UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1841

September Term, 2015

JAMES VICTOR GINGRICH

v.

STATE OF MARYLAND

Berger,
Arthur,
Davis, Arrie W.
(Retired, Specially Assigned),

JJ.

Opinion by Davis, J.

Filed: May 13, 2016

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland court as either precedent within the rule of *stare decisis* or as persuasive authority. Md. Rule 1-104.

Appellant, James Victor Gingrich, was tried and convicted at a court trial in the Circuit Court for Worcester County (Groton III, J.) of driving under the influence of alcohol; driving under the influence of alcohol *per se*; driving while impaired by alcohol; displaying an expired registration plate; and driving on a highway without registration. The court sentenced appellant to one year in the Worcester County Jail for driving under the influence of alcohol and merged the remaining counts for sentencing purposes. Appellant filed the instant appeal in which he raises the following questions, which we quote:

> 1. Did the lower court violate Maryland Rule 4-246 and appellant's constitutional rights by failing to ensure that he knowingly and voluntarily waived his right to a jury trial?
>
> 2. Was the evidence insufficient to sustain Appellant's convictions?

FACTS AND LEGAL PROCEEDINGS

At the preliminary hearing on September 15, 2015, the following colloquy occurred:

> THE COURT: You understand you do have the right to a jury trial consisting of 12 people who would hear the evidence in your case and all 12 would have to agree that you're guilty beyond a reasonable doubt in order for you to be found guilty?
>
> [APPELLANT]: Yes, I do.
>
> THE COURT: You understand what a jury trial would consist of?
>
> [APPELLANT]: Yes, I do.
>
> THE COURT: Do you want a jury trial?
>
> [APPELLANT]: No.
>
> THE COURT: I find he's knowingly and voluntarily waived his right to a jury trial. It will be set in for a non-jury trial on the date that's already set.

At trial, the following colloquy occurred:

THE COURT: And you understand, because of those penalties, you're entitled to a jury trial consisting of 12 people who would hear the evidence in your case and all 12 would have to be convinced beyond a reasonable doubt to find you guilty. Do you understand what a jury trial would consist of?

[APPELLANT]: Yes, I do.

THE COURT: Do you want a jury trial?

[APPELLANT]: No.

THE COURT: I find he's knowingly and voluntarily waived his right to a jury trial.

The State's only witness, Trooper Teves,[1] Maryland State Police, testified that, on April 23, 2015, while on patrol, he came into contact with Sharma Lewis. The contact with Lewis prompted Trooper Teves to proceed to St. John Neumann Church. According to Trooper Teves, he arrived at the church one hour after his interaction with Lewis at approximately 5:30 p.m and sunlight was still visible. The only vehicle in the parking lot of the church was a "white Nissan Pathfinder S.U.V. displaying Maryland Registration 6AE9642." When Trooper Teves approached the vehicle, appellant exited from the driver's side front door stating, "she's crazy, and she's trying to get me in trouble." Trooper Tevers stated that he could "smell the strong odor of an alcoholic beverage emanating from [appellant's] breath and person," and that appellant's "speech was slurred."

[1] According to the State’s brief, Trooper Teves’ first name was not provided in the record. Appellant does not provide first name in his brief.

Regarding the vehicle, Trooper Teves testified, "I had put my hand on the hood, felt it was still warm to the touch . . . ."[2] Inside the vehicle, Trooper Teves observed keys "on the center console, next to the parking brake." Although Trooper Teves concluded that this key was a vehicle key, he could not conclusively determine if it was the ignition key to the vehicle that appellant occupied. Furthermore, Trooper Teves did not attempt to start the vehicle with the key and, at no time, did he observe appellant operate the vehicle or witness the vehicle move. Trooper Teves testified that the vehicle's "transmission was in the park position" when he arrived at the church. He also stated that he did not hear the radio being played in the vehicle, nor did he recall seeing the vehicle's lights on. According to Trooper Teves, appellant stated that he had not been driving because he did not have a key to the vehicle. He further explained to Trooper Teves that Lewis "had dropped him off there [church parking lot] and left the vehicle there with him, but [that] she took the key." Lewis' residence was approximately a ten-minute drive from the church and she was not in possession of her vehicle or any other vehicle when she had contact with Trooper Teves one hour prior to his encounter with appellant. Trooper Teves administered a field sobriety test, which appellant failed. Appellant then "submitted to a voluntary breath test, which yielded a .08."[3]

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[2] Appellant notes in his brief that Trooper Teves did not include this evidence in the Statement of Charges.

[3] MD. CODE ANN., CTS. & JUD. PROC. § 10-307(g). "If at the time of testing a person
(continued...)

Appellant's counsel, in his motion for judgment of acquittal, argued that there was no evidence "at all that the car was being operated or attempted to be operated, much less that he drove it." The court denied the motion and found appellant guilty of driving under the influence and related driving offenses, explaining:

> I understand what your argument is, and it's a good argument under the circumstances. But the—and there are numerous factors that one can look at to determine whether there was operation or in control of the vehicle. They don't all have to be present, but they— if you have all of them, it just makes it a stronger case, but the State is still able to meet their burden with only several of those factors present.
>
> And in this case, the vehicle was in the parking lot by itself. As the trooper approaches, your client gets out of the driver's seat. And the vehicle had been recently driven because it was still warm. There's a lack of credibility as to the fact—on your client's behalf, as to the fact that he indicates he wasn't driving because he didn't have the key. And despite the fact that the key was not in the ignition, there is a automotive key. It's not a key for something else. And the fact that it would be a key to an automobile other than the car that it's located in isn't reasonable.
>
> So for the reason—those reasons, that, in fact, it is a car that's recently driven, the officer finds your client in the driver's seat with the availability of a key, despite his representations that he didn't have a key, I find that, in fact, he was driving.

DISCUSSION

I. WAIVER OF JURY TRIAL

Appellant contends that the trial court failed to engage in the requisite inquiry, on the record, as required to satisfy the knowing and voluntary standard for waiver of a jury trial.

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[3](...continued)
has an alcohol concentration of 0.08 or more, as determined by an analysis of the person's blood or breath, the person shall be considered under the influence of alcohol *per se* as defined in § 11-174.1 of the Transportation Article."

Appellant acknowledges that the Court of Appeals has held that a contemporaneous objection is required to preserve the issue for appellate review. Despite appellant's failure to make a contemporaneous objection, appellant argues that the issue is still preserved because the Court of Appeals holding did not address "other violations of Rule 4–246, such as inadequacies in a waiver colloquy." If the issue is determined to not be preserved, appellant argues that this Court should exercise discretion to review the issue for plain error.

The State responds that appellant's complaint of the trial judge's noncompliance with Rule 4–246 is unpreserved because he did not object at any point to the court's acceptance of his waiver. The State further asserts that, even if appellant had preserved the issue, his Rule 4–246 claim fails because the record illustrates that he had "some knowledge" of the right to a jury trial and there is no trigger requiring a voluntariness inquiry.

A. Preservation

"The right to a jury trial is guaranteed under the United States and Maryland Constitutions, and a criminal defendant's decision to waive a jury trial is not taken lightly." *Butler v. State,* 214 Md. App. 635, 647 (2013), *overruled on other grounds by Nalls v. State*, 437 Md. 674 (2014) (citing U.S. CONST., amends. VI, XIV; MD. DECL. OF RTS., Arts. 5(c), 21, 24).[4] Indeed, the United States Supreme Court has set forth a two-part test for determining the validity of a waiver of a constitutional right:

[4] The Sixth Amendment applies to the states through the due process clause of the Fourteenth Amendment.

> First, the relinquishment of the right must have been *voluntary* in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full *awareness* of both the nature of the right being abandoned and the consequences of the decision to abandon it.

Moran v. Burbine, 475 U.S. 412, 421 (1986) (Emphasis supplied).

Maryland Rule 4-246 governs the waiver of the right to a jury trial in circuit court and has incorporated the Supreme Court's two-part test. The Rule provides in relevant part:

> (a) **Generally**. In the circuit court, a defendant having a right to trial by jury shall be tried by a jury unless the right is waived pursuant to section (b) of this Rule. The State does not have the right to elect a trial by jury.
>
> (b) **Procedure for Acceptance of Waiver**. A defendant may waive the right to a trial by jury at any time before the commencement of trial. The court may not accept the waiver until, after an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, the court determines and announces on the record that the waiver is made *knowingly and voluntarily*.

(Emphasis supplied).

Significantly, the Court of Appeals has ruled that a contemporaneous objection is required in order to preserve an issue concerning waiver of the right to a jury under Rule 4–246(b).

> Although appellate courts ordinarily will not reach an issue not decided by the court below, in limited circumstances, 'if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal[,]' appellate courts may exercise their discretion to decide an issue that was not preserved . . . based on the continued confusion surrounding this issue in the trial courts, we shall exercise our discretionary

> review under Rule 8–131(a)[5] . . . . *Going forward, however, the appellate courts will continue to review the issue of a trial judge's compliance with Rule 4–246(b) provided a contemporaneous objection is raised in the trial court to preserve the issue for appellate review*.

Nalls, 437 Md. at 693 (Emphasis supplied).

The Court has subsequently clarified and reiterated the need for a contemporaneous objection in order to review a trial court's compliance, *vel non*, with the requirements of Rule 4–246(b).

> We made it perfectly clear in *Nalls* that a claimed failure of the court to adhere strictly with the requirements of Rule 4–246(b) requires a contemporaneous objection in order to be challenged on appeal . . . . We exercised our discretion . . . in order to clarify the misconception, held by petitioners . . . that this Court had "created an exception to the general contemporaneous objection requirement to preserve an issue for appeal[ ]" in an earlier decision, [*Valonis*] . . . . We made clear in *Nalls*, that *Valonis* is not to be understood as creating such an exception from the requirement of a contemporaneous objection, set forth in Rule 8–131(a), for claimed violations of Rule 4–246(b). In short, we did not create in *Nalls* a "change in procedure," as Petitioner contends; on the contrary, *we reinforced in that case what long has been the preservation rule, set forth in the plain language of Rule 8–131(a), which requires a contemporaneous objection*.

Spence v. State, 444 Md. 1, 14–15 (2015) (Emphasis supplied) (citations omitted).

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[5] Md. Rule 8–131(a) Generally. The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. 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, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

In the case *sub judice*, appellant concedes that he failed to make a contemporaneous objection, in the lower court, concerning the trial judge's compliance with Rule 4-246(b). Although appellant argues that the holding in *Nalls* is limited to appellate review of "a claim of noncompliance with the 'determine and announce' requirement of the rule," the Court of Appeals has set forth no such limitation. In *Nalls*, the Court stated that "[t]he determination and announcement requirement goes to the very heart of the fundamental right to a jury trial" and, "[b]ecause of that constitutional significance, and perceived problems with compliance among the trial courts," the Court decided to exercise its discretionary review. *Nalls*, 437 Md. at 693 (citing *Valonis*, 431 Md. at 569). Appellant also argues that the Court of Appeals did not consider "other violations of Rule 4–246, such as inadequacies in a waiver colloquy," when determining that a contemporaneous objection is required. In *Nalls*, however, the Court stated that, "the Petitioners believe that *Valonis* created an exception to the general contemporaneous objection requirement to preserve an issue for appeal," (*id*. at 692), but reiterated that, "to the extent that *Valonis* could be read to hold that a trial judge's alleged noncompliance with Rule 4–246(b) is reviewable by the appellate courts *despite the failure to object at trial*, *that interpretation is disavowed*." *Id*. at 693–94 (Emphasis supplied). Accordingly, *Nalls* guides our determination that the Court of Appeals framed its holding in terms of compliance with the rule *generally* and not in a limited manner, as appellant argues. Therefore, the issue is not preserved for our review.

B. Plain Error Review

Moreover, the unpreserved issue should not be reviewed for plain error. In reviewing for plain error, we consider four elements:

> First, there must be an error or defect—some sort of "[d]eviation from a legal rule" that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it "affected the outcome of the district court proceedings." Fourth and finally, if the above three prongs are satisfied, the [appellate court] has the discretion to remedy the error—discretion which ought to be exercised only if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'

State v. Rich, 415 Md. 567, 578 (2010) (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)).

We will not exercise our discretion to review the issue for plain error, as appellant, in the alternative, requests. An appellate court will review an unpreserved claim, "only where the unobjected to error can be characterized as 'compelling, extraordinary, exceptional, or fundamental to assure the defendant a fair trial' by applying the plain error standard." *Abeokuto v. State*, 391 Md. 289, 327 (2006) (quoting *Richmond v. State*, 330 Md. 223, 236 (1993); *Rubin v. State*, 325 Md. 552, 588–89 (1992)). We decline to apply the plain error standard in the instant case because, not only is the claim neither compelling, extraordinary nor exceptional in light of similar cases decided by the Court of Appeals, but also because exercising plain error review would circumvent the very purposes the Court of Appeals articulated in *Nalls* that a contemporaneous objection was required. Therefore, appellant's

claim regarding the trial court's noncompliance with Rule 4–246(b) is unpreserved and we will not review for plain error.

II. SUFFICIENCY OF THE EVIDENCE

A. Offenses for Driving Under the Influence

Appellant next contends that the evidence presented was insufficient to sustain his convictions pertaining to the driving offenses. Specifically, appellant asserts that the State failed to prove beyond a reasonable doubt that he had actually driven the vehicle or was in actual physical control of the vehicle while under the influence of alcohol. The State counters that appellant's claim is without merit, as a reasonable inference from the facts and evidence presented is that appellant was operating the vehicle shortly before his apprehension.

This Court reviews, *de novo*, whether the evidence presented is sufficient to sustain a conviction. *Wilder v. State,* 191 Md. App. 319, 335 (2010). "In reviewing for sufficiency, we must determine 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id.* (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (Emphasis in original). *Accord State v. Smith*, 374 Md. 527, 533 (2003). Furthermore, due process demands that no person be subject to a criminal conviction unless the evidence establishes every element of the offense beyond a reasonable doubt. *Jackson,* 443 U.S. at 316. Moreover, if appellant is convicted by the court, without a jury, "we will review both

the law and the facts, but the judgment of the lower court will not be set aside on the evidence unless clearly erroneous.” *Wallace v. State*, 63 Md. App. 399, 404 (1985).

Md. Code Ann., Transp. § 21–902 outlines the elements of the offense of driving while under the influence or impairment of alcohol or drugs. The section provides, in part:

> (a)(1) A person may not drive or attempt to drive any vehicle while under the influence of alcohol.
>
> (2) A person may not drive or attempt to drive any vehicle while the person is under the influence of alcohol *per se.*
>
> * * *
>
> (b)(1) A person may not drive or attempt to drive any vehicle while impaired by alcohol.

Md. Code Ann., Transp. § 11–114 defines the term, “drive,” as “to drive, operate, move or be in actual physical control of a vehicle, including the exercise of control over or the steering of a vehicle being towed by a motor vehicle.” Accordingly, as a precondition to our determination of whether the evidence presented is sufficient to sustain a conviction for a driving offense, we must preliminarily determine what legally constitutes “driving.”

The Court of Appeals has recognized that "drive," "operate" and "move" each "clearly connotes either some motion of the vehicle or some physical movement or manipulation of the vehicle's controls." *Atkinson v. State,* 331 Md. 199, 206 (1993).[6] “The term ‘driving’

[6] *Atkinson* also discusses that “[a]ctual physical control” of a vehicle is one of four definitions included within the § 21–902(b) term “drive,” as well. *Id.* at 205.

generally connotes steering and controlling a vehicle while in motion; the term 'operating,' on the other hand, is generally given a broader meaning to include starting the engine or manipulating the mechanical or electrical devices of a standing vehicle.'" *Id.* (citing *Thomas v. State*, 277 Md. 314, 318 (1976)).

In order for a conviction of driving under the influence of alcohol to be sustained, the actual "driving" does not have to be witnessed. "A person may also be convicted under § 21–902 if it can be determined beyond a reasonable doubt that *before being apprehended* he or she has actually driven, operated, or moved the vehicle while under the influence." *Id.* at 218 (emphasis supplied). Essentially, "[p]roof of the crime . . . may arise from a permitted inference that the defendant was guilty of driving under the influence *in the past tense*." *Harding v. State*, 223 Md. App. 289, 292 (2015) (Emphasis supplied).

In *Gore v. State*, 74 Md. App. 143 (1988), this Court concluded that established facts, such as "that the car key was in the ignition in the 'on' position, with the alternator/battery light lit; that the gear selector was in the 'drive' position; and that the engine was warm to the touch . . . [were] sufficient to support a finding by the trier of fact that appellant was 'driving.'" *Id.* at 149. In *Dukes v. State,* 178 Md. App. 38, 52 (2008), "the fact that appellant was intoxicated and asleep in the driver's seat of a vehicle that was stopped *in the roadway*, with its lights on, is powerful circumstantial evidence that appellant drove the vehicle to that location while intoxicated." (Emphasis in original). *See also Harding*, *supra* (evidence

sufficient to establish Harding was driving where an emergency response call brought officers to the scene of an apparent accident with the car smoking and in the bushes).

In the instant case, there is no evidence that anyone witnessed appellant driving a vehicle while under the influence of alcohol. Therefore, the evidence presented must be sufficient to support a reasonable inference that appellant had driven the vehicle, while under the influence of alcohol, *before* he was apprehended. At trial, the judge indicated that the fact that the vehicle was "still warm," that appellant was in the driver's seat and the presence of an automotive key in the car supported the inference that appellant had recently driven while under the influence of alcohol.

Although the warmth of a vehicle's hood has been sufficient to support "driving" in other cases, it was not the only evidence presented. In prior cases, in conjunction with the fact that the vehicle's hood was "warm to the touch," other circumstantial evidence has been presented to support a reasonable inference that a vehicle has recently been driven or operated. In *Gore*, *supra*, evidence presented included the warmth of the vehicle *engine*, along with the fact that the car key was in the ignition in the "on position," the battery light was on and the car gear was in "drive."

In the case *sub judice*, the facts and evidence presented support a reasonable inference that appellant was driving the vehicle before Trooper Teves apprehended him. Appellant asserts that there was no evidence that the vehicle could have recently been driven, *i.e.*, there was no key in the ignition nor was the recovered key confirmed as the key for the vehicle.

Appellant further asserts that there is no evidence that the vehicle was even operational, *i.e.*, the vehicle's transmission was not engaged, there were no alternator or battery lights lit and the headlights and radio were not on. Significantly, Trooper Teves testified that the hood of the vehicle was "warm to the touch" and that he had spoken with Lewis at her house *an hour before he encountered appellant.* Furthermore, when the trooper spoke with Lewis at her home, he noted that the house was a ten-minute drive from appellant's location and Lewis did not have her car or any other vehicle at her disposal. This, combined with the evidence that the hood of the vehicle was "warm to the touch" directly contradicts appellant's contention that Lewis drove him to the church parking lot in her car, left him there and took her key with her.

We do not require that the testimony of a police officer consist of only firsthand knowledge of a vehicle's operability or movement in order to sustain a conviction for "driving" under the influence. *See Gore*, *supra*. The evidence presented, however, must be sufficient to allow a rational trier of fact to make a reasonable inference that appellant drove while intoxicated. In the instant case, the evidence was sufficient for the fact-finder, the trial judge, to reasonably infer that appellant had driven the vehicle while under the influence of alcohol, prior to Trooper Teves' arrival.

B. Other Offenses

Appellant's final contention concerns the remaining offenses, *i.e.*, driving on a highway without registration and for displaying an expired registration plate. Appellant first

argues that, even assuming that there is evidence that he had driven the car or was in actual physical control of the vehicle, that it does not constitute evidence that he drove the vehicle on a highway, as required under § 13–411(d). Finally, he asserts that the evidence is insufficient to support the conviction under § 13–411(f) concerning the display of expired registration plate because only the "registered owner of the vehicle" can be liable for the display of expired tags.

The State responds that appellant's argument concerning the other offenses, of which he is convicted, is also without merit for the same reason as his argument concerning the driving offenses was, namely, that the evidence presented sufficiently supported the reasonable inference that he drove the vehicle, while under the influence of alcohol, prior to his apprehension. Additionally, the State notes that, under Transportation Article, appellant was liable for the violation of driving a vehicle that displayed an expired tag.

Md. Code Ann., Transp. § 13–411(d) provides:

> (d) Except as otherwise expressly permitted by the Maryland Vehicle Law, as to any vehicle required to be registered under this title, a person may not drive the vehicle on any highway in this State, unless there is attached to the vehicle and displayed on it, as required in this title:
>
> (1) A registration plate or plates issued for the vehicle by the Administration for the current registration period; and
>
> (2) Any validation tab issued for the vehicle under this subtitle.

Md. Code Ann., Transp. § 11–127 defines "highway" as

> (1) The entire width between the boundary lines of any way or thoroughfare of which any part is used by the public for vehicular travel, whether or not the way or thoroughfare has been dedicated to the public and accepted by any proper authority; and
>
> (2) For purposes of the application of State laws, the entire width between the boundary lines of any way or thoroughfare used for purposes of vehicular travel on any property owned, leased, or controlled by the United States government and located in the State.

In the instant case, we concluded, *supra*, that the evidence was sufficient to support the reasonable inference that appellant had driven the vehicle while under the influence of alcohol. Accordingly, the evidence is also sufficient to support the reasonable inference that, in traversing to the church parking lot, appellant necessarily drove the vehicle on a road that would satisfy the statutory definition of "highway." Therefore, the evidence is sufficient to support his conviction under § 13-411(d).

Md. Code Ann., Transp. § 13–411(f) provides that, "[e]xcept as otherwise expressly permitted by the Maryland Vehicle Law, a vehicle used or driven in this State may not display on either its front or rear any expired registration plate issued by any state."

In the case *sub judice*, appellant argues that liability necessarily runs only to the person to whom the vehicle is registered because only that person could be expected to be in possession of the registration and to display it. He further contends that holding him criminally liable for failure to display the vehicle registration has nothing to do with the purpose of the statute. Appellant also cites *Robb v. Wancowicz,* 119 Md. App. 531, 544

(1998) to support his argument concerning the purpose of the statute, but *Robb* discusses § 13–411(g), a different subsection from that which is at issue in the instant case.

Section 13–411(f) does not expressly designate "liability" to the owner or person to whom the vehicle is registered, as appellant suggests. Certainly, the owner of the vehicle is required to apply for registration of the vehicle. *See* MD. CODE ANN., TRANSP. § 13–403(a)(1). The Transportation Article, however, specifically outlines, in § 13–409(a), that "[a]n individual who is driving or in control of a vehicle shall carry a registration card in the vehicle to which the registration card refers[,]" and subsection (b) states that, "[o]n demand of a police officer who identifies himself as a police officer, an individual who is driving or in control of a vehicle shall display a registration card that refers to the vehicle." Therefore, an individual who is not the owner of the vehicle, but who is *driving or in control of the vehicle*, must still possess and display the vehicle's registration card. In the instant case, the evidence supports the reasonable inference that appellant was driving the vehicle prior to his apprehension, as discussed *supra*. Accordingly, the evidence presented is also sufficient to sustain his conviction under § 13–411(f).

CONCLUSION

For the foregoing reasons, we hold that appellant failed to preserve, for our review, the issue of whether the trial court complied with Md. Rule 4–246 concerning his waiver of a jury trial. We further hold that the evidence presented supports appellant's conviction for driving while under the influence of alcohol, driving while under the influence of alcohol *per*

se, driving on a highway without vehicle registration and displaying an expired registration plate.

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