UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1408

September Term, 2015

JOSEPH NORMAN, JR.

v.

STATE OF MARYLAND

Wright,
Nazarian,
Serrette, Cathy Hollenberg
(Specially Assigned),

JJ.

Opinion by Nazarian, J.
Dissenting Opinion by Serrette, J.

Filed: August 11, 2016

This case tests further whether or not recent legislation decriminalizing possession of small amounts of marijuana alters the Fourth Amendment analysis when officers detect (or suspect) that marijuana is present. Joseph Norman Jr. was charged with possession with intent to distribute marijuana, possession of marijuana, and possession of paraphernalia. Before trial in the Circuit Court for Somerset County, Mr. Norman moved to suppress the marijuana and paraphernalia on the ground that they were obtained in violation of his Fourth Amendment rights. The court denied the motion. Mr. Norman waived his right to a jury trial and proceeded with a not guilty plea on an agreed statement of facts. The court found Mr. Norman guilty of possession of marijuana and sentenced him to nine months in prison. Mr. Norman appeals, contending that the trial court erred in denying his motion to suppress. We affirm.

I. BACKGROUND

On March 22, 2015, sometime after dark, Trooper Jon Dancho of the Maryland State Police stopped a 1996 Nissan on U.S. 13 for an inoperable right rear tail light. When the Trooper made contact with the driver, he detected a strong odor of raw marijuana coming from the passenger compartment of the vehicle. He ordered all of the occupants, including Mr. Norman, who was in the front passenger seat, out of the vehicle so that he could perform a probable cause search based on the smell of marijuana.

To ensure his safety during the search, Trooper Dancho patted down the driver for weapons, found none, then patted down Mr. Norman. During Mr. Norman's pat-down, Trooper Dancho detected large quantities of unknown objects in his pants, which the

Trooper believed was a controlled dangerous substance. Trooper Dancho asked Mr. Norman what was in his pants pocket, but Mr. Norman did not answer. The Trooper then moved the object in Mr. Norman's pocket to make sure that it wasn't a weapon, and a package fell out and onto the ground. Trooper Dancho patted down the other occupant, who had been in the backseat, and found nothing.

After patting down all of the occupants, Trooper Dancho searched the car, where he found a grinder with trace amounts of marijuana and a small amount of marijuana in the center dash area compartment. Upon identifying the marijuana from Mr. Norman's person, as well as the other contraband from the car, Trooper Dancho placed Mr. Norman under arrest and transported him to the barrack. Once at the station, Trooper Dancho conducted a secondary search of Mr. Norman incident to arrest, during which another bag of marijuana fell from his pants. Trooper Dancho advised Mr. Norman of his *Miranda* rights, which Mr. Norman waived, and Mr. Norman admitted that all controlled dangerous substances and paraphernalia were his, for his personal use.

II. DISCUSSION

Mr. Norman's sole contention on appeal is that the trial court erred in denying his motion to suppress. Specifically, Mr. Norman submits that the pat-down for weapons was not supported by reasonable suspicion that he was armed and dangerous, and that even if it were a justified *Terry* frisk for weapons, it exceeded the permissible scope of such a frisk. Mr. Norman also argues that the smell of raw marijuana did not provide probable cause to search the car. The State counters that the pat-down for weapons was a reasonable *Terry* frisk or, in the alternative, a legal search incident to arrest, and that the search of the car

was supported by probable cause based on the smell of raw marijuana. In light of our recent decision in *Bowling v. State*, 227 Md. App. 460 (2016), we hold that the smell of raw marijuana emanating from the vehicle, in which Mr. Norman was a passenger, provided probable cause to search the vehicle under the automobile exception to the warrant requirement, and that the pat-down was a permissible *Terry* frisk.

We review a denial of a motion to suppress evidence seized pursuant to a warrantless search based on the record of the suppression hearing. *State v. Nieves*, 383 Md. 573, 581 (2004); *Laney v. State*, 379 Md. 522, 533 (2004). We consider the evidence in the light most favorable to the prevailing party. *Gorman v. State*, 168 Md. App 412, 421 (2006) (internal citations and quotations omitted). We "accept the suppression court's first-level factual findings unless clearly erroneous, and give due regard to the court's opportunity to assess the credibility of the witnesses." *Id.* Additionally, "[w]e exercise plenary review of the suppression court's conclusions of law, and make our own constitutional appraisal as to whether an action taken was proper, by reviewing the law and applying it to the facts of the case." *Id.*

The Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment in *Mapp v. Ohio*, 367 U.S. 643, 655 (1961), prohibits unreasonable searches and seizures, and warrantless searches and seizures are presumptively unreasonable. *Fernandez v. California*, 134 S. Ct. 1126, 1131 (2014); *Georgia v. Randolph*, 547 U.S. 103, 109 (2006); *Spence v. State*, 444 Md. 1, 6 (2015). One exception to the warrant requirement, however, is the "automobile exception" or "*Carroll* doctrine," named after *Carroll v. United States*, 276 U.S. 132 (1925), in which the Supreme

Court held that an officer may conduct a warrantless search of an automobile if the officer has probable cause to believe it contains evidence of a crime or contraband. *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999). The key word in that last phrase, as we will see, is "or."

First, we address Mr. Norman's assertion that the search of the vehicle violated his Fourth Amendment rights because it was not supported by probable cause. Probable cause 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." *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (internal quotations and citations omitted). In assessing probable cause, we consider the "totality of the circumstances." *Cox v. State*, 161 Md. App. 654, 669 (2005). At the suppression hearing, defense counsel argued that in light of the recent statutory changes that made possession of less than ten grams of marijuana a civil (rather than criminal) offense, the smell of marijuana did not give the Trooper probable cause to believe that a criminal amount of marijuana was present in the vehicle, and thus, did not justify a warrantless search of the vehicle.

The trial court noted the novelty of defense counsel's argument in light of the statutory changes, but denied the motion because, although decriminalized in part, marijuana is not legal here:

> Paraphernalia is still illegal in Maryland. And it is still illegal in this state to smoke marijuana in an automobile.

* * *

> The law of the land still in this State is that a strong odor of marijuana presents probable cause to search a motor vehicle if for no other reason alone.

We agree, and have the benefit of *Bowling v. State*, 227 Md. App. 460 (2016) (which, to be fair, had not been decided at the time of the suppression hearing).[1] The question presented in *Bowling* was whether "the positive alert of a drug dog that is certified to detect marijuana, along with other controlled dangerous substances, furnishes probable cause to search a vehicle, given the decriminalization of small amounts of marijuana and the drug dog's inability to distinguish between the odor of less than 10 grams of marijuana and 10 or more grams of marijuana." *Id.* at 462. We held that it did, noting first that with respect to the odor of marijuana, "Maryland Appellate courts consistently have held 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.* at 469 (citations omitted). We noted too that neither the United States Supreme Court nor Maryland appellate courts had limited the automobile exception to encounters where the police have probable cause to believe that there is evidence of a crime in the vehicle. To the contrary, we said, "a search is permitted when there is probable cause to believe that the car contains evidence of a crime **or** contraband." *Id.* at 472 (emphasis in original). Applying principles of

[1] In his brief, Mr. Norman asserts that the trial court erred because Trooper Dancho smelled raw, rather than burnt marijuana. Had there been an odor of burnt marijuana, Mr. Norman claims, Trooper Dancho would have had reason to believe that the driver may have been impaired or that the vehicle contained paraphernalia. As we explain, though, *Bowling*'s holding that the smell of raw marijuana alone furnishes probable cause to conduct a search of the vehicle pursuant to the *Carroll* doctrine eliminates our need to address this distinction.

statutory interpretation, we concluded that "although 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." *Id.* at 476. And because possession of any amount of marijuana is illegal, and marijuana is still contraband, we held that the new law "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." *Id.*

The same reasoning applies here. The presence of narcotic odors detected by police officers can provide probable cause to search. *See United States v. Johns*, 469 U.S. 478, 482 (1985) ("After the officers came closer and detected the distinct odor of marijuana, they had probable cause to believe that the vehicle contained contraband."); *Johnson v. United States*, 333 U.S. 10, 13 (1948) (discussing that the presence of narcotic odors can be a basis for probable cause); *Waugh v. State*, 275 Md. 22, 30 (1975) (noting that if the detective had actually smelled what he believed to be the odor of marijuana coming from the defendant's suitcases, it would have constituted probable cause to search the suitcases); *State v. Harding*, 166 Md. App. 230, 241 (2005) (a strong odor of marijuana emanating from the passenger compartment of the defendant's vehicle provided probable cause to search that area of the vehicle.); *Ford v. State*, 37 Md. App. 373, 379 (1977) ("[K]nowledge 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."). Before the recent statutory changes, there would have been no question that

Trooper Dancho had probable cause to search the vehicle based on the smell of raw marijuana. But the *Carroll* doctrine allows a warrantless search of a vehicle when an officer has probable cause to believe that it contains evidence of a crime *or contraband*, and marijuana (in any amount) is still contraband, even if a small amount might no longer constitute a crime (although Mr. Norman had more than that). So when Trooper Dancho, an officer experienced in drug enforcement and trained to detect illegal drug odors, smelled raw marijuana coming from the passenger compartment of the vehicle in which Mr. Norman was a passenger, he had probable cause to conduct a warrantless search of the vehicle.

Next, Mr. Norman argues that the officer safety pat-down (that ultimately dislodged the greater amount of marijuana) violated the Fourth Amendment. In *Terry v. Ohio*, 329 U.S. 1 (1968), the Supreme Court held that officers may stop and frisk without violating the Fourth Amendment's ban on unreasonable searches and seizures so long as two conditions are met: *first*, the investigatory stop must be lawful; and *second*, to proceed from a stop to a frisk (to pat-down for weapons), the officer must reasonably suspect that the person stopped is armed and dangerous. *Id.* The stop in this case was lawful, and Mr. Norman doesn't claim otherwise. Mr. Norman, however, does challenge the Trooper's reasonable suspicion to conduct the pat-down, and his challenge turns on whether the decriminalization of small amounts of marijuana decouples the long-recognized connection between drugs and weapons.[2]

[2] The State contends that, under Rule 4-252, Mr. Norman waived his challenge to the scope of the frisk because he did not raise it below. Mr. Norman argued (continued…)

Mr. Norman argues that the trial court's ruling was incorrect because "there was nothing, aside from the suspected presence of marijuana, to justify the pat down." Relying on several cases, Mr. Norman contends that the trial court effectively "created a blanket exception to the rule that pat downs are permissible only when police have reasonable suspicion to believe that a person is armed and dangerous." We disagree. The cases on which Mr. Norman rely all deal with no-knock entry warrants, not *Terry* frisks conducted prior to a probable cause search of a vehicle. *Richards v. Wisconsin*, 520 U.S. 385 (1997) (finding that the Fourth Amendment does not permit a blanket exception to the knock-and-announce warrant requirement for felony drug investigations); *Davis v. State*, 383 Md. 394, 427 (2004) (holding that, under the current law, a judicial officer in Maryland may not issue a no-knock warrant); *Dashiell v. State*, 374 Md. 85, 90 (2003) (explaining that a "no-knock" warrant does not, *per se*, rise to the level of articulable suspicion needed for an officer to conduct a *Terry* frisk for weapons). In those cases, the courts refused to permit a blanket exception that would automatically elevate any case involving a drug investigation to the level of exigent circumstances, and thus allow the police to either obtain a no-knock warrant, execute one, or automatically conduct a *Terry* frisk on persons where the search was executed.

We agree with that principle, and likewise reject the notion that the possible presence of drugs creates a blanket exception to the Fourth Amendment's reasonableness

in his brief that the frisk was overly invasive, but conceded at oral argument that he had not challenged the scope of the frisk in the circuit court. As such, the issue isn't before us, and we offer no views on whether the frisk would have passed muster had it been raised.

requirement. That said, our courts have long recognized both the inherent dangers involved in traffic stops, at which officers may encounter drug activity unexpectedly and without the opportunity to prepare to defend themselves, and the close correlation between the presence of drugs and the presence of weapons. *See, e.g.*, *Bost v. State*, 406 Md. 341, 360 (2008) ("Guns often accompany drugs, and many courts have found an indisputable nexus between drugs and guns") (citations omitted)); *Stokeling v. State,* 189 Md. App. 653, 667 (2009) ("[R]easonble suspicion that the appellant was in possession of illegal narcotics in turn raised reasonable, articulable suspicion that he was in possession of a firearm."); *Hicks v. State*, 189 Md. App. 112, 134 (2009) ("We have often recognized the inherent dangers of drug enforcement, and an investigatory stop based upon a reasonable suspicion that a suspect is engaged in drug dealing, can justify a frisk for weapons."); *Dashiell v. State*, 143 Md. App. 134, 153 (2002) ("Persons associated with the drug business are prone to carrying weapons."), *aff'd* 374 Md. 85, 821 (2003); *Banks v. State*, 84 Md. App. 582, 591 (1990) ("Possession and indeed, use, of weapons, most notably, firearms, is commonly associated with the drug culture[.]"). And the trial court expressly recognized this connection as a factor bearing on the reasonableness of this particular search:

> Courts have recognized that attacks against law enforcement officers have become prevalent. There is a greater need for police to take protective measures to insure their safety and that of the community that might have been unacceptable in earlier times so *Terry* searches have been expanded to accommodate those concerns.
>
> * * *
>
> Given the additional weapons, specifically guns are often associated with drug activity the Court is persuaded that under

> the totality of the circumstances in this case that a pat down for weapons was reasonable.

We agree with the circuit court that this pat-down was justified. Again, the Trooper had probable cause to search the vehicle based on the odor of raw marijuana coming from the passenger compartment. That probable cause in turn raised reasonable, articulable suspicion that all occupants of the vehicle were engaged in a joint enterprise and together were in possession of drugs.[3] *See* Stokeling, 189 Md. App. at 667 (explaining that "when a certified K-9 alerts to the presence of narcotics in a vehicle in which there is more than one occupant, there is at least reasonable, articulable suspicion to believe that the occupants of the vehicle are engaged in a joint enterprise and together are in possession of narcotics."); *accord Pringle*, 540 U.S. at 696. The stop took place at night, there were three individuals in the vehicle, and Trooper Dancho smelled a strong odor of raw marijuana, which can indicate drug trafficking. And because Trooper Dancho was experienced in drug enforcement, "considerable credit can be given to officers in conducting investigations into illegal drug activity." *Stokeling*, at 667 (internal quotations and citations omitted). Based on the totality of the circumstances, we agree with the circuit court that the Trooper had legitimate concerns about his own safety and that it was reasonable for

[3] In his Reply Brief, Mr. Norman cites *State v. Wallace*, 372 Md. 137 (2002) for the proposition that the smell of raw marijuana emanating from the passenger compartment of the vehicle did not provide probable cause to arrest Mr. Norman, as he was only a passenger and not the driver of the car, and conduct a search incident to arrest. But because we find that Trooper Dancho conducted a permissible *Terry* frisk, and not a search incident to arrest, we need not address whether he had probable cause to arrest Mr. Norman as well.

him to frisk Mr. Norman for weapons before conducting a probable cause search of the vehicle.

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

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Filed: August 11, 2016

Respectfully, I dissent from the majority opinion as there was insufficient evidence to support a finding that Trooper Dancho had reason to believe that Appellant was armed and dangerous, and accordingly, I believe that Appellant was frisked in violation of the Fourth Amendment to the U.S. Constitution.

This year, the Maryland legislature decriminalized the possession of small amounts of marijuana, rendering possession of less than 10 grams a civil offense.[1] With this in mind, the majority ruled that the warrantless search of Appellant's vehicle was justified because "marijuana (in any amount) is still contraband[]. . . ." It then upheld the frisk, opining that the trooper had legitimate concerns about his safety based on the totality of circumstances, to wit: the trooper's experience in drug enforcement plus the strong smell of raw marijuana.

While the Majority "reject[ed] the notion that the possible presence of drugs creates a blanket exception to the Fourth Amendment's reasonableness requirement," it nonetheless adopted what is, in essence, a blanket exception.

Notably, the circuit court made no particularized findings of dangerousness. Nor were there findings regarding the trooper's drug enforcement experience.

[1] Md. Code Ann., Crim. Law § 5-601.1, provides:
(1) A violation of § 5-601 of this part involving the use or possession of less than 10 grams of marijuana is a civil offense.
(2) Adjudication of a violation under § 5-601 of this part involving the use or possession of less than 10 grams of marijuana:
(i) is not a criminal conviction for any purpose; and
(ii) does not impose any of the civil disabilities that may result from a criminal conviction.

Rather, the circuit court opined: "Paraphernalia is still illegal in Maryland. And it is still illegal in this State to smoke marijuana in an automobile . . . . [A] strong odor of marijuana presents probable cause to search a motor vehicle if for no other reason alone."[2] Citing *In re: David S.*, 367 Md. 523, (2002), the circuit court declared that *Terry* has been expanded to protect law enforcement officers and ruled that in light of the association between guns and drugs, the pat down was reasonable.

In *Terry v. Ohio*, 329 U.S. 1, 9 (1968), the Supreme Court reiterated the long held precept that:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. (quoting *Union Pac. R. Co. v. Botsford,* 141 U.S. 250, 251 (1891)).
>
> Counterbalancing this right, the Court recognized that:
>
> [W]e cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

Id. at 24.

[2] There was nothing in the record suggesting that anyone had been smoking in the vehicle. No paraphernalia had been identified prior to the search of the vehicle, nor did the circuit court make factual findings about paraphernalia in the vehicle.

In the instant case, there were no factual findings that would give rise to the belief that Appellant might be armed and dangerous without the application of a blanket exception to the Fourth Amendment, applicable to even a decriminalized amount of marijuana. And while the majority distinguished this case from the series of no knock entry cases in which such blanket exceptions have been rejected, the principles set forth in the no-knock cases are applicable here, as well.

In *Richards v Wisconsin,* 520 U.S. 385 (1997), the Supreme Court held:

> If a *per se* exception were allowed for each category of criminal investigation that included a considerable-albeit hypothetical-risk of danger to officers or destruction of evidence, the knock-and-announce element of the Fourth Amendment's reasonableness requirement would be meaningless.
>
> Thus, the fact that felony drug investigations may frequently present circumstances warranting a no-knock entry cannot remove from the neutral scrutiny of a reviewing court the reasonableness of the police decision not to knock and announce in a particular case. Instead, in each case, it is the duty of a court confronted with the question to determine whether the facts and circumstances of the particular entry justified dispensing with the knock-and-announce requirement.

Id. at 394.

Similarly, in *Davis v. State*,[3] 383 Md. 394, 432–33 (2004), the Court of Appeals held that:

> To use the officers' experience to establish a reasonable suspicion that the petitioners, because they are drug dealers, have, carry and use firearms and are likely to have, carry, and use them in this case and that, in the event of an announced entry to execute the search and seizure warrant, the drugs in this case could, and would likely, be destroyed is to do what the *Richards* Court

[3] Superseded by statute as stated in *Ford v. State*, 181 Md.App., 535 (2009).

> forbids, to give effect to a blanket exception to the knock and announce requirement on the basis only of overgeneralizations. As *Richards* points out, see 520 U.S. at 392–93, 117 S.Ct. at 1421, 137 L.Ed.2d at 623, such overgeneralizations may be applied to every drug investigation. Moreover, the need and reason for the exception "can, relatively easily, be applied" to many other categories of crimes. *Id.* at 393, 117 S.Ct. at 1421, 137 L.Ed.2d at 623. We hold that the entry in this case was not justified by existing and articulated exigency.

In *Birchfield v. N. Dakota*, 136 S. Ct. 2160, 2188 (2016), the Supreme Court again explained, "this Court has recognized two kinds of exceptions to the warrant requirement that are implicated here: (1) case-by-case exceptions, where the particularities of an individual case justify a warrantless search in that instance, but not others; and (2) categorical exceptions, where the commonalities among a class of cases justify dispensing with the warrant requirement for all of those cases, regardless of their individual circumstances.

The majority applied a categorical exception - any indication of drugs during a traffic stop, no matter how slight, whether or not decriminalized, justifies a frisk for weapons. While this intrusion may appear to be minor, as Justice Sotomayor recognized in her dissenting opinion in *Utah v. Strieff*, 136 S. Ct. 2056, 2069 (2016), "Although many Americans have been stopped for speeding or jaywalking, few may realize how degrading a stop can be when the officer is looking for more." Because I believe that the majority opinion erodes Fourth Amendment protections, I respectfully dissent.