

Circuit Court for Worcester County
Case Nos. 23-K-16-0511

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1899

September Term, 2017

ETOYI J. ROACH

v.

STATE OF MARYLAND

Wright,
Graeff,
Sharer, J., Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: September 4, 2019

*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.

The single issue presented by Etoyi J. Roach in this appeal is whether the Circuit Court for Worcester County erred in denying his motion to suppress physical evidence seized at the time of his arrest in Ocean City in August 2016. Following denial of his motion, he entered a plea of not guilty on an agreed statement of facts, resulting in guilty verdicts of possession of heroin and possession of cocaine with intent to distribute.¹ His timely appeal followed.

Because Roach raises only a challenge to the admissibility of the physical evidence seized, our factual reference is limited to the evidence adduced at the suppression hearing. We review a circuit court’s denial of a motion to suppress on ““only the evidence contained in the record of the suppression hearing.”” *Gupta v. State*, 452 Md. 103, 129 (2017) (quoting *Rust v. State*, 403 Md. 68, 82-83 (2008)). The suppression court’s factual findings, including ““its conclusions regarding the credibility of testimony[,] are accepted unless clearly erroneous.”” *Id.* (quoting *Rush*, 403 Md. at 83). The evidence and all inferences reasonably drawn therefrom are viewed “in the light most favorable to the prevailing party.” *Id.* (internal quotations and citation omitted). However, we review the suppression court’s legal conclusions *de novo* by undertaking our own “independent constitutional appraisal of the record by reviewing the law and applying it to the facts ...” found by the suppression court. *Id.* (internal quotations and citation omitted).

¹ Roach was sentenced to a term of incarceration of 14 years, four years of which were suspended, to be followed by two and a half years of supervised probation.

The suppression hearing

On August 7, 2016, at about 12:24 a.m., PFC Neshawn Jubilee of the Ocean City Police Department was on duty in a marked patrol car in downtown Ocean City. He received a radio broadcast alerting to a vehicle described as a Chevy Impala, bearing Delaware registration, which had committed a moving traffic violation. Jubilee saw the described vehicle, initiated a traffic stop, approached the vehicle, and observed Roach to be the driver. He obtained Roach's driver's license and registration and, at the same time, obtained identification from the two passengers.²

Jubilee began standard license checks and continued to perform the checks after PFC Daniel McBride arrived and contacted the two passengers in the vehicle. It was McBride who had observed the moving violation and initiated the radio alert. During the duration of the stop, other officers arrived: PSA Hawkins³ and PFC Corey Gemerek of the Ocean City Police Department and Corporal Christopher Larmore of the Worcester County Sheriff's Department. McBride had requested the K-9 officer and dog, and, upon their arrival, Roach and his passengers were removed from the vehicle. Larmore, the K-9 officer, conducted a scan of the vehicle with his dog, Simon. Based on the scan, McBride

² One of the passengers, Ryan Steck, was also charged with related drug offenses. Steck's motion to suppress and Roach's were heard simultaneously, and both were denied. Steck, however, was tried separately. On his direct appeal, Steck's convictions were likewise affirmed. *See Steck v. State*, 239 Md. App. 440 (2018).

The other passenger, Jerry Weston, died while in police custody as a result of allegedly ingesting cocaine.

³ The record does not reveal PSA Hawkins' first name.

searched the vehicle and found a significant quantity of heroin in the pocket in the rear of the front passenger seat. During a search of Roach incident to the arrest, cocaine was found on his person.

Roach parses his contention of the court's error into three aspects: (1) that the officers lacked a basis to believe that Roach had committed a moving traffic offense and, therefore, lacked a constitutionally permissible justification for the traffic stop; (2) the stop was unreasonable in length; and (3) that the scan by the K9 dog was inconclusive as to contraband in the vehicle, thus there was no basis for the search of the vehicle or his person.

1. The stop

The events of the early morning began when McBride, on bicycle patrol near 1st Street and St. Louis Avenue, observed a black Chevy Impala that, as it “went to make a left-hand turn, [] pulled out in front of a taxicab, which caused the taxicab to hit his brakes in the roadway, given that the vehicle had pulled out right in front of him.” The driver of the taxicab had to “slam on his brakes to avoid a collision with the vehicle.” McBride gave a radio alert and, learning that a stop had been affected, went to that location, taking about four minutes to arrive. He stated that it was his initial intent to issue a warning to the operator.

Roach concedes that “the police have the right to stop and detain the operator of a vehicle when they witness a violation of the traffic law.” But, he argues that in this instance the police lacked a reasonable suspicion that the car was being driven contrary to the laws governing the operation of vehicles, citing *Lewis v. State*, 398 Md. 349 (2007). Roach clings to a very thin thread, suggesting that McBride, in stating his intent to charge Roach

with an unsafe lane change, was referring to the wrong section of the Transportation Article (Tr.). Roach asserts that Tr. § 21-309(b) “controls lateral movement – to the right or left – while the vehicle is in transit, and – as [he] submitted in the lower court – not while the vehicle is turning perpendicularly. *That* conduct is governed by § 21-402.” (Emphasis in appellant’s brief). That mistaken reference, he suggests, did not provide reasonable cause to stop the vehicle under that provision of the statute. We are not impressed with his venture into the minutiae of the traffic laws, as Roach was in fact charged under both statutes.

McBride observed the operation of a vehicle in a manner that nearly caused a collision with another vehicle, determined that there had been a moving violation, and acted accordingly. As the suppression court observed, “[t]he behavior, the actions, of the Defendant in driving the vehicle in front of the cab certainly is grounds for a traffic offense.” The court’s conclusion was sound. We know of no authority that requires an officer, at the time an apparent moving violation is observed, to form an intellectual calculation of the precise statute section or sub-section that will support the ultimate charging document.

Indeed, this Court has applied the rationale of several United States Supreme Court cases in determining the reasonableness of the traffic stops with respect to police intentions in relation to the Fourth Amendment. In *Herring v. State*, 198 Md. App. 60, 73 (2011), we applied the Court’s rationale in *Whren v. United States*, 517 U.S. 806, 813 (1996), explaining that “the constitutional reasonableness of traffic stops did not depend on the actual motivations of the officers involved and that ‘[s]ubjective intentions play no role in

ordinary, probable-cause Fourth Amendment analysis.” *Accord Brown v. State*, 171 Md. App. 489, 523-24 (2006) (explaining that “[i]t is of no consequence that [the officer] did not charge [the defendant] with any of those offenses; neither is it relevant to the Fourth Amendment analysis that [the officer] may have harbored a different subjective intention” (citing *Whren*, 517 U.S. at 814-15)). *See also Cox v. State*, 161 Md. App. 654, 672 (2005) (applying the rationale of *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004), where, in underscoring the vitality of its holding in *Whren*, the Supreme Court “added that an officer’s ‘subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause.’”).

2. The length of the detention

Roach suggests that the traffic stop was unreasonably extended by redundant paperwork and discussion to allow for the arrival of the K-9 dog and its handler. He asserts that “[t]he Fourth Amendment loadstar [sic] is reasonableness and, in assessing the reasonableness of a traffic stop, a court must assess whether ‘it was reasonably related in scope to the circumstances which justified the interference in the first place.’” (Quoting *Lewis*, 398 Md. at 361).

In *State v. Ofori*, 170 Md. App. 211, 235 (2006), we recognized that a K-9 scan “is accepted as a perfectly legitimate utilization of a free investigative bonus as long as the traffic stop is still genuinely in progress.” The Court of Appeals announced that a traffic stop “‘must be temporary and last no longer than is necessary to effectuate the purpose of the stop.’” *Ferris v. State*, 355 Md. 356, 369 (1999) (quoting *Florida v. Royer*, 460 U.S. 491, 500 (1983)). And, “[o]nce the purpose of that stop has been fulfilled, the continued

detention of the car and the occupants amounts to a second detention.” 355 Md. at 372. There is no essential disagreement between the State and Roach as to the applicable standards on the facts before us.

Roach argues that the delay was caused by Jubilee’s unreasonable delay in his review of the passengers’ documents before a review of Roach’s license status. He then asserts that McBride caused undue delay by talking with Larmore before the K-9 scan began and suggests further that McBride purposely delayed writing the traffic violation warning until Larmore arrived with Simon. In total, the time elapsed between McBride’s observation of the traffic violation and the arrival of Larmore was about eight minutes.

It is true that the “reasonableness of a traffic-based detention is not measured by the clock alone.” *Ofori*, 170 Md. App. at 237. It is, however, an element to be considered. We have had occasion to consider the reasonableness of the temporal distance between a stop and the arrival of a K-9 unit and have found, in *Carter v. State*, 236 Md. App. 456, 471 (2018), a 17-minute stop, including a ten-minute wait for the K-9 arrival, and in *Partlow v. State*, 199 Md. App. 624, 639 (2011) an 18 minute stop, including an 11 minute wait for arrival of the K-9 unit, not to be unreasonable. In *Partlow*, we said that “[i]f the officer issuing the citations is legitimately still working on those citations when the K-9 unit arrives, the traffic stop is still ongoing, and the detention will be considered reasonable for Fourth Amendment purposes.” *Id.* at 638 (citing *Ofori*, 170 Md. App. at 243).

The motions court found no undue delay; nor, do we.

3. Simon's performance

Lastly, Roach contends that the scan by Simon, the police K-9 dog, did not indicate the presence of contraband in the vehicle and, therefore, the officers lacked a basis to conduct the warrantless search of the vehicle.⁴

The testimony before the suppression court detailed the summons of Larmore and Simon to the scene, the preliminaries to Simon's scan of the vehicle and its occupants who were, at the time, outside the vehicle. Larmore described Simon's reaction to his scan: that he detected the odor, and that the odor emanated from both the vehicle and the occupants, then seated at the curb. In his testimony, Larmore was asked:

[PROSECUTOR]: When you observed the behaviors of your dog, did you observe behaviors consistent with odor coming from the vehicle?

[WITNESS]: Yes.

[PROSECUTOR]: And did you observe behaviors of the odor coming from the individuals sitting on the curb?

[WITNESS]: Yes.

Roach argues that because Simon did not go into his "final alert," as Larmore conceded, and because Simon was reacting to two sources of odor, that probable cause did not exist for the search. The cases do not impose such a rigid standard of certainty. Larmore testified that Simon reacted to the separate alerts. The suppression court accepted

⁴ The use of properly trained and certified dogs in detecting the presence of drugs and other contraband has been accepted by the courts of this State and others. Simon's qualifications have not been challenged. On this record, we see no need to cite chapter and verse the foundation for the admissibility of such evidence or the weight to be given it. There is no disagreement between the parties on those points.

that possibility as not limiting the probable cause, stating that “I find that the testimony of Deputy Larmore was very compelling and specific as to what the dog did for him to determine that, in fact -- even though I’ve used the word alert, it’s not the quote/unquote ‘alert,’ but an indication that there were drugs there.” Our discussion in *State v. Cabral*, 159 Md. App. 354 (2004) supports that conclusion.

In *Cabral* we considered the situation in which the drug dog, Bruno, was said to have reacted to residual or stale odors of drugs in the vehicle occupied by Cabral. In our resolution of that question, we said:

The possibility that the contraband may no longer be present in the vehicle does not compel the finding that there is no probable cause; for purposes of the probable cause analysis, we are concerned with the probability, not certainty. The issue of a possible alert to a residual odor is a factor to be considered by the trial court, but it is not dispositive.

Cabral, 159 Md. App. at 380-81.

We find no error in the suppression court’s ruling.

In sum, we hold that probable cause existed for the stop of Roach’s vehicle; that the police did not unreasonably extend the duration of the stop; and that the evidence adduced by the drug dog scan was sufficient to establish probable cause for the ensuing search of the vehicle and Roach’s person. We shall affirm the judgments of the circuit court.

**JUDGMENTS OF THE CIRCUIT COURT
FOR WORCESTER COUNTY AFFIRMED;
COSTS ASSESSED TO APPELLANT.**