UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1466

September Term, 2015

DEXTER WILLIAMS

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Wright,
Moylan, Charles E., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Moylan, J.

Filed: May 18, 2016

The appellant, Dexter Williams, was found to be guilty, on his conditional plea of guilty, by Judge Edward R.K. Hargadon in the Circuit Court for Baltimore City of possession of marijuana. The appellant was sentenced to 20 days of incarceration. The conditional guilty plea, pursuant to Maryland Rule 4-242(d)(2), preserved his entitlement to appeal an adverse ruling at his pre-trial suppression hearing. That is, indeed, his sole appellate contention:

> That his pre-trial motion to suppress physical evidence was erroneously denied.

The Suppression Hearing

Baltimore City Detective Tristan Ferguson was the sole witness at the suppression hearing. He was accepted as an expert witness on the smell of marijuana. At approximately 10:30 p.m. on April 8, 2015, Detective Ferguson, who was in an unmarked car with two other detectives, pulled up to a stop sign. Another vehicle, occupied only by the appellant, was also stopped in the lane to the right of the detective's car. Detective Ferguson, for no apparent reason, got out of his vehicle and walked toward the appellant's vehicle. The appellant's driver's window was open. At the point when Detective Ferguson was "within four feet of the [appellant's] car," the detective distinctly smelled the odor of marijuana.

With that testimony, the battle was joined. The battle, however, was not over the entitlement of Detective Ferguson to get out of his vehicle and to approach the appellant's vehicle. Even if it was rank investigative opportunism, it was not constitutionally forbidden.

Nor was the battle over the fact that Detective Ferguson had, indeed, detected the odor of marijuana emanating from the appellant's car. That was an uncontested given. Over the course of extensive direct examination, cross-examination, and redirect examination, the fiercely contested combat was not over what the detective had smelled but exclusively over the legal and constitutional significance of his having smelled it.

Hotly debated were such sub-issues as the aromatic potency of fresh marijuana versus that of burnt marijuana and the relationship between the amount of marijuana at the source of the smell and the resultant distance at which the smell might be detected. Obsessed with these minutiae, the appellant is now calling on this Court to assess the reasonable outer limit of Detective Ferguson's olfactory power and to referee whether even the most favorable version of that power could yield probable cause for a warrantless Carroll Doctrine search. We find it convenient, however, to ignore such questions in their entirety. Whatever the answers might be, they would not affect the outcome of this appeal.

A False Premise

The castle of the appellant's appeal is built on sand. He acknowledges that prior to 2014, he would have had no case. The smell of marijuana would, ipso facto, have authorized the arrest and subsequent search incident of him as the car's driver and/or the warrantless Carroll Doctrine search of the car itself. Wilkes v. State, 364 Md. 554, 586-87, 774 A.2d 420 (2001); Pyon v. State, 222 Md. App. 412, 439, 112 A.3d 1130 (2015).

It is the appellant's thesis that fortune smiled on recreational pot smokers in Maryland in 2014 and that he may reap the Fourth Amendment benefit of that good fortune. The appellant looks to Chapter 158 of the Acts of 2014 and its ameliorating effect on the punishment for the possession of small amounts of marijuana. Maryland Code, Criminal Law Article, § 5-601(c)(2)(ii), now provides:

> "(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 possession of less than 10 grams of marijuana is a civil offense punishable by a fine not exceeding $500."

Building upon this ameliorating of the punishment, it is the appellant's thesis that 1) the possession of less than 10 grams of marijuana has been decriminalized; 2) Detective Ferguson was not able to ascertain whether the marijuana he smelled consisted of 10 grams or more; and 3) the detection of what may well have been a non-criminal amount of marijuana may not, therefore, be used to establish probable cause.

The Continuing Status of Marijuana as Contraband

This Court recently filed its opinion in Bowling v. State, ___ Md. App. ___ , No. 1121, September Term 2015 (filed March 31, 2016). But for the substitution of a dog's nose

for a detective's nose, Bowling's thesis was precisely the same as the appellant's thesis in this case:

> "[Bowling] contends that the circuit court 'erred by ruling that an alert from a drug dog that can detect and alert to marijuana along with other substances provides probable cause to search a vehicle.' He notes that, in 2014, the Maryland General Assembly decriminalized the possession of less than ten grams of marijuana, and therefore, he argues, at the time of his offense, possession of less than 10 grams of marijuana was a civil offense which did not warrant searches and arrests. [Bowling] asserts that, because [the drug dog] did not have the ability 'to distinguish between a criminal quantity of marijuana and a noncriminal quantity,' the alert did not provide probable cause to believe that evidence of a crime was present in the vehicle, as opposed to items associated with a civil infraction."

(Emphasis supplied).

At the outset of the Bowling opinion, Judge Graeff squarely holds that the possession of even smaller amounts of marijuana is unquestionably illegal and indisputably a civil offense. If it were not illegal, it could not be deemed an offense. Our opinion held, "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 is still illegal." The opinion then quotes with approval Commonwealth v. Cruz, 945 N.E.2d 899, 911 (Mass. 2011):

> "[D]ecriminalization is not synonymous with legalization."

That, of course, is the bottom line. The possession of even small amounts of marijuana has not been legalized in Maryland. It long has been illegal and it remains illegal.

Criminal Law Article, § 5-601 deals with "Possessing or administering controlled dangerous substances" and subsection (a)(1) makes it clear that "a person may not possess ... a controlled dangerous substance." Sections 5-401(a) and 5-402(d)(1)(vii), in turn designate marijuana as a Schedule I Controlled Dangerous Substance. Section 5-601's penalty provisions, subsections (c)(1) and (c)(2)(i), provide that one who violates § 5-601 by possessing 10 grams or more of marijuana is "guilty of a misdemeanor" and "is subject to imprisonment not exceeding 1 year or a fine not exceeding $1,000 or both." Maryland has not legalized the possession of less than 10 grams of marijuana. It has simply ameliorated the punishment. A "civil offense" is not innocent behavior and the very word "offense" should make that apparent.

Even though the possession of less than 10 grams of marijuana is designated as a "civil offense" rather than a crime, it is subject to escalating "fines" of $100, $250, and $500. The sanction of a fine is not imposed for behavior that is legal. Even when the possession of marijuana is of an amount less than 10 grams, the court may impose other sanctions or restraints upon the offender. Subsection (c)(2)(ii)(4) provides:

> "(4) A. In addition to a fine, a court shall order a person under the age of 21 years who commits a violation punishable under subsubparagraph 1, 2, or 3 of this subparagraph to attend a drug education program approved by the Department of Health and Mental Hygiene, refer the person to an assessment for substance abuse disorder, and refer the person to substance abuse treatment, if necessary.
>
> "B. In addition to a fine, a court shall order a person at least 21 years old who commits a violation punishable under subsubparagraph 3 of this

> subparagraph to attend a drug education program approved by the Department of Health and Mental Hygiene, refer the person to an assessment for substance abuse disorder, and refer the person to substance abuse treatment, if necessary."

(Emphasis supplied). Such conditions may not be imposed for lawful behavior, such as the possession of material that may be lawfully possessed.

As material which is unlawful for the ordinary citizen to possess in Maryland, marijuana is, by definition, contraband. As contraband, if falls within the permitted investigative purview of the Fourth Amendment and of Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). Under the Carroll Doctrine exception to the warrant requirement, what may be warrantlessly searched for and seized from an automobile is not simply evidence of a crime (less than 10 grams of marijuana may arguably not be that) but also contraband (marijuana in any amount is that). In Carroll, 267 U.S. at 153, Chief Justice Taft spoke of contraband as a proper target of warrantless investigation:

> "Having thus established that contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant, we come now to consider under what circumstances such search may be made."

(Emphasis supplied).

The Supreme Court has consistently followed suit. In Illinois v. Gates, 462 U.S. 213, 238-39, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), Justice Rehnquist defined probable cause generally as whether

> "there is a fair probability that contraband or evidence of a crime will be found in a particular place."

(Emphasis supplied).

In Wyoming v. Houghton, 526 U.S. 295, 300, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999), Justice Scalia characterized the Carroll Doctrine:

> "Carroll v. United States, [ ] similarly involved the warrantless search of a car that law enforcement officials had probable cause to believe contained contraband – in that case, bootleg liquor.
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> ...
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> "Thus, the Court held that 'contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant' where probable cause exists."

(Emphasis supplied). See also, Maryland v. Dyson, 527 U.S. 465, 467, 119 S.Ct. 2013, 144 L.Ed.2d 442 (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." (Emphasis supplied)); Pennsylvania v. Labron, 518 U.S. 938, 940, 116 S.Ct. 2485, 135 L.Ed.2d 1031 (1996); California v. Acevedo, 500 U.S. 565, 580 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991) ("The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained." (Emphasis supplied)).

Maryland recognizes a belief in the existence of contraband as an alternative predicate for a Carroll Doctrine search of an automobile. Judge Raker wrote for the Court of Appeals in Nathan v. State, 370 Md. 648, 665-66, 805 A.2d 1086 (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."

(Emphasis supplied). See also, Wallace v. State, 142 Md. App. 673, 684, 791 A.2d 968 (2002) ("[I]f contraband were in plain view on a person, a warrantless search could be conducted.").

After surveying caselaw around the country, this Court's opinion in Bowling v. State quoted with approval from State v. Smalley, 225 P.3d 844, 848 (Or. Ct. App. 2010). The argument had been made before the Court of Appeals of Oregon that because the possession of less than one ounce of marijuana was no longer deemed to be a criminal offense, the odor of marijuana could no longer give an officer probable cause to search a vehicle. The Court of Appeals rejected that argument:

> "Defendant does not argue that marijuana becomes contraband only in quantities of more than an ounce, and we know of no authority for that proposition. Indeed, both the legal and common definitions of 'contraband' indicate that the term encompasses anything that the law prohibits possessing. Black's Law Dictionary defines 'contraband' as '[g]oods that are unlawful to import, export, produce, or possess.' *Id.* at 365 (9th ed. 2009); see also Webster's Third New Int'l Dictionary 494 (unabridged ed. 2002) ("goods or merchandise the importation, exportation, or sometimes possession of which is forbidden").

(Emphasis supplied). Our Bowling opinion then summarized Oregon's resolution of our common issue.

> "Because marijuana constituted contraband, regardless of its quantity, the court held that the officer's detection of the odor of marijuana in the vehicle gave him the requisite probable cause to search it."

(Emphasis supplied).

The Bowling opinion also cited with approval the case of State v. Barclay, 398 A.2d 794, 798 (Me. 1979), wherein the Supreme Judicial Court of Maine held that, although the possession of a small amount of marijuana was deemed a civil, rather than a criminal, offense, marijuana remained illegal to possess and was, therefore, contraband. The Maine court held that when an officer stopped a car for a minor traffic offense but then smelled marijuana, the officer had probable cause to believe the vehicle contained contraband and was justified in conducting a warrantless search.

Judge Graeff's opinion in Bowling traced the legislative history of the 2014 amelioration of the punishment for possession of small amounts of marijuana. An amendment was specifically added to make certain that the downgrading of modest possession to the status of a civil offense did not have any adverse effect on the investigative prerogatives of the police. The amendment also made it clear that even small amounts of marijuana continued to be classified as contraband and, therefore, continued to be subject to forfeiture. The clarifying amendment is now codified as § 5-601(d), which provides:

> "(d) Effect of (c)(2)(ii) on other laws. – 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:
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> (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 supplied).

The Bowling opinion summarized this unchanged status of the smelling of marijuana, in any amount, on an investigator's assessment of probable cause.

> "Given this legislative history, we conclude 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. 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, [the drug dog]'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."

(Emphasis supplied).

Detective Ferguson's smelling of marijuana in this case established probable cause for the Carroll Doctrine search of the appellant's vehicle. The motion to suppress the fruits of that search was properly denied.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.