UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1960

September Term, 2014

ABU B. KABBA

v.

STATE OF MARYLAND

Krauser, C.J.,
Nazarian,
Reed,

JJ.

Opinion by Reed, J.

Filed: February 26, 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.

On October 10, 2013, police officers followed a suspicious package from the U.S. Postal Service facility at BWI-Marshall Airport to the apartment of Abu B. Kabba, appellant. After observing him take the package into his apartment and get into his car shortly thereafter, appellant was stopped by the Maryland State Police under the pretext of a window tinting violation. Appellant eventually accompanied the police – ostensibly with his consent – to his apartment, where a sweep of the premises revealed evidence that led to his ultimate arrest.

Following an unsuccessful challenge to the evidence during a suppression hearing, appellant elected for a jury trial in the Circuit Court for Montgomery County. On June 10, 2014, appellant was found guilty of possession with intent to distribute cocaine, and several related drug and firearm offenses. He was sentenced to a total of thirteen years' incarceration, five of which without the possibility of parole.

Appellant noted a timely appeal, and presents the following questions for our review, which we have rephrased slightly[1]:

1. Did the circuit court err by denying a motion to suppress, where police conducted a *Whren* stop for a purported window tint violation but the State failed to prove a basis to believe the tint was illegal as is required by *Williams v. State*?

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[1] In his brief, appellant's original questions presented were as follows:

> 1. Whether the circuit court erred by denying a motion to suppress, where police conducted a *Whren* stop for a purported window tint violation but the State failed to prove a basis to believe the tint was illegal as is required by *Williams v. State*?
>
> 2. Whether the consent given to search the appellant's apartment was tainted by the initial illegal stop, and subsequent illegal detention, and was involuntary?

2. Did the circuit court err in finding that the consent given to search the appellant's apartment was not tainted by the *Whren* stop and subsequent detention, and was not given involuntarily?

For the reasons that follow, we answer both in the negative, and affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On October 13, 2013, University of Maryland Detective Julia Heng, working with the Maryland State Police ("MSP") as part of a Metropolitan Area Drug Task Force, observed a suspicious overnight package at the U.S. Postal Service facility at BWI-Marshall Airport. The eight-pound box drew Detective Heng's attention because (1) it was from Sunnyvale, California (apparently, a reported source of similar drug packages), (2) it did not require a signature prior to delivery, and (3) police could not verify the existence of the package's addressee. Leading her to believe the package contained CDS, Detective Heng travelled to the package's intended destination, 20376 Mill Pond Terrace, Germantown, Maryland 20876, and observed the package being delivered by the U.S. Postal Service at approximately 11:10 a.m., that same day.

Detective Heng, from the back of a minivan with tinted windows, observed appellant arrive at that location in a silver Audi, shortly before the package was delivered. She testified that at approximately 11:35 a.m., she observed appellant leave his basement apartment in the rear of the house to retrieve the package and return to his apartment. A short time later, Detective Heng observed appellant get into his car, the silver Audi, and drive away, but did not say whether she observed appellant carrying the package with him.

Detective Heng then questioned appellant's landlord about the package, who confirmed that the purported addressee, an "Adam Dickinson," did not live in the building.

Shortly after noon, MSP Trooper Preau[2] was informed of the situation by Detective Heng and told to stop appellant's car because the driver might have had the package. At approximately 12:21 p.m. on Shakespeare Boulevard in Germantown, Maryland, Trooper Preau pulled appellant over under the pretense of driving a car with allegedly illegally tinted windows. During the stop, after Trooper Preau had appellant get out of the car, appellant informed him that he did not have a license because it was suspended. Toward the end of the stop, MSP Corporal Matthew Murphy arrived with his canine. The canine search resulted in a positive alert for the presence of drugs, but none were found during a subsequent search of the car.

After the search, MSP Detective Sergeant John Hall and Detective Randy Marks arrived at the scene and questioned appellant about the package. Appellant told Sergeant Hall that he did not know what was in the package and that it was "intended for a friend," namely, a "Mr. Lee." When asked by Sergeant Hall if he could take them to Mr. Lee's house, appellant said he could, and that he had been there "several times."

Appellant then got into Sergeant Hall's vehicle with Corporal Murphy to show them where Mr. Lee lived. As they drove around, appellant claimed he would recognize the residence by the cars parked out front, but never actually identified the residence.

[2] Trooper Preau's first name is unclear from the record.

Eventually, Sergeant Hall, feeling like he was being taken on "a wild goose chase," suggested that they just go back to appellant's house, to which appellant agreed.

The vehicle's occupants were greeted upon arrival by Detective Heng and MSP Detective Sergeant Juan Hedgecloth. After explaining to appellant that they were really only there for the package, appellant continued to deny having knowledge of its contents. The officers explained to appellant that they did not have a warrant to search his apartment, but Sergeant Hall testified that appellant consented to the search, produced his keys to open the door, and indicated to the officers where the package was. According to Detective Heng, appellant was "adamant" that the officers did not need a warrant because he intended to give them his consent. Detective Heng then gave appellant a consent-to-search form, which he signed.

A protective sweep of his apartment revealed, in plain view, a "Dirty Harry size revolver" and a bag of suspected cocaine. Based on that evidence, Sergeant Hall instructed Detective Heng to obtain a search warrant for the apartment. Sergeant Hall informed appellant, who was standing in the apartment's front doorway, that he was free to leave or stay, but he was not allowed to take anything.

At some point after that, Trooper Preau was called in to arrest appellant. When he arrived, he found the front door open and appellant seated in a chair, without being restrained or guarded by any officers. When the decision was made to arrest appellant, Trooper Preau attempted to place him in handcuffs, but as he was attempting to do that, appellant grabbed the consent form and tried to eat it—a fact which is undisputed. Officers

were able to stop him from eating it, arrested him, and later that day, seized the evidence listed under the search warrant.

At the suppression hearing, appellant's counsel argued that Trooper Preau failed to establish a reasonable articulable suspicion for the stop, that there was no testimony regarding the circumstances surrounding appellant's signing of the consent form, and that, regardless, the consent was meaningless because no person in appellant's position would have felt free to leave. The State argued that appellant's supplemental written motion did not refer to challenging the stop so the suppression court should not consider the argument; Appellant responded that it was included in his original boilerplate motion. The suppression court, after agreeing that appellant failed to include the stop in his motion, nevertheless found that the stop was proper, that appellant was free to leave, and that appellant voluntarily rode with the officers to his house and consented to the search. The court further held that after the protective sweep, the officers had probable cause to arrest appellant and probable cause to support the issuance of the warrant.

The case then proceeded to trial, where appellant was convicted of all counts except for possession with intent to distribute marijuana. On October 2, 2014, appellant was sentenced to a total of 13 years' incarceration; five of which without parole. Appellant timely noted appeal on October 27, 2014.

DISCUSSION

I. STANDARD OF REVIEW

The Court of Appeals recently summarized the appropriate standard of review of a court's denial of a motion to suppress:

> In reviewing a trial court's decision to grant or deny a motion to suppress, an appellate court ordinarily limits its review to the record of the motions hearing. *Trusty v. State,* 308 Md. 658, 669–72, 521 A.2d 749 (1987). The evidence is viewed in the light most favorable to the prevailing party, and the trial court's fact findings are accepted unless clearly erroneous. *Williamson v. State,* 413 Md. 521, 531, 993 A.2d 626 (2010). "The ultimate determination of whether there was a constitutional violation, however, is an independent determination that is made by the appellate court alone, applying the law to the facts found in each particular case." *Belote v. State,* 411 Md. 104, 120, 981 A.2d 1247 (2009) (citations omitted); *see also Carter v. State,* 367 Md. 447, 457, 788 A.2d 646 (2002).

Sinclair v. State, 444 Md. 16, 27 (2015).

II. THE TRAFFIC STOP

A. Parties' Contentions

Appellant argues that the suppression court erred in denying his motion to suppress because the State failed to prove a basis to believe that his window tint was illegal, based on the Court of Appeals' holding in *Williams v. State*, 401 Md. 676 (2014). He first contends that it was properly preserved for our review because in his "initial motion to suppress," he asked the suppression court to suppress "[a]ll evidence . . . indirectly obtained as a result of . . . an unlawful search and seizure of [appellant], his property, or other items or areas in which [appellant] had a reasonable expectation of privacy." That motion, combined with the fact that the State responded to the argument at the hearing and it was ruled upon by the court, leads appellant to conclude it was properly preserved for our review. Appellant then argues that in *Williams*, *supra*, the Court of Appeals concluded that, based on the Supreme Court's holding in *Whren v. United States*, 517 U.S. 806 (1996), an officer conducting a pretextual "*Whren* stop" must provide a reasonable, articulable suspicion that the window tinting was illegal, and that here, Trooper Preau's testimony that

the windows appeared "dark" and "heavy" falls short of that requirement. Accordingly, appellant believes that "all of the evidence seized in the case flowed from the illegal detention and should have been suppressed."

The State responds by arguing that the issue was not properly preserved, because his "omnibus motion to suppress unidentified evidence" failed to state the grounds upon which suppression was sought, pursuant to Md. Rule 4-252. The State argues the issue was only brought to its attention in appellant's concluding argument, and that, based on *Carroll v. State*, 202 Md. App. 487 (2011) and *Savoy v. State*, 218 Md. App. 130 (2014), appellant waived his appellate challenge, which precludes plain-error review. We agree with the State.

B. Analysis

Maryland Rule 4-252(e) dictates the required content of a motion to suppress evidence. That section provides:

> A motion filed pursuant to this Rule shall be in writing unless the court otherwise directs, *shall state the grounds upon which it is made*, and shall set forth the relief sought. A motion alleging an illegal source of information as the basis for probable cause *must be supported by precise and specific factual averments*. Every motion shall contain or be accompanied by a statement of points and citation of authorities.

Md. Rule 4-252(e) (emphasis added). "The obvious and necessary purpose of that requirement is to alert both the court and the prosecutor to the precise nature of the complaint, in order that the prosecutor have a fair opportunity to defend against it and that the court understand the issue before it." *Denicolis v. State*, 378 Md. 646, 660 (2003). In

Denicolis, the Court of Appeals made the following relevant observation about "omnibus" motions to suppress:

> It has apparently become the practice for some defense counsel to file this kind of motion, seeking a panoply of relief based on bald, conclusory allegations devoid of any articulated factual or legal underpinning, presumably in the belief that if the motion complies with the time requirement of Rule 4–252(b), compliance with Rule 4–252(e) is unnecessary. That is not the case. If a motion fails to provide either a factual or legal basis for granting the requested relief, it cannot be granted.

Denicolis, 378 Md. at 660.

Here, as the State points out, appellant filed just such an "omnibus" motion, but later filed a supplemental motion to suppress, arguing that appellant was under arrest from the moment he was brought into the apartment and that the search of his apartment was involuntary as a result. Thus, at no point prior to the suppression hearing did appellant provide the State or the suppression court with the requisite notice under the rules, and as a result, there is an insufficient record for us to review the merits of his contention. As such, we hold that appellant failed to preserve the challenge to the basis for the traffic stop.

Furthermore, we note that, appellant's attempted plain error review, while not explicitly invoked by name, is equally unavailing. Maryland Rule 8-131(a) provides that "[o]rdinarily, 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," in which case the issue may be sufficiently preserved. Md. Rule 8-131(a). The State correctly points us to *Carroll*, wherein we held that

> if a defendant fails to raise a ground seeking suppression of evidence, which is required to be raised pre-trial by Rule 4–252, the defendant has waived his or her right to appellate review of that issue. Plain error review generally is

> not applicable, and an appellant seeking review must show good cause for the failure to raise the issue in the circuit court.

Carroll, 202 Md. App. at 513. In his brief, appellant does not endeavor to persuade us of any such good cause, and we are likewise unable to find any upon our own examination of the record. Appellant has waived any appellate review of this allegation, and plain error review is therefore unavailable.

II. CONSENT TO SEARCH THE APARTMENT

A. Parties' Contentions

Appellant contends that the "illegal detention" stemming from the car stop "tainted" his consent, because it was rendered "involuntary" as a result. According to appellant, "[a] reasonable person in [appellant]'s position would not have believed he was free to leave during the entire encounter with [the] police, from the initial stop until his formal arrest." He argues that the "illegal detention of almost one hour, from the time of the illegal stop at 12:21 p.m. to the time of the entry to his apartment, shortly before the time on the written consent, 1:15 p.m., tainted the alleged consent." To appellant, the suppression court erred in finding that there was voluntary consent "under all of the facts and circumstances." Accordingly, since the consent search formed the basis for the warrant and seizure of all of the evidence produced in the case, appellant would have us reverse the denial of his motion to suppress.

The State, on the other hand, argues that "[b]ecause the [suppression] court was not clearly erroneous – indeed amply justified – to find otherwise, this Court should affirm the suppression ruling." The State contends that this allegation of error is simply the first one

"all over again," but appellant "continues, however, by spinning additional theories that are waived under Rule 4-252, principally, that the officers unconstitutionally prolonged the traffic stop, without reasonable suspicion, to allow time for the canine alert." To the State, based "on the totality of the circumstances, the [suppression] court was not clearly erroneous to conclude that a reasonable person in [appellant]'s position would have felt free to decline Sergeant Hall's invitation to locate Lee's home and to search the apartment." Concluding that appellant's consent was therefore voluntary, the State would have us affirm the denial of the motion to suppress. We again agree with the State.

B. Analysis

As this claim also concerns a decision made during a suppression hearing, our standard of review remains the same as stated above from *Sinclair*, *supra*. Specifically regarding the issue of voluntariness of consent, we use the following guiding principles:

> A search conducted pursuant to valid consent, *i.e,* voluntary and with actual or apparent authority to do so, is a recognized exception to the warrant requirement. *United States v. Matlock,* 415 U.S. 164, 171, 94 S.Ct. 988, 993, 39 L.Ed.2d 242 (1974); *Schneckloth v. Bustamonte,* 412 U.S. 218, 222, 93 S.Ct. 2041, 2045, 36 L.Ed.2d 854 (1973).
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> . . . When the State alleges that the basis of the search or seizure is consent, the burden is on the State to prove that the consent was freely and voluntarily given. *United States v. Mendenhall,* 446 U.S. 544, 557, 100 S.Ct. 1870, 1878, 64 L.Ed.2d 497 (1980); *Abeokuto v. State,* 391 Md. 289, 334, 893 A.2d 1018, 1044 (2006); . . . The determination of whether consent is valid is a question of fact, to be decided based upon a consideration of the totality of the circumstances. *Schneckloth, supra,* 412 U.S. at 227, 93 S.Ct. at 2047–48 (stating "whether a consent to a search was in fact 'voluntary' or was the

> product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances").

Jones v. State, 407 Md. 33, 51-52 (2008).

As an initial matter, we first briefly address the inherent conflict in appellant's argument, as noted by the State—how are we to review the 'totality of the circumstances' when a large portion of those circumstances were not sufficiently preserved for appellate review? Here, to examine the 'totality of the circumstances' of whether appellant consented to a search of his apartment clearly must involve the initial stop. Although appellant invites us to factor those events in detail into our analysis, we decline to do so. To do otherwise would clearly swallow the purposes of Rule 4-252. *See Sinclair*, 444 Md. at 35-36. Instead, for our purposes, when viewing the evidence in the light most favorable to the prevailing party, we will assume that the traffic stop occurred, and was legal, and begin viewing the circumstances after its conclusion.

Much of appellant's argument centers around the fact that, after the resultant search of his car following the canine alert, Corporal Murphy "tossed [appellant]'s cell phone into the car *after* the search of the car was complete and nothing was found." Corporal Murphy testified at the suppression hearing that he took appellant's cell phone as a safety precaution, and that once the stop was finished and appellant indicated he wanted his cell phone, it was returned to him. Regarding this portion of the timeline of appellant's eventual arrest, the suppression court repeatedly noted that appellant was never under arrest or told he was not free to go:

> [Trooper Preau] never tells him he's under arrest. We heard from the tape they had nothing but very pleasant conversation back and forth and it was in

> the middle of the day, daylight. There was [sic] no objective findings that the [c]ourt can make that the defendant or an objective person could believe there's [sic] under arrest. He was never told he was under arrest and in fact he was repeatedly told let's just you know get this squared away and you can be out of here.
>
> Then we see the dogs [sic] come search, nothing's found. Cell phone's put back in and the defendant rides off with and oh, let me add. And the fact that the K-9 officer comes who's also not in uniform and not showing a gun and another Montgomery County Police officer just comes by who never pulls a gun, no one pulls a gun and no one threatens the defendant. No one makes the defendant do anything. No one restrains him, tells him he can't go. In fact he's told he can go but chose not to.

Surely, such findings cannot be deemed clearly erroneous.

In fact, the rest of the suppression court's findings cannot be said to be clearly erroneous either. The court found, and the parties appear to agree, that there was no evidence that appellant was informed that he had a right to leave. However, the court also correctly noted "the fact that he didn't know what other choices he had doesn't make it non-consensual."[3] Indeed, nothing else in the suppression court's ruling appears to weigh against the idea that appellant's consent was invalid.

Accordingly, we agree with the suppression court, and hold that appellant's consent was freely and voluntarily given. From the moment Sergeant Hall identified and explained that he was there to talk about the package, appellant was abundantly cooperative with the

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[3] *See U.S. v. Drayton*, 536 U.S. 194, 206-07 (2002) ("While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent. Nor do this Court's decisions suggest that even though there are no *per se* rules, a presumption of invalidity attaches if a citizen consented without explicit notification that he or she was free to refuse to cooperate. Instead, the Court has repeated that the totality of the circumstances must control, without giving extra weight to the absence of this type of warning." (internal quotation marks and citation omitted)).

police—for reasons we need not speculate. Nothing in the record suggests that appellant was forced to do anything against his will, nor does it show that he was ever coerced or misled into allowing the officers into his apartment. Appellant voluntarily accompanied plain-clothes officers, who used no force—be it express or implied—to find "Mr. Lee," and after failing to do so, "adamantly" consented to a search of his apartment, and memorialized his consent on a written consent to search form; a form which bears mentioning for a number of reasons, not least of which is the fact that he tried to eat and destroy it *after* incriminating evidence had been discovered.[4] The suppression court did not err in denying appellant's motion to suppress.

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

[4] We note that appellant expressly declined to challenge the scope of the consent to search the apartment or the scope of the protective sweep. *See* Appellant's Br. at 26 ("Whatever happened after the protective sweep is irrelevant since the protective sweep provided the necessary probable cause for the search warrant.").