UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0119

SEPTEMBER TERM, 2015

JERMAUL RONDELL ROBINSON

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Arthur,
Kenney, James A., III,
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: April 29, 2016

Jermaul Rondell Robinson, the appellant, was charged in the District Court of Maryland for Baltimore City with possession of Oxycodone, possession of at least 10 grams of marijuana, and possession of paraphernalia. After the case was transferred to the Circuit Court for Baltimore City, he filed a motion to suppress, which the court denied. The appellant proceeded on a not guilty plea on an agreed statement of facts and was found guilty of possession of marijuana. After he was sentenced to time served, he noted an appeal, asking whether the court erred in denying his motion to suppress.

Finding no error, we shall affirm the judgment of the circuit court.

FACTS AND PROCEEDINGS

Motions Hearing

On October 18, 2014, at about 10:30 p.m., Officer Steven Vinias, of the Baltimore City Police Department, was driving southbound in the 3100 block of Oakfield Avenue, in Baltimore City. His partner, Sergeant Ruiz, was with him.[1] Officer Vinias noticed the appellant leaning against a parked black Nissan Maxima. As he passed that vehicle, Officer Vinias detected the "overwhelming smell" of fresh marijuana. Officer Vinias was familiar with the smell of marijuana and had made between 30 to 40 arrests involving the smell of an odor of marijuana. He had received approximately 40 hours of training in the detection of controlled dangerous substances, including the odor of marijuana. He was able to distinguish between the smell of fresh and burnt marijuana.

[1] The sergeant's first name is not in the record.

Officer Vinias stopped his vehicle, and then he and his partner got out and approached the appellant. The Nissan was the only vehicle parked on that side of the street, and the appellant was the only person near it. As they walked toward the appellant, he made a "slight movement towards his waistband area." For officer safety, they detained him. He was within an arm's length of the Nissan. Officer Vinias could smell the odor of marijuana emanating from the vehicle. The appellant admitted that he had been driving the Nissan and, responding to a question by Officer Vinias, confirmed that there was marijuana in the vehicle. Officer Vinias searched the Nissan and recovered from inside the vehicle's center console armrest a number of baggies of what appeared to be marijuana, as well as a pill of suspected Oxycodone.

The appellant moved to suppress the marijuana and Oxycodone from evidence. At the suppression hearing, Officer Vinias opined, over objection, that based on his experience he believed when he found the baggies that they contained more than 10 grams of marijuana. On cross-examination, he agreed that marijuana comes in "different grades and different strengths." He did not know whether "each strain of marijuana produces a different smell." He also agreed that the odor of marijuana is "not synonymous all the time" with the quantity of marijuana. He confirmed that he did not see the appellant smoking or holding marijuana and that nothing illegal was recovered from the appellant's person.

On redirect, Officer Vinias testified that the smell of marijuana at the time of this encounter was "very strong." The odor was "imminent" in the areas near the appellant and his vehicle. No one else was present at the time.

Soon after this evidence was received, counsel for the appellant argued, among other things, that the recent amendment of the possession of marijuana statute, decriminalizing possession of less than 10 grams, "leaves the door wide open as to what this odor really means in this State." He asserted that "the odor of marijuana alone is not enough to justify a search of a person or a vehicle"; and, absent probable cause to believe that the marijuana weighed more than 10 grams, the search of the Nissan was illegal.

In addition, during argument on the motion, the court and defense counsel engaged in the following colloquy:

> THE COURT: So the question I have is, if you're talking about something that – I mean let's be clear that marijuana isn't legal. It's a matter of whether it's a civil citation or a criminal offense. It's never not unlawful. It's a matter of whether it's criminal or a civil citation.
>
> So I guess the question – I don't want to use the incorrect parlance here, but I guess what I'm saying is it's always subject to some kind of either a fine or some sort of operation by the law that says, you know, you're going to pay something whether it's in time or in a citation, a civil citation.
>
> So I guess the question I have is in view of that and where this lies in our statutory framework, does your approach reasonably put the police in a situation where they are unable to do their jobs?
>
> [DEFENSE COUNSEL]: It – it absolutely encumbers law enforcement, but so does the Fourth Amendment. So does the right, requirement that they go get a warrant. So does the requirement they have probable cause.

Defense counsel continued:

[DEFENSE COUNSEL]: But no longer are law enforcement going to be allow[ed] to walk down a street corner, detect marijuana and arrest everybody in that street corner.

That's specifically what the legislature was concerned about. Because this issue was debated by the legislat[ure].

THE COURT: Okay.

[DEFENSE COUNSEL]: People from the State, people from law enforcement said, "Hey, wait a minute. This is a great tool we have to search people. Because, you know what, sometimes people can smell like marijuana and we recover guns. We recover bullets, all these dangerous things."

The legislat[ure] considered that and still, nonetheless put no provision within the rules to say, "But nonetheless, if the odor of marijuana, you could search," because that would be unconstitutional obviously.

THE COURT: Well, do you need to have in the statute –

[DEFENSE COUNSEL]: No.

THE COURT: – the affirmative authority to search?

[DEFENSE COUNSEL]: No. But the legislat[ure] was thinking about this issue.

THE COURT: All right.

[DEFENSE COUNSEL]: And they provided no guidance whatsoever to the court.

THE COURT: The language is either in there or it's not in there, and we are left to argue it in court. I can't take the absence of an affirmative statement in the statute to imply the absence. That's not how statutory construction works.

[DEFENSE COUNSEL]: But the issue was addressed to the legislat[ure] and they decided to not address it.

Ultimately, the court denied the motion to suppress. It found that the encounter "morph[ed] into what might be seen as a safety issue." And, "based on the totality of the

circumstances, I do – I do believe and find the State persuasive on the issue of the localization based on the testimony of the officer."

Not Guilty Plea on an Agreed Statement of Facts

After the appellant waived his right to a jury trial, the parties agreed to the following facts in support of the plea:

> It's agreed as accurate and true that on October the 18th of 2014 at 10:30 p.m. officers were in the 3100 block of Oakfield Avenue in Baltimore, Maryland when they saw a vehicle with the headlights on and an individual later identified as the defendant, Mr. Jermaul Robinson, leaning against the door.
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> Officers immediately smelled the overwhelming odor of marijuana. Based on that observation, they exited their vehicles and approached Mr. Robinson, who reached for his waistband and was then detained by officers.
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> Mr. Robinson indicated that he was the driver of the vehicle he was standing next to. And when asked if he had marijuana, he answered, "In the car."
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> Officers then recovered 18 Ziplocks of marijuana weighing 10.84 grams in total, also one Oxycodone pill in the center console of that vehicle.
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> The State submits as State's Exhibit 1, a copy of the drug analysis indicating the marijuana recovered – suspected marijuana. It did test positive for marijuana, a Schedule 1 narcotic.
>
> *** * ***
>
> If called to testify, the witnesses would confirm this version of events, identify Mr. Robinson as the individual standing against the car on the date and time in question. All events did occur in Baltimore City, State of Maryland.

DISCUSSION

The appellant contends that the smell of fresh marijuana did not provide probable cause either to detain him or to search his vehicle because possession of less than 10

grams of marijuana is a civil offense. He argues that, because Officer Vinias did not know merely from smelling the odor of marijuana that there was 10 grams or more of marijuana in the Nissan, probable cause did not exist to search the vehicle; therefore, the court erred by denying the motion to suppress on Fourth Amendment grounds.[2] The State responds that the law of probable cause remains unchanged by the decriminalization of possession of less than 10 grams of marijuana and the suppression ruling should be upheld.

> When we review a trial court's grant or denial of a motion to suppress evidence alleged to have been seized in contravention of the Fourth Amendment, we view the evidence adduced at the suppression hearing, and the inferences fairly deducible therefrom, in the light most favorable to the party that prevailed on the motion. We defer to the trial court's fact-finding at the suppression hearing, unless the trial court's findings were clearly erroneous. Nevertheless, we review the ultimate question of constitutionality de novo and must make our own independent constitutional appraisal by reviewing the law and applying it to the facts of the case.

Corbin v. State, 428 Md. 488, 497–98 (2012) (citation and internal quotation omitted).

The United States Supreme Court has explained probable cause as follows:

[2] The appellant also argues that the ruling violated Article 26 of the Maryland Declaration of Rights. This issue was not raised or decided below and therefore is not preserved for review. *See* 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[.]"); *State v. Bell*, 334 Md. 178, 187–91 (1994) (discussing waiver of claim at suppression hearing based on failure to argue ground below). We note, moreover, that "[w]e have interpreted Art. 26 of the Maryland Declaration of Rights as being *in pari materia* with the Fourth Amendment to the United States Constitution." *Id.* at 180 n.2. Also, "Maryland has no independent exclusionary rule for physical evidence." *Fitzgerald v. State*, 153 Md. App. 601, 682 n.4 (2003), *aff'd*, 384 Md. 484 (2004).

> The long-prevailing standard of probable cause protects "citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime," while giving "fair leeway for enforcing the law in the community's protection." *Brinegar v. United States*, 338 U.S. 160, 176 (1949). On many occasions, we have reiterated that the probable-cause standard is a "'practical, nontechnical conception'" that deals with "'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Illinois v. Gates*, 462 U.S. 213, 231 (1983) (quoting *Brinegar*, *supra*, [338 U.S.] at 175–176); *see, e.g., Ornelas v. United States*, 517 U.S. 690, 695 (1996); *United States v. Sokolow*, 490 U.S. 1, 7–8 (1989). "[P]robable cause is a fluid concept–turning on the assessment of probabilities in particular factual contexts–not readily, or even usefully, reduced to a neat set of legal rules." *Gates*, 462 U.S. at 232.
>
> The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances. *See ibid*.; *Brinegar*, 338 U.S. at 175. We have stated, however, that "[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt," *ibid*. (internal quotation marks and citations omitted), and that the belief of guilt must be particularized with respect to the person to be searched or seized, *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979).

Maryland v. Pringle, 540 U.S. 366, 370–71 (2003).

In *Ford v. State*, 37 Md. App. 373, *cert. denied*, 281 Md. 737 (1977), we addressed whether the smell of marijuana coming from a vehicle furnishes probable cause to arrest the driver of the vehicle and to search the vehicle. In that case, a police officer stopped a vehicle for speeding. The driver got out and shut the door behind him. The officer smelled the odor of marijuana "coming from the clothes of the subject, and also from the interior of the vehicle which he was operating[.]" *Id.* at 375. The officer had received education and training in detection of marijuana. The driver was arrested.

After being advised of his rights, at the officer's request the driver reached back into the vehicle and removed a brown paper bag from near where Ford, his passenger,

was seated. The officer determined that the bag contained suspected marijuana, ordered Ford out of the vehicle, and arrested him. Ford was convicted of possession of marijuana with intent to distribute.

On appeal, Ford argued that the smell of marijuana was not itself sufficient to provide probable cause to arrest the driver, and therefore the ensuing search of the vehicle was unlawful. We rejected that argument.

Recognizing that a police officer is justified in making a warrantless arrest when there is probable cause to believe that a misdemeanor is being committed in his presence, we quoted *Davids v. State*, 208 Md. 377, 383 (1955), for the proposition that information relating to probable cause may originate from an officer's sensory perceptions:

> "Where some evidence of the commission of a misdemeanor reaches an officer through his senses, and it is augmented by other strongly persuasive facts in his possession, all of which is sufficient to convey virtual knowledge to any normal mind that the misdemeanor is then being committed, he may act upon such information as being tantamount to actual knowledge that the misdemeanor is being committed."

Ford, 37 Md. App. at 376 (emphasis omitted). Accordingly, "[o]dors so detected may furnish evidence of probable cause of [the] most persuasive character, . . . [*i.e.*,] physical fact(s) indicative of possible crime[.]" *Id.* at 378 (internal quotation marks and citations omitted).[3] After reviewing the evidence showing the officer's training and experience in detecting the odor of marijuana, we stated:

[3] We also found that the plain view doctrine applied. "The plain view doctrine of the Fourth Amendment requires that: (1) the police officer's initial intrusion must be lawful . . . (2) the incriminating character of the evidence must be 'immediately apparent;' and (3) (Continued…)

> We have no doubt . . . that knowledge gained from the sense of smell alone may be of such character as to give rise to probable cause for a belief that a crime is being committed in the presence of the officer. When such conditions exist a warrantless arrest infringes upon no constitutional right.

Id. at 379. We concluded that the arrest of the driver based on the smell of marijuana coming from his person and the interior of the vehicle he was operating was supported by probable cause, and the search of the vehicle, which revealed the evidence Ford was seeking to suppress, was justified under either the search incident to arrest rationale or the automobile exception under the *Carroll* doctrine.[4]

In 2014, the Maryland General Assembly decriminalized the possession of less than 10 grams of marijuana. The new law was in effect at the time of the events in this case. Maryland Code (2002, 2012 Repl. Vol., 2015 Supp.) section 5-601 of the Criminal Law Article ("CL") now provides, in pertinent part:

> (a) Except as otherwise provided in this title, a person may not
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> (1) possess or administer to another a controlled dangerous substance, unless obtained directly or by prescription or order from an authorized provider acting in the course of professional practice;
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> * * *

(…continued)
the officer must have a lawful right of access to the object itself." *Sinclair v. State*, 444 Md. 16, 42 (2015) (citations omitted).

[4] The "*Carroll* doctrine" refers to *Carroll v. United States*, 267 U.S. 132 (1925), and generally means that, "[i]f a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more." *Maryland v. Dyson*, 527 U.S. 465, 467 (1999) (citations omitted).

> (c)(1) Except as provided in paragraphs (2) and (3) of this subsection, a person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 4 years or a fine not exceeding $25,000 or both.
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> (2)(i) Except as provided in subparagraph (ii) of this paragraph, a person whose violation of this section involves the use or possession of marijuana is subject to imprisonment not exceeding 1 year or a fine not exceeding $1,000 or both.
>
> (ii) 1. A first violation of this section involving the use or possession of less than 10 grams of marijuana is a civil offense punishable by a fine not exceeding $100.
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> 2. A second violation of this section involving the use or possession of less than 10 grams of marijuana is a civil offense punishable by a fine not exceeding $250.
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> 3. A third or subsequent violation of this section involving the use or possession of less than 10 grams of marijuana is a civil offense punishable by a fine not exceeding $500.

Very recently, in *Bowling v. State*, __ Md. App. __, No. 1121, Sept. Term, 2015 (filed March 31, 2016), we addressed whether a K-9's detection of the odor of marijuana emanating from a vehicle provided probable cause to search the vehicle, even though the K-9 and accompanying officers did not know whether there was 10 grams or more of marijuana inside. There, the defendant was stopped for traffic violations. The officer knew him from prior encounters and suspected he was driving on a suspended license. When the officer approached the defendant's vehicle, he noticed that the defendant was "very nervous," his hands were shaking, and he was avoiding eye contact. *Id.*, slip op. at 2. The defendant did not produce a Maryland driver's license, but did provide a "Maryland ID card" and a vehicle registration. The defendant got out of his vehicle, but

locked himself out of it. Based on what had just transpired and knowing that the defendant had a history of CDS and weapon possession, the officer called for backup, including a K-9 unit.

Deputy J.C. Richardson and his K-9 partner, Diablo, arrived about twenty minutes after the traffic stop was initiated. Diablo was certified and licensed to detect and alert on the odors of marijuana, cocaine, heroin, methamphetamines, and MDMA (ecstasy). He could pick up minute amounts of these substances, but could not determine or communicate the amount of the substance detected.

Diablo sniffed the exterior of the defendant's vehicle, and alerted on the rear driver's side door. Because the vehicle was locked from the inside, the officer called for a tow truck. The tow truck driver informed the officer that it was company policy not to tow a locked vehicle if the keys were visible. The tow truck driver opened the vehicle. A search of the vehicle revealed 198.2 grams of marijuana, an OxyContin tablet, and assorted paraphernalia.

The defendant moved to suppress the marijuana evidence, arguing that, because CL section 5-601 had decriminalized the possession of less than 10 grams of marijuana, and because Diablo could not determine the quantity of marijuana present, the dog's alert did not provide probable cause to believe that a crime was in progress. And, absent probable cause, the warrantless search of his vehicle violated the Fourth Amendment.

This Court disagreed. We framed the issue as "whether the police had sufficient probable cause to search [the defendant's] car pursuant to the *Carroll* doctrine." *Id.*, slip

op. at 8. We recognized that the established precedent in Maryland is that "the detection of the odor of marijuana by a trained drug dog establishes probable cause to conduct a warrantless *Carroll* doctrine search of a vehicle." *Id.*, slip op. at 9 (citing *Wilkes v. State*, 364 Md. 554, 586–87 (2001); *Pyon v. State*, 222 Md. App. 412, 439 (2015)); *see also State v. Wallace*, 372 Md. 137, 146 (2002) ("Further, the law is settled that when a properly trained canine alerts to a vehicle indicating the likelihood of contraband, sufficient probable cause exists to conduct a warrantless '*Carroll*' search of the vehicle."), *cert. denied*, 540 U.S. 1140 (2004). Accordingly, the issue before us was "whether this new law, decriminalizing possession of limited amounts of marijuana, changes the established jurisprudence that the smell of marijuana provides probable cause to search a vehicle." *Bowling*, slip op. at 11.

After reciting the statutory language, we explained that possession of less than 10 grams of marijuana remains illegal in Maryland:

> This statutory language makes clear that, although the legislation enacted in 2014 decriminalized the possession of less than 10 grams of marijuana, it remains a civil offense, and therefore, it still is illegal. "[D]ecriminalization is not synonymous with legalization." *Com. v. Cruz*, 945 N.E.2d 899, 911 (Mass. 2011).

Id., slip op. at 10. We recognized that other states have reached differing conclusions on this question. *Id.*, slip op. at 10–13 (discussing *State v. Crocker*, 97 P.3d 93 (Alaska Ct. App. 2004); *Com. v. Overmyer*, 11 N.E.3d 1054 (Mass. 2014); *State v. Smalley*, 225 P.3d 844 (Or. Ct. App. 2010); *State v. Barclay*, 398 A.2d 794 (Me. 1979)). After considering those cases, we observed that the *Carroll* doctrine, *i.e.*, the automobile exception, is not

limited to "situations where there is probable cause to believe there is evidence of a crime in the vehicle. Rather, a search is permitted when there is probable cause to believe that the car contains evidence of a crime **or** contraband." *Id.*, slip op. at 13 (emphasis in original). *See Carroll v. United States*, 267 U.S. 132, 153 (1925) ("[C]ontraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant[.]"); *see also Maryland v. Dyson*, 527 U.S. 465, 467 (1999) ("'If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more.'" (citation omitted)); *Nathan v. State*, 370 Md. 648, 665–66 (2002) ("Police officers who have probable cause to believe that there is contraband or other evidence of criminal activity inside an automobile that has been stopped on the road may search it without obtaining a warrant." (citations omitted)), *cert. denied*, 537 U.S. 1194 (2003).

Looking to the legislative history, we concluded that the General Assembly "intended that, although possession of a small amount of marijuana would no longer be a criminal offense, it would continue to be considered contraband, regardless of the quantity." *Bowling*, slip op. at 15. In support, we cited the testimony of one of the bill's sponsors before the House Judiciary Committee, Senator Robert "Bobby" Zirkin. *Id.*[5]

[5] In addition to the testimony cited in *Bowling*, Senator Zirkin stated that "[t]he intention of this bill is not to stop what would be right now a lawful search incident to arrest." *See Crim. L. – Possession of Marijuana – Civ. Offense: Hearing on S.B. 364 Before the Sen. Jud. Comm.*, 2014 Reg. Sess. (Md. Apr. 1, 2014) 1:03:48, *available at* http://mgahouse.maryland.gov/mga/play/1f0ace2b889b4079bcfb85b6ba52d452/?catalog/03e481c7-8a42-4438-a7da-93ff74bdaa4c&playfrom=2926752. When asked whether the (Continued…)

We noted that CL section 5-601(d) supports the conclusion that even small amounts of marijuana still are contraband:

> (d) The provisions of subsection (c)(2)(ii) of this section making the possession of marijuana a civil offense may not be construed to affect the laws relating to:
>
> (1) operating a vehicle or vessel while under the influence of or while impaired by a controlled dangerous substance; or
>
> (2) *seizure and forfeiture.*

(Emphasis added.) We held that, because the range of a reasonable search extends to contraband, and not just evidence of a crime, decriminalization of the possession of small quantities of marijuana does "not affect existing case law allowing officers to search a vehicle based upon a K-9 alert to the smell of marijuana." *Bowling*, slip op. at 16.

> [A]lthough the Maryland General Assembly made possession of less than 10 grams of marijuana a civil, as opposed to a criminal, offense, it is still illegal to possess any quantity of marijuana, and marijuana retains its status as contraband. Accordingly, we hold that this legislation does not change the established precedent that a drug dog's alert to the odor of marijuana, without more, provides the police with probable cause to authorize a search of a vehicle pursuant to the *Carroll* doctrine. Here, Diablo's alert provided a sufficient basis to believe that contraband would be found in the vehicle, and therefore, it provided probable cause to search the vehicle. The circuit court properly denied the motion to suppress.

Id., slip op. at 16–17.

The holding in *Bowling* controls here. As we have stated:

(…continued)
bill would affect searches of vehicles by police K-9 units, Senator Zirkin responded in the negative, noting that "[m]ost of the senators were comfortable with the fact that that was already the law." *Id.* at 1:22:14. And, Senator Zirkin clarified that "[t]his is not legalization." *Id.* at 50:03.

> So long as the police agent, human or canine, is in a place where that agent has a constitutionally unassailable right to be, it is free to employ its olfactory senses in any way it wishes. The dog is as free to smell cocaine or marijuana as the officer is free to smell the roses or the garbage or "the breath of new mown hay." Neither dog nor man needs a judicial permission slip to sniff the air.

Jackson v. State, 190 Md. App. 497, 506 (2010). The fact that the marijuana in the case at bar was detected by the olfactory sense of a trained and experienced police officer, as opposed to by the olfactory sense of a K-9 unit dog, makes no difference at all. In both situations, the officers had probable cause to believe there was contraband in the vehicle and therefore probable cause to search it.

In sum, notwithstanding the decriminalization of the possession of less than 10 grams of marijuana, the odor of marijuana, a substance that remains "contraband," provides probable cause to search a vehicle under the Fourth Amendment. The circuit court properly denied the motion to suppress.

JUDGMENT OF THE CIRCUIT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.