UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0306

September Term, 2017

STATE OF MARYLAND

v.

LINDSEY T. FEHR

Wright,
Graeff,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: September 21, 2017

This interlocutory appeal arises from the Circuit Court for Talbot County's partial grant of a motion to suppress filed by appellee, Lindsey T. Fehr. By indictment filed on December 13, 2016, Fehr was charged with simple possession of marijuana and possession of marijuana with intent to distribute. On March 10, 2017, Fehr filed a motion to suppress evidence, and following a hearing on April 27, 2017, the circuit court granted Fehr's motion in part. On May 2, 2017, the State of Maryland timely appealed, presenting a single question for our review:

> Did police have probable cause to search the trunk of Fehr's car after discovering marijuana during a lawful search of the passenger compartment?

For the reasons that follow, we answer this question in the affirmative and reverse the circuit court's judgment.

Facts

At the suppression hearing, Officer Jason Dyott of the Easton Police Department testified that on September 7, 2016, at approximately 9:50 p.m., he was on stationary uniformed patrol in a marked Ford Explorer when he observed a white Mitsubishi Lancer with Pennsylvania license plates traveling east on Route 50 near Lomax Street. Ofc. Dyott noticed that the vehicle had a cracked windshield that "could clearly obstruct the driver's view," so he pulled out onto Route 50 and activated his emergency lights to stop the vehicle. The driver complied and proceeded to a Walgreen parking lot at the intersection of Route 50 and Dover Road.

Ofc. Dyott pulled in behind the car, exited his police vehicle, and approached the stopped car, where he saw that Fehr was the car's driver and sole occupant. Ofc. Dyott

identified himself, told Fehr why she had been stopped, and asked for Fehr's driver's license and registration. After Fehr provided the documents, Ofc. Dyott returned to his police vehicle to run license and wanted checks, and to prepare a warning ticket for the cracked windshield.

While Ofc. Dyott was in his car, he saw that Private First Class ("PFC") Ashley Corkran of the Easton Police Department had arrived on the scene and was speaking to Fehr. A "short time after that," he saw PFC Corkran have Fehr exit the vehicle. PFC Corkran then proceeded to "go into the vehicle towards the floorboard of the driver's seat area where she pulled out a . . . long straight blade knife and placed it on the roof of the vehicle." At that time, Fehr stood unrestrained, just to the rear of her car.

Ofc. Dyott recalled that after PFC Corkran removed the knife, she told him that she observed suspected marijuana "right next to the driver's seat in the center console area." Based on PFC Corkran's observation, Ofc. Dyott "performed a probable cause search of the interior" of Fehr's car. Assisted by a third officer who had arrived on the scene, Ofc. Dyott started at the front of the vehicle and worked his way back. In the back seat, Ofc. Dyott located a white plastic bag that contained women's clothing and "a glass jar which contained a . . . greenish brown vegetable matter" that he "identified as suspected marijuana."

Ofc. Dyott seized the marijuana in the jar, which he estimated to be "a minute amount . . . less than ten grams." After placing it in his police vehicle, he "then went and searched the trunk area of the vehicle," where he "located a green and black bag" containing "five large ziplock baggies that contained . . . suspected marijuana," and

which he estimated to be "substantially more than ten grams." Thereafter, Ofc. Dyott placed Fehr in handcuffs.[1]

PFC Corkran's recollection of the stop was mostly consistent with Ofc. Dyott's. She recalled arriving on the scene and approaching the passenger side of Fehr's car while Ofc. Dyott was still speaking to Fehr on the driver's side. PFC Corkran noticed that Fehr was "very fidgety," "was failing to make eye contact with Officer Dyott," and "seemed nervous."

After Ofc. Dyott returned to his patrol car, PFC Corkran approached the driver's side and asked Fehr "about any weapons in the vehicle." According to PFC Corkran, Fehr "stated that she had a knife under the driver's seat which then she immediately reached for." PFC Corkran asked Fehr to keep her hands in the air, then asked Fehr "if she had any illegal drugs such as marijuana in the vehicle." In response, Fehr "immediately turned towards the center console and then reached towards the center console." PFC Corkran again instructed Fehr to keep her hands where they could be seen "and at that time [Fehr] immediately went . . . underneath the driver's seat." As a result, PFC Corkran asked Fehr "to exit the vehicle for [the officer's] safety."

When Fehr got out of the car, PFC Corkran "took her to the rear of her vehicle with Officer Dyott."[2] PFC Corkran then entered the driver's side of the Fehr's car, where she saw "green, leafy particles" of suspected marijuana residue in the center console.

[1] Fehr had stood unrestrained in front of Ofc. Dyott's vehicle while Ofc. Dyott and the other officer searched Fehr's car.

[2] PFC Corkran could not remember whether she frisked Fehr at that time, but testified that it was generally something she would do as a safety precaution.

Next, PFC Corkran looked under the driver's seat and found the knife that Fehr had mentioned. PFC Corkran described it as a serrated "steak knife" with "a wooden handle" and a "larger blade."

In argument following the officers' testimony, defense counsel conceded that the initial stop was lawful but argued that Fehr's admission that she had a knife in the car did not provide probable cause for a warrantless search, and that no other exception to the warrant requirement applied. In response, the State asserted that PFC Corkran lawfully retrieved the knife for her own safety and that her observation of the marijuana while doing so provided probable cause to search both the passenger compartment and the trunk of the vehicle.

After hearing from the parties, the circuit court granted the suppression motion only "as to any contraband found in the trunk," stating in pertinent part:

> [T]here are several different things going on here. The first is the, and they're all warrantless, the first is the stop by Officer Dyott which is perfectly within the [Fourth] amendment. The second is the stop, the conversation between Officer Corkran and the Defendant which is based on Officer Corkran's suspicion that the Defendant might have a weapon and asks. The Defendant volunteers that she does have a knife and tries to reach with it. Officer Corkran says, no, and it's reasonable for Officer Corkran to protect herself to ask the Defendant to leave the vehicle so that she can receive the knife. She notices a leafy substance and then the search is based on her observation of this leafy substance. That leafy substance is sufficient probable cause to search the interior of the vehicle. There is a search of the trunk which is a different search requiring a different basis of probable cause. And this is not a, the *Carroll* [*v. United States*, 267 U.S. 132 (1925)] doctrine which is also called the automobile exception . . . . In this particular instance, having found marijuana in the passenger or driver or the cab of the car, there is no probable cause to go beyond that point to search the trunk.

In sum, the court "den[ied] the motion with respect to anything found in the passenger area but grant the motion with respect to any contraband found in the trunk of the vehicle."

Additional facts will be included as they become relevant to our discussion, below.

Standard of Review

"We review the grant of a motion to suppress based on the record of the suppression hearing, and we view the facts in the light most favorable to the prevailing party." *State v. Andrews*, 227 Md. App. 350, 371 (2016) (citation omitted). In so doing, "we extend 'great deference' to the factual findings and credibility determinations of the circuit court, and review those findings only for clear error." *State v. Donaldson*, 221 Md. App. 134, 138 (citation omitted), *cert. denied*, 442 Md. 745 (2015). "But we make an independent, *de novo*, appraisal of whether a constitutional right has been violated by applying the law to facts presented in a particular case." *Andrews*, 227 Md. App. at 371 (citing *Williams v. State*, 372 Md. 386, 401 (2002)).

Discussion

The State argues that the police had probable cause to search the trunk of Fehr's car after discovering marijuana during a lawful search of the passenger compartment. Specifically, it contends that "the discovery of marijuana residue in the center console and additional marijuana in a jar in the back seat supplied probable cause for a . . . search of the entire car, including the trunk."[3] Thus, the State urges us to reverse the circuit

[3] Fourteen years ago, speaking for this Court, Judge Moylan stated:

court's order that granted Fehr's motion to suppress as to the marijuana found in the trunk.

In response, Fehr argues that "the mere observation of a small, non-criminal quantity of marijuana in the passenger compartment of a car does not give rise to probable cause to search the trunk of the car for additional contraband."[4] According to Fehr, the State misapplies existing case law to create a "bright line rule that whenever the police find any marijuana in the passenger compartment of a vehicle, they automatically have probable cause to believe that there is additional marijuana located elsewhere in the vehicle." Moreover, Fehr asserts that the officers in this case failed to "assert a belief or a basis for believing that there was additional marijuana in the trunk."

> [A]n argument might someday be made for extending a search such as this based upon some almost Newtonian proposition that the discovery of some contraband suggests the likely presence of more contraband yet to be discovered . . . .

Bell v. State, 96 Md. App. 46, 55 (1993), *aff'd and remanded*, 334 Md. 178 (1994). The State makes that argument today.

[4] At the outset, Fehr argues that in addition to being prohibited from searching the trunk, the police were also not permitted to search the back seat of the car because they lacked particularized reason to suspect that additional marijuana was in the vehicle. As Fehr did not note a cross-appeal from the circuit court's denial of her motion to suppress the marijuana found in the back seat, this issue is not properly before us. *See Ruby v. State*, 353 Md. 100, 113 (1999) (stating that failure of aggrieved party to file notice of appeal terminates its right of appeal, and the appellate court acquires no jurisdiction to hear that matter) (citation omitted); *Kunda v. Morse*, 229 Md. App. 295, 302 n.4 (2016) (limiting review to questions presented by appellant where appellee's argument "resembles less a counterargument and much more a cross-appeal"); *Maxwell v. Ingerman*, 107 Md. App. 677, 681 (1996) (if a timely cross-appeal is not filed, we will ordinarily review only those issues properly raised by the appellant) (citing Md. Rule 8-202(e)). In any event, Fehr's argument fails, as we shall explain, *infra*.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV. Reasonableness under the Fourth Amendment "generally requires the obtaining of a judicial warrant," unless the search or seizure "falls within a specific exception to the warrant requirement." *Riley v. California*, 134 S. Ct. 2473, 2482 (2014) (citations omitted). One such "specifically established and well-delineated" exception is the automobile exception or *Carroll* doctrine. *California v. Acevedo*, 500 U.S. 565, 580 (1991) (citation omitted). Named after *Carroll v. United States*, 267 U.S. 132 (1925), it permits police to search an automobile without a warrant when they have probable cause to believe that it contains either contraband or evidence of a crime. *Acevedo*, 500 U.S. at 579-80. "The scope of a warrantless [*Carroll*-doctrine] search of an automobile . . . is defined by the object of the search and the places in which there is probable cause to believe that it may be found." *United States v. Ross*, 456 U.S. 798, 824 (1982). Thus, "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search."[5] *Id.* at 825.

[5] "The Supreme Court has made a distinction between probable cause to believe that drugs are in a particular section of the car, and probable cause to believe that drugs are generally within the car." *United States v. Seals*, 987 F.2d 1102, 1107 n.8 (5th Cir. 1993). The Court has stated:

> "[P]robable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab." *United States v. Ross*, 456 U.S. 798, 824, 102 S.Ct. 2157, 2172, 72 L.Ed.2d 572 (1982) . . . . "[I]f probable cause justifies a search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its

"A police officer has probable cause to conduct a search when the facts available to [him] would warrant a [person] of reasonable caution in the belief that contraband or evidence of a crime is present." *Florida v. Harris*, 568 U.S. 237, 243 (2013) (citations and internal quotation marks omitted). All that is required for probable cause "is the kind of fair probability on which reasonable and prudent [people], not legal technicians, act." *Id.* at 244 (citation and internal quotation marks omitted). "In evaluating whether the State has met this practical and common-sensical standard," the reviewing court looks at "the totality of the circumstances." *Id.* (citations omitted). We then "decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (citation and internal quotation marks omitted).

Applying these principles, this Court has held that the odor of marijuana provides probable cause to search an entire car, including the trunk. *Wilson v. State*, 174 Md. App. 434, 454-55 (2007). In *Wilson*, we recognized that "marijuana and other illegal drugs, by their very nature, can be stored almost anywhere within a vehicle. [T]he location-specific principle that probable cause must be tailored to specific compartments and containers within an automobile does not apply when officers have only probable cause to believe

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> contents that may conceal the object of the search." *Id.* Thus, if officers have probable cause to believe that contraband is in only one part of a car, then they are limited to that area. If, on the other hand, officers have probable cause to believe that contraband is located somewhere in a car, but they don't know exactly where, then they can search the entire vehicle.

Id.

that contraband is located somewhere within the vehicle, rather than in a specific compartment or container within the vehicle." *Id.* at 454 (internal citations and quotation marks omitted). Thus, we concluded that "[i]t is not unreasonable for an officer to believe that the odor of burnt marijuana indicates current possession of unsmoked marijuana somewhere inside of the vehicle, including the trunk." *Id.* at 455 (footnote omitted). In so doing, we noted that a ruling to the contrary would make "the trunk, or any other area outside of the passenger compartment . . . a safe harbor for the transportation of drugs for both users and traffickers who use drugs." *Id.* (footnote omitted).

In this case, PFC Corkran observed suspected marijuana residue in the center console of Fehr's car. Like odor, residue could reasonably indicate the presence, or use, of marijuana. *Cf. id.* at 454 ("The odor of burnt marijuana emanating from a vehicle provides probable cause to believe that additional marijuana is present elsewhere in the vehicle."). Again, we note that "marijuana . . . can be stored almost anywhere within a vehicle," and "it may very well be true in a lot of cases that one who smokes openly in his or her vehicle might also store marijuana in the trunk." *Id.* at 454, 455. Thus, as in *Wilson*, it was not unreasonable for PFC Corkran and Ofc. Dyott to believe that the residue in Fehr's car "indicate[d] current possession of unsmoked marijuana somewhere inside of the vehicle, including the trunk." *Id.* at 455. Moreover, because they had probable cause to believe that contraband was located *somewhere* in the car, as opposed to only *one specific part* of the car, the search of the trunk was proper. *United States v. Seals*, 987 F.2d 1102, 1107 n.8 (5th Cir. 1993) (citing *Ross*, 456 U.S. at 824); *see also*

Wilson, 174 Md. App. at 454 ("The location-specific principle that probable cause must be tailored to specific compartments and containers within an automobile, does not apply when officers have only probable cause to believe that contraband is located somewhere within the vehicle, rather than in a specific compartment or container within the vehicle.") (Internal citations and quotation marks omitted). *Cf. State v. Bell*, 334 Md. 178 (1994) (limiting the scope of the permissible *Carroll* doctrine search to a single vial where the only probable cause was the officers' observation of defendant dropping a vial into a parked car through a three-inch window opening).

Fehr argues that, in this case, "the police initially had cause to [] believe only that there was marijuana in the center console area," as neither officer "claimed to be suspicious that there was additional marijuana in the vehicle, nor did either officer cite a basis for having such a belief, for example suspicious behavior on Ms. Fehr's part or an odor of marijuana." This argument is without merit.

First, the presence of marijuana residue alone could indicate use, so as to give the police a generalized suspicion that marijuana was located somewhere within the vehicle. As the State correctly notes in its brief:

> [L]imiting police to a search of the passenger compartment under the circumstances here would create the very "safe harbor" this Court sought to eliminate in *Wilson*. The suppression court's ruling creates a legal anomaly under which a person who has actual marijuana in his or her car (or least what appears to be marijuana) is entitled to greater constitutional protection than someone who has only the odor of marijuana coming from his or her car.

Second, PFC Corkran *did* testify that Fehr was "very fidgety," failed to "make eye contact with Officer Dyott," and "seemed nervous." Thus, the discovery of marijuana

residue, in conjunction with the defendant's nervousness, coupled with the presence of additional marijuana in the back seat, provided the officers with probable cause to believe that additional drugs were contained elsewhere in the vehicle. *Cf. Seals*, 987 F.2d at 1107 ("The discovery of cocaine residue, in conjunction with the defendant's nervousness and false answers, coupled with the modification of the rear seat, provided the officers with probable cause to believe that additional drugs were contained within the vehicle.").

Lastly, Fehr argues that individuals are presumed to know the law and that, therefore, her possession of a non-criminal quantity of marijuana in the passenger compartment of her car does not "logically or as a matter of common sense" indicate "that she would choose to subject herself to the possibility of incarceration by hiding an additional criminal quantity in the trunk." This reasoning is flawed. Although we have the benefit of hindsight, it is worth noting that Fehr *did* – as a matter of fact – "subject herself to the possibility of incarceration by hiding an additional criminal quantity [of marijuana] in the trunk." And, as a matter of law, the General Assembly's decriminalization of small quantities of marijuana was not intended to affect the authority of police to search for and seize marijuana under the *Carroll* doctrine. *Robinson v. State*, 451 Md. 94, 125-28 (2017); *see also Bowling v. State*, 227 Md. App. 460, 476 (holding that decriminalization "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"), *cert. denied*, 448 Md. 724 (2016).

Our conclusion today not only follows from Maryland case law, but is consistent with the position of courts from other jurisdictions that have considered whether small quantities of marijuana found in the passenger compartment support a further search of the car's trunk. *See, e.g., United States v. Burnett*, 791 F.2d 64, 67 (6th Cir. 1986) (holding that officer's discovery of clear plastic bag of suspected marijuana on floorboard gave him "every right to search the passenger area of the car, the trunk, and any and all containers which might conceal contraband"); *People v. Dey*, 101 Cal. Rptr. 2d 581, 583 (Cal. Ct. App. 2000) ("We find that a person of ordinary caution would conscientiously entertain a strong suspicion that even if defendant makes only personal use of the marijuana found in his day planner, he might stash additional quantities for future use in other parts of the vehicle, including the trunk."); *State v. Schinzing*, 342 N.W.2d 105, 110 (Minn. 1983) (stating that officer's "discovery of marijuana in the ashtray gave him probable cause to believe that he would find marijuana elsewhere and justified his searching anywhere in the car that he might reasonably expect to find more marijuana," including the trunk); *Osban v. State*, 726 S.W.2d 107, 109 (Tex. Crim. App. 1986) ("[E]ven though there is a distinction between users and dealers and the latter are *more* likely to have additional contraband hidden in the trunk, this does not mean that users, whether occasional, regular, or habitual, are *not* likely to hide additional contraband in the trunk." (Emphasis in original)), *overruled in part on other grounds*, *Heitman v. State*, 815 S.W.2d 681 (Tex. Crim. App. 1991); *see also United States v. Turner*, 119 F.3d 18, 20 (D.C. Cir. 1997) (upholding trunk search based on odor of burnt marijuana, and discovery in passenger compartment of plastic baggie of marijuana and evidence of

marijuana blunt, noting that "federal courts that have considered the 'personal use' argument have rejected it, and have upheld trunk searches on evidence similar to that found here") (citations omitted).[6]

As the State correctly acknowledges, what Fehr calls a "bright line rule" is simply an application of the long-standing principle that "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *Ross*, 456 U.S. at 825. Thus, for all of the foregoing reasons, we conclude that the evidence found in the trunk should not have been suppressed. Accordingly, we reverse the circuit court's judgment that granted Fehr's motion to suppress such evidence, and we remand the case for further proceedings not inconsistent with this opinion.

JUDGMENT OF THE CIRCUIT COURT FOR TALBOT COUNTY REVERSED. CASE REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.

[6] In Massachusetts, the justices of the Supreme Judicial Court have "reconsidered [their] jurisprudence" in light of the decriminalization of possession of one ounce or less of marijuana. *Com. v. Rodriguez*, 37 N.E.3d 611, 617 (Mass. 2015) (citations omitted). There, they concluded that "in a case . . . where the *only* factor leading an officer to conclude that an individual possesses marijuana is the smell of burnt marijuana, this factor supports a reasonable suspicion that that individual is committing the civil offense of possession of a small quantity of marijuana, but not probable cause to believe that he or she is committing the offense." *Id.* at 618 (emphasis added). Because the stop in that case was based only on the odor, or a "reasonable suspicion to believe that a civil marijuana infraction was occurring, but not probable cause," the Court held that "the stop was impermissible." *Id.* at 612. By contrast, the stop in this case was based on Ofc. Dyott's observation of a cracked windshield, the investigation of which led to the discovery of marijuana in two separate places within the car. Therefore, unlike in *Rodriguez*, we cannot say that the search of Fehr's trunk was based solely on reasonable suspicion.