UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 127

September Term, 2016

RICHARD CHILES

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Berger,
Nazarian,

JJ.

Opinion by Eyler, Deborah S., J.

Filed: November 4, 2016

In the Circuit Court for Baltimore County, Richard Chiles, the appellant, entered a conditional guilty plea to a charge of possession with intent to distribute cocaine. He was sentenced to ten years' incarceration without the possibility of parole. He appeals, presenting two questions, which we have rephrased slightly:

I. Did the circuit court err by denying the appellant's motion to suppress?

II. Did the circuit court abuse its discretion by denying the request to reopen the suppression hearing?

For the following reasons, we answer both questions in the negative and shall affirm the judgment of the circuit court.

FACTS AND PROCEEDINGS

On December 4, 2014, officers from the Baltimore County Police Department ("BCPD") and the Maryland State Police ("MSP") stopped the appellant while he was driving a white minivan on Millpaint Lane in Owings Mills. After a K-9 dog alerted to the minivan, the police searched it and seized a kilogram of cocaine from inside a cereal box in the back seat of the van. The appellant was placed under arrest, and a search of his person revealed two small baggies of cocaine. He was charged with possession with intent to distribute cocaine and related charges. The appellant moved to suppress the drug evidence, challenging the legality of the traffic stop and the resulting seizure.

The evidence adduced at the October 13, 2015 suppression hearing, viewed in the light most favorable to the State as the prevailing party, was as follows. MSP Sergeant Christian Armiger testified that he is the commander of the Delivery System Parcel Interdiction Initiative, a "multi-jurisdictional task force that concentrates on the

interdiction of drug and other contraband parcels" via Federal Express, United Parcel Service, and the United States Postal Service ("USPS"). BCPD Detective Edward Hann and MSP Corporal Dave McCarthy also are members of the task force.

On December 4, 2014, Sgt. Armiger, Det. Hann, and Cpl. McCarthy were assisting the USPS Inspection Service with an investigation into a suspicious parcel addressed to 9 Millpaint Lane, Apartment 1C, Owings Mills, Baltimore County. They set up an undercover surveillance operation near that address. Sgt. Armiger was driving an unmarked pick-up truck; Det. Hann was driving an unmarked vehicle; and Cpl. McCarthy was driving an unmarked K-9 vehicle, and was accompanied by his K-9 dog "Ace."

Sgt. Armiger surveilled the USPS truck delivering the suspicious parcel. The parcel was dropped off at the rental office for an apartment complex in Owings Mills.

Meanwhile, other task force members surveilled 9 Millpaint Lane. That address corresponds to an apartment building with a dedicated parking lot. A little before noon, a member of the task force observed a man walk out of 9 Millpaint Lane and get into a Jeep parked in the lot. The man drove the Jeep to the rental office for the apartment complex.

Sgt. Armiger, who had remained at the rental office, observed the man in the Jeep enter the rental office and then return to his vehicle carrying a parcel. The man drove back to 9 Millpaint Lane. Sgt. Armiger followed him. The man pulled into the parking lot outside of 9 Millpaint Lane. Sgt. Armiger and other officers approached the Jeep and identified themselves. The Jeep "wreaked [sic] of marijuana and there was marijuana in plain view." Police searched the Jeep and recovered the parcel, which was found to

contain approximately one pound of marijuana. The driver, Rahiem James, was placed under arrest. He had a key to Apartment 1C on his keychain.

James told Det. Hann that he was supposed to leave the parcel inside Apartment 1C. He would receive a small amount of marijuana as payment for completing that task. According to James, someone he did not know would be coming to Apartment 1C to pick up the parcel at some later time. James did not provide a name or description of the person or any information about the time of the pickup.

About an hour later, Sgt. Armiger and the other task force members were getting ready to leave the apartment complex. Sgt. Amiger was in his unmarked truck in the parking lot outside 9 Millpaint Lane. There was one marked police car parked in the lot and at least two other unmarked vehicles. Sgt. Armiger observed a white Dodge Caravan minivan traveling south on Millpaint Lane toward the 9 Millpaint Lane address. As the minivan approached the turn-off into the parking lot for 9 Millpaint Lane, it had its right turn signal on and was slowing down. The driver, later identified as the appellant, made eye contact with Sgt. Armiger and, as Sgt. Armiger observed, turned off the right turn signal and continued driving straight on Millpaint Lane. Sgt. Armiger pulled out of the parking lot and followed the minivan south on Millpaint Lane.

Sgt. Armiger testified that as he followed the minivan, he was at a "higher vantage point" because of the height of his truck and the steep downward slope of the road as it approached its intersection with Dolfield Road. From that position, Sgt. Armiger could see the appellant holding a "flip phone in his [right] hand and . . . manipulating . . . the

phone as he was driving." Sgt. Armiger could see the phone clearly because of the backlighting on the screen. Sgt. Armiger believed that the appellant was texting while driving in violation of Md. Code (1977, 2012 Repl. Vol., 2014 Supp.), section 21-1124.1 of the Transportation Article ("Transp.").[1]

When the appellant stopped at the stop sign at Dolfield Road, Sgt. Armiger pulled in front of the minivan and activated his rear emergency lights.[2] Det. Hann and Cpl. McCarthy pulled up behind the minivan in their unmarked vehicles. The marked police car also pulled over. Sgt. Armiger approached the driver's side of the minivan, identified himself, and told the appellant that he had stopped him for texting while driving. He asked the appellant if he had any cell phones on him, asked for the appellant's license and registration, and told the appellant to step out of the vehicle.

Simultaneously, Cpl. McCarthy brought "Ace" over to scan the minivan. Ace immediately alerted. The K-9 scan occurred while the traffic stop was ongoing. According to Sgt. Armiger, it did not extend the stop,

On cross-examination, defense counsel asked Sgt. Armiger whether the back window of the minivan had "excessive tint." He replied that it did not. Defense counsel

[1] That statute provides in pertinent part that "an individual may not use a text messaging device to write, send, or read a text message or an electronic message while operating a motor vehicle in the travel portion of the roadway." Transp. § 21-1124.1(b).

[2] Sgt. Armiger testified that he did not have front emergency lights on his unmarked vehicle.

then asked if the back window had "any tint." Sgt. Armiger replied that he did not "recall it having tint, other than what a factory—it would come from the factory."

The parties stipulated that, if called, Cpl. McCarthy would testify that Ace "scanned the car and found . . . some drugs" and that the K-9 unit already was on the scene at the time of the traffic stop.

Det. Hann testified that he was present when James was arrested. He confirmed Sgt. Armiger's testimony that James advised police that someone would be coming to pick up the parcel from Apartment 1C. He also confirmed that no other identifying information about the person picking up the parcel was provided. Det. Hann further testified that when the appellant was arrested, he, like James, was found to have a key to Apartment 1C, 9 Millpaint Lane, in his possession.

The appellant was the sole witness in the defense case. He testified that on December 4, 2014, he was living at 1 Comill Court, an apartment building around the corner from 9 Millpaint Lane. Around noon, he left his apartment to go to the Horseshoe Casino in Baltimore City. He drove north on Comill Court, made a right turn onto a cross street, and then made another right turn onto Millpaint Lane. As he passed 9 Millpaint Lane, he saw "4 or 5 police cars" in the parking lot.[3] He slowed down because there were speed bumps in the road. After he passed 9 Millpaint Lane, the cars pulled out of the parking lot and followed him. The appellant testified that he was not texting or

[3] The appellant subsequently testified that he did not realize they were police cars when he first saw them.

holding his cell phone as he drove; rather, he had both hands on the wheel at all times. When he stopped at Dolfield Road, Sgt. Armiger pulled him over. Sgt. Armiger told him he had stopped him "for texting" and then "snatched [him] out [of] the vehicle." Sgt. Armiger directed him to sit on the curb and began asking him if he knew James. The appellant said he did not know James. He further testified that he did not know anybody who lived at 9 Millpaint Lane, Apartment 1C.

On cross-examination, the appellant was asked whether he had a cell phone with him on December 4, 2015. He replied that he had two or three cell phones with him that day. He also was asked why he had a key to 9 Millpaint Lane, Apartment 1C if he did not know anyone at that address. He denied that he ever had a key to that apartment.

In closing argument, the prosecutor candidly acknowledged that the traffic stop on December 4, 2015 was pretextual, *i.e.*, that Sgt. Armiger's actual purpose in initiating the traffic stop was to advance the drug investigation, not to enforce the traffic laws. The prosecutor stated that Sgt. Armiger's subjective purpose was irrelevant, however, because he had an objectively reasonable belief that the appellant was texting while driving, giving him cause to make a traffic stop. The evidence showed that the K-9 alert happened *during* the lawful traffic stop, giving rise to probable cause, independent of the traffic violation, for the police to search the minivan.

In response, defense counsel argued that the court should reject Sgt. Armiger's testimony that he observed the appellant texting while driving and, instead, should credit the appellant's testimony that he had both hands on the steering wheel at all relevant

times. Defense counsel argued that even if the court credited Sgt. Armiger's testimony, however, it should rule that the K-9 scan was an unreasonable search. He explained:

> I just think that you still—what's reasonable? Is it reasonable that somebody's texting, even if they say they're texting, which I suggest that they have not shown by the preponderance of the evidence that he was, that they can then take the dogs—if they just saw somebody else that was driving down the street, that they figured let's, let's stop him. They already [had] all their implements in place, but they have no intention of doing anything. And I think the fact that um,—it was unreasonable. I think they had no reason to stop him and I, I suggest to the Court they had no reason to search once the stop was made. Thank you.

The court credited Sgt. Armiger's testimony and found that he saw the appellant texting while driving, which is a traffic offense, and therefore was justified in making the traffic stop. The court further ruled that Ace already was on the scene and alerted to the minivan before the traffic stop was over. The alert gave the officers probable cause to search the vehicle. The court also ruled that Sgt. Armiger had reasonable articulable suspicion that the appellant had committed a drug offense, which also justified the stop. On those bases, the court denied the motion to suppress.

Nearly three months later, on January 11, 2016, the appellant moved for a supplemental and/or *de novo* suppression hearing. He asserted that at the time of the suppression hearing, his minivan had been in police custody. Since that time, defense counsel had been able to locate the minivan in a private impound lot and had discovered that, contrary to Sgt. Armiger's testimony, the back window of the van was heavily tinted. He attached to his motion photographs of the minivan depicting the tinted windows.

The court held a hearing on the motion on January 28, 2016, and denied it. We shall discuss the hearing in more detail, *infra*.

The appellant entered his conditional guilty plea on February 1, 2016. He was sentenced on March 17, 2016. This timely appeal followed. We shall include additional facts as relevant to our discussion.

DISCUSSION

I.

Denial of Motion to Suppress

Our standard of review is well-established:

> In reviewing a trial court's ruling on a motion to suppress, we defer to that court's findings of fact unless we determine them to be clearly erroneous, and, in making that determination, we view the evidence in a light most favorable to the party who prevailed on that issue, in this case the State. We review the trial court's conclusions of law, however, and its application of the law to the facts, without deference.

Taylor v. State, 448 Md. 242, 244 (2016) (citations omitted).

The appellant contends the suppression court clearly erred by ruling that Sgt. Armiger had reasonable articulable suspicion that he was involved in the drug operation at 9 Millpaint Lane when the traffic stop was initiated. He asserts, moreover, that even crediting Sgt. Armiger's testimony that he observed him texting while driving, the stop still exceeded the bounds of a valid pretextual stop under *Whren v. United States*, 517 U.S. 806 (1996), because Sgt. Armiger had "neither the intention nor the ability" to cite him for a traffic violation. Alternatively, he urges this Court to hold that pretextual traffic stops violate Article 26 of the Maryland Declaration of Rights.

The State responds that the appellant did not argue before the suppression court that the traffic stop was invalid, under *Whren*, because Sgt. Armiger did not intend to write a ticket or that pretextual traffic stops are *per se* unconstitutional under the Maryland Declaration of Rights; therefore those arguments were waived and are not properly before us on appeal. It maintains that the suppression court did not err in ruling that the search was lawful under *Whren* based upon Sgt. Armiger's testimony, which it credited, that he observed the commission of a traffic violation and upon the uncontroverted evidence that the canine scan did not extend the subsequent traffic stop.

We hold that the suppression court implicitly assessed the traffic stop under *Whren*, and correctly ruled that the traffic stop was a lawful pretextual stop, and that it was not impermissibly extended to permit the canine scan. Accordingly, we need not decide whether the court erred in ruling that Sgt. Armiger lawfully stopped the appellant based upon reasonable articulable suspicion that he was involved in the drug operation at 9 Millpaint Lane. We explain.

In *Whren*, 517 U.S. at 808, the Supreme Court considered "whether the temporary detention of a motorist who the police have probable cause to believe has committed a civil traffic violation is inconsistent with the Fourth Amendment's prohibition against unreasonable seizures unless a reasonable officer would have been motivated to stop the car by a desire to enforce the traffic laws." The facts before the Court were that police officers patrolling in a "'high drug area'" in Washington, D.C., in an unmarked vehicle, passed a truck with temporary tags and several young occupants inside. *Id*. The

occupants avoided eye contact, and the truck sat at an intersection for an unusually long time. The officers made a U-turn to head back toward the truck. The driver of the truck made an abrupt right turn without signaling and sped off. The police car pursued the truck and pulled it over a short distance away. When one of the police officers approached the driver's side window of the truck, he observed two large plastic bags containing crack cocaine in the hands of the passenger, Whren. Illegal drugs also were recovered in a subsequent search of the vehicle.

Whren challenged the legality of the stop and the seizure of the drugs. He argued that the police officers did not have probable cause or reasonable suspicion to believe that he and the other occupants were involved in drug activity and that the purported reason for stopping the vehicle—to issue a warning for a violation of the traffic laws—was entirely pretextual. A federal district court denied the motion to suppress and the Court of Appeals for the District of Columbia affirmed. The Supreme Court granted *certiorari* and affirmed. It explained that, ordinarily, a traffic stop is "reasonable" under the Fourth Amendment when the police officers "have probable cause to believe that a traffic violation has occurred." *Id*. at 810. Whren did not dispute that the officers had probable cause to believe the driver of the truck had failed to signal before making a right turn. He argued, however, that in order to deter the police from using traffic stops "as a means of investigating other law violations, as to which no probable cause or even articulable suspicion exists," the "Fourth Amendment test for traffic stops should be . . . whether a police officer, acting reasonably, would have made the stop for the reason given." *Id*.

The Supreme Court rejected that argument. It held that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Id*. at 813. If a police officer has probable cause to believe that a driver has violated the traffic code, the stop is reasonable under the Fourth Amendment regardless of the officer's subjective intent in making the stop or whether an objectively reasonable officer in the same situation would have made the stop.

Since *Whren*, the Court of Appeals has joined other appellate courts in holding that a traffic stop is reasonable under the Fourth Amendment if it is based upon an observed traffic violation *or* reasonable articulable suspicion that a traffic law was violated. *See State v. Williams*, 401 Md. 676, 687 (2007) (adopting "[t]he prevailing view among courts" that a traffic stop supported by reasonable articulable suspicion is reasonable under the Fourth Amendment); *see also United States v. Shareef*, 100 F.3d 1491, 1500 (10th Cir. 1996); *United States v. Atwell*, 470 F.Supp.2d 554, 571 (D. Md. 2007). In either case, a motorist or passengers in a vehicle "can not be detained at the scene of the stop longer than it takes—or reasonably should take—to issue a citation for the traffic violation." *Pryor v. State*, 122 Md. App. 671, 674-75 (1998). Ordinarily, it is reasonable for a police officer to detain the occupants of a vehicle long enough to check the driver's license and registration and to run a warrant check. *See, e.g., Byndloss v. State*, 391 Md. 462, 483-84 (2006) (holding that a thirty minute detention during a traffic stop, during which time a canine scan was conducted, was not unreasonable because the computer systems were down, delaying the completion of the necessary checks). As this

Court explained in *State v. Ofori*, 170 Md. App. 211, 234 (2006), when an "objectively justifiable stop for a traffic violation furnishes a target of opportunity for a subjectively desired narcotics investigation . . . [t]he investigative instrumentality is frequently a drug-sniffing canine." That is "a perfectly legitimate utilization of a free investigative bonus as long as the traffic stop is still genuinely in progress." *Id*. at 235.

We return to the case at bar. The appellant does not dispute that Sgt. Armiger had probable cause to stop him based upon his observation that he was texting while driving, in violation of Transp. section 21-1124.1(b). He also does not dispute that the K-9 scan of his vehicle occurred within moments of the stop. Finally, he does not dispute that the Ace alerted and that the alert gave rise to probable cause for the police to conduct a *Carroll* search of his vehicle.[4]

The appellant argues, however, that Sgt. Armiger's candid testimony that he "had no intention of writing [the appellant] a ticket" for the traffic violation required the suppression court to find that the traffic stop never began and, as such, the entire stop was an unreasonable detention. We agree with the State that this argument is unpreserved, having never been raised before the suppression court.[5] Even if preserved, it lacks merit. It is clear from *Whren* that Sgt. Armiger's subjective intention plays no role in the

[4] *See Carroll v. United States*, 267 U.S. 132, 150–51 (1925) (if police have probable cause to believe there is contraband in a vehicle, they may search the vehicle without first obtaining a warrant).

[5] This argument was raised during the hearing on the motion to reopen the suppression hearing, however.

reasonableness analysis under the Fourth Amendment. *See also Charity v. State*, 132 Md. App. 598 (2000) (holding that a narcotics officer's traffic stop of the defendant for tailgating was "completely legitimate" even though the officer had no interest in enforcing drug regulations). Rather, that inquiry turns on whether the detention of the appellant lasted longer than it would reasonably take to process the traffic violation. The appellant and Sgt. Armiger both testified that when Sgt. Armiger approached the appellant's vehicle, he told the appellant he was stopping him for "texting" and asked him if he had any cell phones. Sgt. Armiger testified that he also asked for the appellant's license and registration. These are routine steps to process a traffic violation. The court made a non-clearly erroneous finding of fact that Ace scanned the vehicle and alerted *while* Sgt. Armiger was taking these steps and, as such, the scan occurred contemporaneously with the continuation of a lawful traffic stop.[6]

Alternatively, the appellant asks us to hold that a traffic stop only is reasonable under the Fourth Amendment if an objectively reasonable police officer would have made a traffic stop based upon the traffic violation absent the pretextual justification for

[6] The suppression court did not credit the appellant's testimony that Sgt. Armiger did not ask him for his license and registration or that he immediately pulled him from the vehicle and began asking him about James; accordingly, that evidence is not relevant to our analysis. *See State v. Funkhouser*, 140 Md. App. 696, 705 (2001) (on review of a ruling on a motion to suppress, we accept the version of events found by the trial court, unless clearly erroneous, and "utterly disregard[]" contradictory testimony not credited by the court).

the stop. He relies on two federal cases, both of which pre-date *Whren*,[7] for this proposition. This is the standard that was rejected in *Whren*, and we decline to revisit it. *See Whren*, 517 U.S. at 814 (characterizing Whren's argument to be that the reasonableness inquiry should turn on "whether the officer's conduct deviated materially from usual police practices, so that a reasonable officer in the same circumstances would not have made the stop for the reasons given" and rejecting that standard as being "plainly and indisputably driven by subjective considerations").

Finally, the appellant asks us to hold that pretextual stops are *per se* unreasonable under Article 26 of the Maryland Declaration of Rights.[8] We agree with the State that this argument is wholly unpreserved, having never been raised before or decided by the suppression court. Even if preserved, Maryland appellate decisions make clear that Article 26 "is to be interpreted *in pari materia* with the Fourth Amendment." *Fitzgerald*

[7]*See United States v. Valdez*, 931 F.2d 1448, 1451 (11th Cir. 1991) (suppressing evidence recovered after a traffic stop premised on a violation of the right-of-way of another car as "unreasonably pretextual" because a reasonable police officer would not have made the stop absent an interest in furthering a criminal investigation); and *United States v. Guzman*, 864 F.2d 1512, 1518 (10th Cir. 1988) (suppressing evidence seized after a traffic stop for a seatbelt violation because the stop was "unconstitutionally pretextual at its inception"), *overruled by United States v. Botera-Ospina*, 71 F.3d 783 (10th Cir. 1995).

[8] Article 26 provides:

> All warrants, without oath or affirmation, to search suspected places, or to seize any personal 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 persons in special, are illegal, and ought not to be granted.

v. State, 384 Md. 484, 506 (2004). Moreover, because "no exclusionary rule exists for a violation of Article 26," even if pretextual stops were held to be in violation of the Declaration of Rights, suppression of the seized evidence would not be a remedy. *Padilla v. State*, 180 Md. App. 210, 232 (2008).

II.

Denial of Motion to Reopen Suppression Hearing

As discussed, at the October 13, 2015 suppression hearing, Sgt. Armiger testified that he perceived no "excessive tint" on the rear window of the minivan. The appellant testified, but was not asked if his minivan had tinted windows. Nearly three months after the suppression hearing, the appellant moved to reopen the hearing (or for a *de novo* hearing) pursuant to Rule 4-252(h)(2)(C).[9] The court held a hearing on the motion to reopen and denied it. It reasoned that the appellant had been given an opportunity to fully develop the evidence at the suppression hearing and, in any event, evidence that the rear window of the minivan was tinted would not have altered the ruling on the motion to suppress.

The appellant contends the circuit court abused it discretion by so ruling because photographs taken of the minivan and attached to the motion to reopen showed that the rear window had a "profound tint," calling into question the credibility of Sgt. Armiger's

[9] That Rule provides, in pertinent part, that "[i]f the court denies a motion to suppress evidence, the ruling is binding at the trial unless the court, on the motion of a defendant and in the exercise of its discretion, grants a supplemental hearing or a hearing de novo and rules otherwise."

testimony that he could see the appellant texting while driving. The State responds that the circuit court properly exercised its discretion not to admit photographs taken on an unknown date after the car was released to the appellant and, in any event, any error was harmless because the court explicitly ruled that had the photographs, which were appended to the motion to reopen, been introduced into evidence, that would not have caused the court to change its finding that Sgt. Armiger credibly testified to having observed the appellant texting while driving.

We perceive no error. The court, having been presented with the photographic evidence that purportedly supported the reopening of the suppression hearing and the reconsideration of the prior ruling denying the motion to suppress, concluded that the evidence was of limited probative value given that the photographs were not taken on the date of the traffic stop *and* they would not have affected the court's credibility findings. This plainly was not an abuse of the court's broad discretion. *See In re Shirley B.*, 419 Md. 1, 19 (2011) (quoting *In re Yve S.*, 373 Md. 551, 583–84 (2003) (a court abuses its discretion when "'the decision under consideration [is] . . . well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable'").

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