under Rule 4-301(b)(1)(B) results in "an immediate jury trial." *Moore v. State*, 331 Md. 179, 181 n.1 (1993). Mr. Joppy acknowledges that when the same counsel represents a defendant in both the district court and the circuit court, "the attorney can plan and prepare for trial accordingly," and a continuance would be neither necessary nor appropriate. He argues, however, that the change in public defenders was *surprising* enough to warrant a continuance.

The trial court disagreed, and keyed on two facts that Mr. Joppy understandably glosses. *First*, this motion was denied on the second trial date in this case—Mr. Joppy had previously been granted a continuance—and his original counsel had the three months between the two trial dates to locate witnesses who could "(1) testify about the effects of Vicodin and (2) authenticate the hospital records from Shady Grove Adventist Hospital

showing that on November 5, 2013, Mr. Joppy was given a prescription for Vicodin." *Second*, the State was willing to concede the validity of the prescription so long as the bottle with the label was produced and someone (such as Mr. Joppy, the pharmacist, or the doctor) testified to its existence, and the court agreed to allow Mr. Joppy to introduce this evidence on the second day of the two-day trial. The court did consider whether there was sufficient time to produce a witness, but concluded that Mr. Joppy would need to testify, as he was the only person who could testify that he had taken the Vicodin within the relevant time frame, and that his testimony would address much of the defense by itself:

> COUNSEL FOR [DEFENDANT]: Your Honor, the only issue the defense would have with that is it would put us in the position as we would have to either put him on the stand or get the cooperation of a pharmacist or doctor or someone to show up tomorrow in order to lay the proper authentication. As—
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> [THE COURT]: No but, in order to make it relevant would he, in effect, have to explain to the jury or claim in front of the jury that he had been using Vicodin at that time on that bigger day? Because the fact that he has the prescription for Vicodin wouldn't make any difference.
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> * * *
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> [THE COURT]: But forget the authentications because at best, the only thing a pharmacist or doctor could prove would be that this was prescribed. That doesn't mean he's taking it at the date and time in question. And unless he's taking it at the time in question it's not relevant to the jury's consideration. So, to establish relevance, somebody's going to have to say not only is it lawfully prescribed, but he was under the influence of it at the time, not PCP. Now, if he said that to the police admittedly the State could introduce that. But, you know, the State may not want to introduce your defense for you and you can't introduce it through the police; right? Am I missing something? So he can certainly testify. And he can bring in the prescription to prove what he's saying is true. And the State's

> agreed that as long as he authenticates it he can use the vial. So why doesn't that solve your problem?

Had Mr. Joppy identified a specific witness who was demonstrably unavailable for trial that day, his argument might be stronger (although in that scenario, he presumably would have sought a continuance in district court, before praying a jury trial). But where "defense counsel was unable to proffer [a witness's] testimony to establish its materiality, relevancy and competency, … there was no basis to grant a continuance." *Jackson v. State*, 288 Md. at 194-195; *see also McKenzie v. State*, 236 Md. 597 (1964). In *Bryant v. State*, the Court of Appeals found it insufficient that the defendant provided "a statement that the witness was an important one," where the witness was not named and it was unclear "what facts the defendant believed the witness would prove if present." 232 Md. 20, 21 (1963). We see no abuse of discretion in the court's decision to deny a continuance to allow Mr. Joppy to seek a witness he had already had three months (at least) to find and that remained, at the time of trial, an abstract possibility.

C. Mr. Joppy's Sentences For Reckless Driving And Negligent Driving Merge.

Finally, Mr. Joppy argues that his fines for reckless driving and negligent driving should be merged because negligent driving is a lesser-included offense in reckless driving. The State concedes that the sentences should be merged, and we agree that negligent driving is a lesser-included offense in the greater-inclusive offense of reckless driving under the required evidence test:

> [T]he offenses of negligent driving and reckless driving are the same for double jeopardy purposes. We think that it 'splits hairs' to conclude anything other than that negligent driving,

> *i.e.*, driving in a careless or imprudent manner that endangers property or the life or person of any individual, is a lesser included offense of reckless driving, *i.e.*, driving with a wanton or willful disregard for the safety of persons *or* property.

Jones v. State, 175 Md. App. 58, 89 (2007) (emphasis in original).

There are no elements of negligent driving under Md. Code (1997, 2008 Repl. Vol.), § 21-901.1 of the Transportation Article ("TA"), that are not elements of reckless driving.[3] A person who drove with "wanton or willful disregard" must also have driven "in a careless or imprudent manner." TA § 21-901.1. Accordingly, Mr. Joppy's conviction for negligent driving merges into his conviction for reckless driving, and we vacate the fine the circuit court imposed in connection with the negligent driving charge.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED EXCEPT AS TO THE FINE FOR NEGLIGENT DRIVING, WHICH IS VACATED. COSTS TO BE PAID BY APPELLANT.

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[3] Under TA § 21-901.1(a), "reckless driving" is defined as driving:

> (1) In wanton or willful disregard for the safety of persons or property; or
> (2) In a manner that indicates a wanton or willful disregard for the safety of persons or property.

Under TA § 21-901.1(b), a person is "negligently driving" when:

> [H]e drives a motor vehicle in a careless or imprudent manner that endangers any property or the life or person of any individual.