UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 446

September Term, 2016

CLARENCE BECK

v.

STATE OF MARYLAND

Wright,
Berger,
Shaw Geter,

JJ.

Opinion by Berger, J.

Filed: April 28, 2017

Appellant, Clarence Beck,[1] was convicted by the Circuit Court for Caroline County of possession of cocaine and driving on a suspended license. Challenging only the conviction for possession of cocaine, Beck presents for our review one question: Did the court err in denying his motion to suppress? Finding no error, we affirm the judgment of the circuit court.

FACTS AND PROCEEDINGS

In October 2015, Beck was charged with the aforementioned offenses. Beck subsequently requested a trial by jury. In February 2016, Beck, through counsel, filed a motion in which he requested, *inter alia*, the "[s]uppression of any evidence which is the product or fruit of any unlawful search, seizure, or interception of wire or oral communication," or "derived from any unlawful search, seizure, or interception of wire or oral communication."

In March 2016, the court held a hearing on the motion. The State called Maryland State Trooper First Class Zachary Clark, who testified that, at approximately 1:41 a.m. on October 21, 2015, he "received credible information from" Caroline County Sheriff's Deputy First Class Jerry Stivers that Beck "was operating a Nissan passenger car with a Maryland tag, and that . . . Beck was operating with a suspended license and . . . said to have been involved in distributing CDS." Trooper Clark used his "in-car computer" to

[1]Appellant is also identified in the record as "Clarence Roosevelt Beck," "Clarence Roosevelt Beck III," and "Clarence Rossevelt [sic] Beck, III." For consistency, we shall refer to appellant as "Beck."

"pull up . . . Beck's information regarding his license status . . . as well as his photograph," and discovered that Beck "was, in fact, suspended at that time[.]"

A "few minutes" later, Trooper Clark saw the Nissan traveling westbound on Route 328. The trooper observed that the "[v]ehicle was traveling overly cautious," and "[s]ometimes [at] ten miles per hour under the speed limit." Trooper Clark "initiated [a] traffic stop" of the vehicle and "observed the hazard lights activate on the . . . vehicle." After Trooper Clark "made contact with . . . Beck," who "was operating the motor vehicle," the trooper "requested the assistance of a K-9 unit to conduct [an] open air sniff of the exterior of the vehicle."

"[W]ithin a minute," Deputy Stivers arrived and "conducted his respective duties as the K-9 handler." When the K-9 gave a "positive alert," Trooper Clark "conducted a . . . search" of Beck's vehicle, and Deputy Stivers and a third officer "conduct[ed a] search of Beck's person." The officers recovered from Beck's person a "small amount of a white, powdery substance in a clear plastic baggie," and "a small marijuana cigarette." Trooper Clark testified that Beck "was not arrested after the alert," but "after [a] brief struggle" he "remov[ed] the CDS from his person."

The State also called Deputy Stivers, who testified that, at approximately 1:41 a.m. on October 21, 2015, he was at a store known as the "Goose Creek." The deputy "received information that . . . Beck[] was coming into the store around that time attempting to distribute narcotics." Deputy Stivers saw Beck, who was driving a silver 2014 Nissan, arrive at and enter the store, "conduct[] some activity," exit the store, enter the Nissan, and "exit[] the parking lot." The deputy conducted a "check" of Beck's license and discovered

that he "was suspended through the State of Maryland." Deputy Stivers "relayed" the information to Trooper Clark, and further told the trooper that Beck was "headed westbound" on Route 404.

When Trooper Clark requested that Deputy Stivers "conduct an exterior K-9 scan of [Beck's] vehicle," the deputy traveled to the site of the traffic stop and "identified [him]self and [his] duty assignment to . . . Beck." Beck "was asked to step out of the vehicle for [Deputy Stivers's] safety," and the deputy "deployed [his] K-9 to the exterior of the vehicle." The K-9 gave "a positive alert" to "[t]he presence of controlled dangerous substance." Deputy Stivers then "conducted a search of" Beck and discovered a "white powder substance in his sock which" he and Trooper Clark "believed to be suspected cocaine."

Following the close of the evidence, defense counsel argued that the "seizure was not accompanied by a warrant[,] probable cause[,] nor reasonable, articulable suspicion." The prosecutor, citing *State v. Ofori*, 170 Md. App. 211 (2006), contended that the "positive K-9 alert" gave the officers "probable cause to arrest" Beck and "to search him at that point in time."

Denying the motion to suppress, the court stated:

> . . . I do agree that there was no arrest. I mean the definition of arrest is, you know, if somebody is not free to leave an area by virtue of putting hands on a person, putting handcuffs, being told you're under arrest, but none of that happened here. I agree with that. And what I'm going to apply is the inevitable discovery doctrine, because *Ofori* says that a positive K-9 alert on the car is probable cause to arrest, I'm going to call it the driver. . . . . Mr. Beck was the only person in the car. He got out of the driver's side, the K-9 hit on the driver's side. Timing

> wise is sound, it sounds like to me that when, from what I'm recollecting the testimony, once they had the positive hit, the search on the car, the search on Mr. Beck was occurring at the same, almost sounded like at the same time. I don't think one happened before the other or I can't tell if one happened before the other. And the bottom line is because *Ofori* gave the officers the right to arrest Mr. Beck right then and there, the fact that they didn't say the magic words or didn't put handcuffs on him to me is academic. It was, it's inevitable discovery. The remedy isn't to suppress the alleged cocaine they found on Mr. Beck's person because they had the right to search him incident to the arrest because the K-9 dog hit on the car. So that is my rationale.

In April 2016, Beck pleaded not guilty to the aforementioned offenses on an agreed statement of facts. The court subsequently convicted Beck of the offenses.

DISCUSSION

Beck contends that the court erred in denying the motion to suppress. He claims that the "court erred in concluding that the search . . . was justified as a search incident to arrest," or alternatively, "the inevitable discovery doctrine . . . cannot be applied in this case." The State concedes that the "court's legal analysis . . . was incorrect," but contends that, nevertheless, "this was a prosaic search incident to arrest."

The standard of review for motions to suppress is as follows:

> Our review of a circuit court's denial of a motion to suppress evidence under the Fourth Amendment, ordinarily, is limited to the information contained in the record of the suppression hearing and not the record of the trial. When there is a denial of a motion to suppress, we are further limited to considering facts in the light most favorable to the State as the prevailing party on the motion. Even so, we review legal questions *de novo*, and where, as here, a party has raised a constitutional challenge to a search or seizure, we must make an independent constitutional evaluation by reviewing the relevant law and applying it to the unique facts and circumstances of the case.

> We will not disturb the circuit court's factual findings unless they are clearly erroneous.

Grant v. State, 449 Md. 1, 14-15 (2016) (internal citation and brackets omitted).

In our view, *Conboy v. State*, 155 Md. App. 353 (2004), is instructive.

> While under the influence of alcohol, . . . Conboy[] crashed a Ford van into a ditch by the side of a state road. The van contained construction equipment and was littered with alcoholic beverages. Leaving the badly damaged vehicle where it lay, [Conboy] fled the scene of the accident only to return later, in a taxicab, to retrieve his belongings and the equipment. His return, however, was met by more than a wrecked vehicle. A state trooper had arrived and was investigating the accident.
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> As the trooper approached the cab, he asked [Conboy] whether he was "Mr. Conboy," the man who the trooper had reason to believe was driving the van at the time of the accident. Inebriated and reeking of alcohol, [Conboy] responded, "I'm not David Conboy," thereby revealing what sober reflection might have helped him conceal – his true identity. Unaware of how inculpatory this denial was, [Conboy] then insisted that his name was "George Mitchell Unson" – a less inventive choice than one might think as it apparently belonged to [Conboy's] step brother, whose reaction to this choice has gone unrecorded.
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> Observing a rifle in the backseat of the cab, which would later turn out to be loaded, the trooper asked [Conboy] to step out of the cab. When he did, the trooper patted him down for weapons. Upon feeling a key in [Conboy's] back pocket, the trooper reached into that pocket and retrieved what would ultimately prove to be the key to the van. That, in turn, led [Conboy] to volunteer that he was drunk and had in fact been the driver of the van.
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> [Conboy] was subsequently charged with driving while under the influence of alcohol and numerous other traffic violations. Seeking to exclude evidence of the key . . . , he filed a motion to suppress in the Circuit Court for Worcester County, claiming that when the trooper reached into his pocket to

retrieve the key the trooper exceeded the bounds of a permissible *Terry* stop[.]

* * *

The only evidence presented at the suppression hearing was the testimony of State witness, Trooper David Grinnan of the Maryland State Police. He testified that, on May 28, 2002, at approximately 6:02 pm, he responded to a report of "a single vehicle accident at Route 50 and Silver Point Lane in West Ocean City, Worcester County, Maryland." There, he found an unoccupied "older model Ford van facing eastbound in the westbound ditch, approximately thirty to forty yards past Silver Point Lane." Badly damaged, the van was almost resting on its side; its driver's side wheels "ripped from the vehicle."

The trooper observed "alcohol containers in the vehicle" and further noted that "alcohol had spilled" inside the vehicle, "leaving a strong odor." In addition to the alcoholic beverages, the van contained a stereo and construction tools and equipment.

The trooper then "ran the registration to find out who the vehicle belonged to, who the operator could be." He learned that the vehicle's license plates belonged, not to a Ford van as expected, but "to an ′85 Chevrolet van . . . registered to a subject named Wolf," who resided in West Ocean City, Maryland. Unable to further identify the owner of the Ford van, the trooper left the accident scene to interview Wolf at the address he had been given. At that address, he found Wolf, who explained that he had removed the license plates from his Chevrolet van and given them to his brother for "safekeeping." He also informed the trooper that a "David Conboy," who was then staying with his brother, had taken the license plates and placed them on the Ford van in question.

Leaving Wolf's residence, Trooper Grinnan returned to the accident scene, arriving 30 to 40 minutes after he had initially responded to the accident. When he arrived, he observed that the stereo, the construction tools and equipment, and other items had been removed from the van. He concluded that "whoever had wrecked the van . . . was still in the area," reasoning that removal of all of the equipment would have

taken several trips. At the suppression hearing, he opined: "[I]f I was a construction person and I wrecked my van and I had twenty thousand dollars' worth of equipment in there, I am going to keep going back to the van until my equipment is gone because I am not going to leave the van unattended like that."

A taxicab then "roll[ed] up" to a nearby stop sign. "Thinking that if this person is wrecked he needs to get out of here somehow," the trooper's attention shifted to the cab. He saw [Conboy] "in the front passenger's seat." Although the taxi cab driver was looking in the trooper's direction, [Conboy] "would not look at [him] to save his life." Indeed, "his head was plastered in the opposite direction from mine," the trooper noted. [Conboy's] "continued" refusal to "acknowledge" the trooper, the crash, or the trooper's marked and well-lit cruiser, only "sparked [the trooper's] curiosity." After all, according to the trooper, "when you have that situation, everybody wants to look." Trooper Grinnan then "pointed the cab over to investigate."

Approaching [Conboy], who was still seated in the passenger's side of the vehicle, the trooper asked, "Mr. Conboy?" [Conboy] responded, "I'm not David Conboy" and then identified himself as "George Mitchell Unson," using his stepbrother's name. According to the trooper, [Conboy] "appeared intoxicated," and he detected a "strong odor of an alcoholic beverage coming from [Conboy's] breath and person." A deer rifle and a bottle of Popov vodka lay on the backseat of the cab.

After [Conboy] explained that the rifle was his and that he liked to hunt, the trooper asked [Conboy] to step out of the cab. When he did, the trooper "patted him down . . . to make sure that [Conboy] did not have any other kind of weapons that may be associated with deer hunting, such as buck knives."

During the pat down, the trooper felt an object in [Conboy's] back pocket. He "immediately recognized" that it was "a key of some type," possibly a car key. "[B]ased on the fact that the collision had occurred" and that a vehicle lay "unattended in the ditch," the trooper placed his hand in [Conboy's] pocket and retrieved the key. The key turned out to be "a Ford key, belonging to a Ford motor vehicle." After

> directing [Conboy] to sit on the ground, the trooper returned to the van with the key. He then "checked the Ford key with the van and turned the ignition over and discovered that the key was, in fact, the key to the [wrecked] van."
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> Trooper Grinnan placed [Conboy] under arrest. Following the arrest, a person who was only identified as "Trooper Sutka" arrived at the scene of the accident and took possession of the rifle.

Id. at 357-61 (footnotes omitted).

The court subsequently denied the motion to suppress. *Id.* at 358. Conboy was thereafter "tried upon an agreed statement of facts and convicted of driving while under the influence of alcohol." *Id.*

On appeal, Conboy "ask[ed] this [C]ourt to review the refusal of the trial court to suppress" the key. *Id.* at 359.

> While [Conboy] concede[d] that "the trooper had reason to feel [his] clothing for weapons," he contend[ed] that the trooper exceeded the limits of a *Terry* frisk by "taking a key from [his] pocket." He argue[d] that because the "'incriminating nature of the object [the key] was not immediately apparent'" to the trooper, the search was not constitutionally permissible under the plain feel doctrine, as promulgated by the Supreme Court in *Minnesota v. Dickerson*, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993).

Conboy, 155 Md. App. at 362.

Affirming the trial court's denial of the motion to suppress, we stated:

> [W]e need not reach the question of whether the seizure of the key was justifiable under that doctrine . . . , because the search at issue is sustainable under another exception to the warrant requirement of the Fourth Amendment. It was a search incident to a lawful arrest. . . . .

> [A] police officer with probable cause to believe that a suspect has or is committing a crime may arrest the suspect without a warrant. This is true in cases where the person has committed even a very minor criminal offense, such as a traffic violation. Once lawfully arrested, police may search the person of the arrestee as well as the area within the control of the arrestee to remove any weapons or evidence that could be concealed or destroyed.
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> [A]t the time of [Conboy's] arrest, the trooper had probable cause to arrest [Conboy] for driving under the influence of alcohol before he searched him[.] Before Trooper Grinnan even encountered [Conboy], he observed that someone had crashed a van, strewn with alcoholic beverages, into a ditch and then apparently abandoned it. He also believed that the driver of the van was probably in the area as he observed, upon his return from a brief meeting with the owner of the van's tags, that the property that had been in the van was now gone. And, from the information that he obtained from the tags owner, he obviously believed that there was a reasonable possibility that "David Conboy" was the driver of the van at the time of the accident. That is why, we can presume, he approached the cab's passenger asking "Mr. Conboy?"
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> When a taxicab pulled up and its passenger steadfastly refused to look in the trooper's direction, notwithstanding the uncommon sight of a badly damaged van and a well-lit police car, the trooper understandably suspected that this individual might be the "David Conboy" he was seeking. So he approached [Conboy], inquiring "Mr. Conboy?" whereupon [Conboy] unwittingly confirmed the trooper's suspicions by responding, "I'm not David Conboy."
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> Moreover, [Conboy] was at the scene of the accident just after the removal of property from the van. He arrived there in a taxicab, providing the trooper with an explanation of how the van's driver was able to leave the scene of the accident. At that time, [Conboy] admitted to owning the property in the back seat of the cab, which was the sort of property, particularly the bottle of vodka, that had been

> removed from the van. And, as if that were not enough, he appeared to be intoxicated and, given the presence of full and empty containers of alcohol inside the van and the condition of the van, the trooper had every reason to believe the van's driver was too. In sum, the trooper had probable cause to believe that the badly damaged van, which was littered with alcoholic beverages, had apparently been in an alcohol-related accident and that the still inebriated [Conboy] had been the driver of that vehicle. In short, the officer had probable cause to arrest [Conboy].

Conboy, 155 Md. App. at 364, 367-69 (internal citations, quotations, and footnote omitted).

We reach a similar conclusion here. Like in *Conboy*, we need not reach the question of whether the search of Beck was justifiable for the reason cited by the court, because the search at issue was incident to a lawful arrest. Deputy Stivers told Trooper Clark that the deputy had observed Beck driving a vehicle, checked Beck's license, and discovered that the license was suspended. The trooper used his in-car computer to verify that Beck's license was suspended. Finally, after stopping the vehicle, Trooper Clark discovered that Beck was operating the vehicle. These facts gave Trooper Clark probable cause to believe that Beck had committed the criminal offense of driving on a suspended license. Hence, Trooper Clark had probable cause to arrest Beck before he was searched.

Beck contends that his arrest was unconstitutional because an "actual arrest" is "a condition precedent to a warrantless search incident to arrest." We disagree. In *Conboy*, we recognized that

> as long as police have probable cause to arrest before they search the arrestee, it is not "particularly important that the search precede the arrest rather than vice versa." *Rawlings v. Kentucky*, 448 U.S. 98, 111, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980); *see Lee v. State*, 311 Md. 642, 668, 537 A.2d 235 (1988).

In his comprehensive multi-volume work, *Search and Seizure*, Professor Wayne R. LaFave explains why federal and state courts have rejected any test that would require that an arrest always precede the search at issue, before invoking this exception. *See* Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, vol. 3, § 5.4, at 152-55 (3d ed. 1996 & Supp.2004). He begins his explanation by quoting from the concurring opinion of Justice John Marshall Harlan in *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968), and the opinion authored by Justice Roger Traynor in *People v. Simon*, 45 Cal.2d 645, 290 P.2d 531 (1955).

Their words bear repeating. In his *Sibron* concurrence, Justice Harlan observed:

Of course, the fruits of a search may not be used to justify an arrest to which it is incident, but this means only that probable cause to arrest must precede the search. If the prosecution shows probable cause to arrest prior to a search of a man's person, it has met its total burden. There is no case in which a defendant may validly say, "Although the officer had a right to arrest me at the moment when he seized me and searched my person, the search is invalid because he did not in fact arrest me until afterwards."

Sibron, 392 U.S. at 77, 88 S.Ct. 1889 (Harlan, J., concurring).

"[T]he proposition stated by Justice Harlan," Professor LaFave points out, "does not broaden the power of the police, but instead gives some added measure of protection to those reasonably but mistakenly suspected of criminal behavior." *See* LaFave, *supra*, vol. 3, § 5.4, at 154. That point, the professor notes, was also made by Justice Traynor in *People v. Simon*, 45 Cal.2d 645, 290 P.2d 531 (1955). *See id.* In that case, Justice Traynor wrote:

[I]f the officer is entitled to make an arrest on the basis of information available to him before he searches, and as an incident to that arrest is entitled to make a reasonable search of the person arrested and the place where he is arrested, there is nothing unreasonable in his conduct if he makes the search before instead of after the arrest. In fact, if the person searched

is innocent and the search convinces the officer that his reasonable belief to the contrary is erroneous, it is to the advantage of the person searched not to be arrested. On the other hand, if he is not innocent or the search does not establish his innocence, the security of his person, house, papers, or effects suffers no more from a search preceding his arrest than it would from the same search following it.

Simon, 45 Cal.2d at 648, 290 P.2d 531.

And that reasoning led the Supreme Court to declare, in *Rawlings v. Kentucky*, 448 U.S. 98, 111, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980), that, "where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa."

In *Rawlings*, during a warrant-authorized search of a house, one of the occupants was ordered to empty her purse. 448 U.S. at 101, 100 S.Ct. 2556. When she did, it was observed to contain controlled substances. *Id.* The occupant then turned to Rawlings, who was standing nearby, and told him "to take what was his." *Id.* Rawlings "immediately claimed ownership" of the drugs. *Id.*

The police arrested Rawlings but not before searching him and finding $4,500 and a knife. *Id.* The pre-arrest search of Rawlings'[s] person was subsequently upheld as a valid search incident to an arrest, regardless of the fact that it had preceded his arrest, a distinction which the Court, as previously noted, did not feel was "particularly important." *See id.* at 111, 100 S.Ct. 2556.

The lesson of *Rawlings* has not been lost on Maryland's appellate courts. When the issue of such pre-arrest searches has arisen, they have upheld them so long as a lawful arrest followed the search. *See Lee*, 311 Md. at 668, 537 A.2d 235; *Wilson v. State*, 150 Md. App. 658, 822 A.2d 1247 (2003); *Anderson v. State*, 78 Md. App. 471, 553 A.2d 1296 (1989). As to how quickly the arrest must follow the search, Maryland's appellate courts have approved searches when the arrest occurred immediately after the search, *see*, *e.g.*, *Lee*, 311 Md. at 668, 537 A.2d 235; *Wilson*, 150 Md. App. at 674,

> 822 A.2d 1247, and when it occurred "a few minutes" later. *Anderson*, 78 Md. App. at 487, 553 A.2d 1296.

Conboy, 155 Md. App. at 364-67 (footnotes omitted). Accordingly, an arrest is not necessarily a "condition precedent" to a search incident to that arrest.

Beck next contends that our opinion in *State v. Funkhouser*, 140 Md. App. 696 (2001), is applicable. In that case, Funkhouser

> was charged by the Anne Arundel County Police Department with the possession of cocaine with the intent to distribute it. He moved, pre-trial, to have the physical evidence suppressed on Fourth Amendment grounds. [A] hearing [on the motion was held] in the Circuit Court for Anne Arundel County, Judge Eugene M. Lerner [presiding.]
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> On August 1, 2000, a white Jeep Wrangler, of which Funkhouser was the driver and sole occupant, was stopped by Detective Tom McBride, Jr. for an ostensible traffic violation. The traffic stop was ultimately followed by a warrantless search of the Jeep Wrangler for possible narcotics. After that search failed to produce either narcotics or other evidence, the police took from Funkhouser's person a pouch or "fanny pack" he had strapped around his waist and searched it. It contained a substance believed to be cocaine. As a result of that discovery, Funkhouser was arrested.
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> At the suppression hearing, Detective McBride and Detective Michael Barclay testified for the State. Funkhouser testified for the defense.
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> Detectives McBride and Barclay were both narcotics officers, not traffic officers. On August 1, they had received a "tip" that a suspect driving a white Jeep Wrangler was in possession of a large quantity of cocaine at a gymnasium in a mall on Ritchie Highway. Their investigative purpose was to check out that "tip." With commendable candor, they freely acknowledged that they were taking advantage of the broad

investigative prerogative available to them by virtue of *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).

* * *

Both Detective McBride and Detective Barclay testified that they saw Funkhouser in the Jeep Wrangler exit the mall at a red light and make a right-hand turn onto Ritchie Highway without first coming to a complete stop. On that basis, they overtook and then stopped the Jeep Wrangler. Funkhouser, by diametric contrast, testified that what the detectives said was untrue. He testified that, because of heavy traffic coming down Ritchie Highway, he was stopped "for a good two minutes" before he was able to turn onto Ritchie Highway.

* * *

In the very act of first approaching Funkhouser and requesting his driver's license and registration card, Detective McBride initiated the discussion with respect to consent to search the car. As Funkhouser was producing his license and registration, McBride told him that he was stopped for a traffic infraction involving the light at the parking lot.

McBride then asked Funkhouser "if he had any type of weapons, drugs, bombs, anything like that in the vehicle." Funkhouser replied "No." McBride then asked if Funkhouser would mind if McBride took a look inside Funkhouser's vehicle. Funkhouser questioned why McBride wanted to look in his vehicle. McBride told Funkhouser: "It's completely up to you whether I search your vehicle. Do you mind if I take a look?" Funkhouser replied: "No. Go ahead." . . . .

. . . . Funkhouser, the prevailing party, testified that, when asked by Detective McBride if he minded whether the officer searched his vehicle, he replied, "Yes, I do mind."

* * *

Detective McBride testified that he immediately informed the other officers that Funkhouser had given his consent to the search of the vehicle. Neither detective explained why, if they thought they had valid consent for a

search, they did not proceed immediately with the search at that point. Indeed, immediately after Detective McBride announced to his fellow officers that he had obtained consent to search the car, he ordered Funkhouser out of the vehicle. That was for the express purpose of facilitating the search of the car's interior. That step was taken before the drug-sniffing dog had even been removed from the police cruiser. . . . . The consensual search that seemed imminent was inexplicably put "on hold."

Instead, Detective McBride testified that he returned to the police cruiser to make a radio check on Funkhouser's driving record and also to check for any outstanding warrants. After doing that, he brought out from his cruiser a trained and certified cocaine-sniffing canine and had the dog sniff the outside of the vehicle. The dog, after scanning the full circumference of the vehicle, made a positive alert at both the front driver's side door and the front passenger's side door. The search of the Jeep Wrangler did not begin until the canine "alert" was a *fait accompli*.

* * *

McBride's testimony was that the canine "alert" came approximately five or six minutes after the initiation of the traffic stop.

* * *

Detective McBride . . . testified that he got back in his police car to radio in his request for a records check. . . . . Funkhouser, on the other hand, testified that Detective McBride did not get back into the car or talk on the radio.

* * *

The Jeep Wrangler was searched twice. No narcotics were discovered.

* * *

When the searches of the Wrangler proved unproductive, the detectives turned their attention to Funkhouser himself, who was walking around, unrestrained,

> outside the vehicle. He was wearing a "fanny pack," buckled around his waist. Detective Barclay physically removed the "fanny pack" from Funkhouser's person. He unzipped it and searched it, finding what he believed to be cocaine. At the suppression hearing, attention focused on the State's proffered justification for seizing the pack from Funkhouser's person and searching it. Judge Lerner inquired, "What right did they have to take [the] pouch?"
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> The only theory of justification advanced by the State was that Funkhouser, by virtue of his recent presence in the vehicle, was for *Carroll* Doctrine purposes a mere extension of the vehicle.

Funkhouser, 140 Md. App. at 701-03, 706-12. Following argument, the court "granted the suppression motion." *Id.* at 701.

On appeal, the State contended that "the alert of a drug detection dog to the passenger compartment of a car establishes probable cause to search the occupants of the car[.]" *Id.* at 712 (emphasis omitted). This Court rejected the contention, noting that "there is no case, state or federal, that has ever stretched the perimeter of a *Carroll* Doctrine search to embrace a former occupant of a vehicle who is at the moment of search already outside the vehicle." *Id.*

The State alternatively contended "that the same probable cause that justified the *Carroll* Doctrine search of the Jeep Wrangler was, *ipso facto*, probable cause to arrest Funkhouser and that the search of Funkhouser's person, including the 'fanny pack,' was a search incident to lawful arrest." *Id.* at 717. We concluded that the State "fail[ed] to have preserved its argument on this issue for appellate review," *id.* at 717, because "Judge Lerner was never called upon to make any decision with respect to a search incident to lawful arrest." *Id.* at 720.

Nevertheless, we stated that we would "not be constrained by the non-preservation of the issue," because we were "desirous of expatiating on the subject of search incident to lawful arrest by way of considered *dicta*[.]" *Id.* at 720. Explicitly stating that, "although we may be commenting on a non-preserved issue, we most definitely are not deciding the case on the basis of a non-preserved issue," *id.*, we concluded:

> In this case, the canine "alert" could have provided, all else being assumed to have been constitutional, a double justification for two related but separate and distinct Fourth Amendment events. The police not only had probable cause to search the Jeep Wrangler; they also had probable cause to arrest Funkhouser as its driver and lone occupant.
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> Probable cause to make an arrest, however, is a far doctrinal cry from the arrest itself; the antecedent justification for an event is not the event itself. The Fourth Amendment significance of an arrest, as the trigger for a warrantless search incident, is not the accumulation of data in the mind of an officer; it is the change in the legal status of the person arrested. What matters is an actuality, not a potentiality. We need to remind ourselves periodically of the precise thing to which a "search incident" is incident. It is, of course, incident to a lawful arrest.
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> Of the firmly rooted exceptions to the warrant requirement, a search incident to lawful arrest is the only one that authorizes a full-blown search of a person for the purpose of discovering evidence. (The frisk component of a stop-and-frisk authorizes the pat-down of the clothing surface for the limited purpose of detecting the presence of a weapon.) Probable cause to believe that a person is carrying evidence does not justify a warrantless search of the person any more than probable cause to believe a home contains evidence justifies a warrantless search of a home. Only places or things enjoying a lesser expectation of privacy, such as automobiles, are vulnerable to probable-cause-based warrantless searches for the purpose of discovering and seizing evidence of crime.

That the police have probable cause for a lawful arrest of a person does not in and of itself justify a warrantless search of that person. The search must be incident to an arrest itself. It may not be incident merely to good cause to make an arrest. The existence of an unserved warrant of arrest, for instance, would not justify a warrantless search of a person who is not actually arrested.

* * *

It is axiomatic that a search incident to lawful arrest is absolutely dependant on the fact of an actual arrest.

* * *

For a search to be an incident of an arrest, it need not literally follow the arrest. If an officer has determined to make an arrest, the search incident is simply an aspect of the arresting prerogative. It is one part of an omnibus tactical maneuver. Because of the potential exigencies of a police-citizen confrontation, the process of 1) disarming the arrestee and 2) preempting destructible evidence a) may proceed simultaneously with the act of arresting or b) may even precede it by a moment or two. This departure from more routine sequencing does not destroy the search's character as an aspect or incident of the arrest it merely supports and accompanies.

The temporal latitude that we extend to incidental searches that are "essentially contemporaneous," however, does not dictate embracing antecedent searches that, albeit essentially contemporaneous, are nonetheless not incidental. An arrest that is made on the basis of what the search recovers will never be constitutional no matter how instantaneously it may follow the search.

* * *

The State seeks to avoid the foreclosing effect of no arrest having been made by arguing that the arrest followed the search almost immediately thereafter and was, therefore, "essentially contemporaneous" as if that tight sequencing were dispositive. In this case it is clear, however, that no decision to arrest Funkhouser had been made and that the seizure and search of the "fanny pack" was no mere incident of an arrest

> already in motion, even if moments behind, on a parallel track. It was, rather, the finding of suspected drugs in the "fanny pack" that was the precipitating or catalytic agent for Funkhouser's arrest in this case. There is no suggestion that Funkhouser was going to be arrested regardless of what the search of the "fanny pack" revealed. This was an arrest incident to search.
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> * * *
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> Essential contemporaneity is a necessary condition for an out-of-sequence search incident, but it is not a sufficient condition. "Essentially contemporaneous" is not, in and of itself, a legitimating mantra.
>
> * * *
>
> The temporal proximity between the search and the arrest . . . does not qualify the search as an "incident" of the arrest. That is a separate consideration. The seizing and searching of the "fanny pack" in this case was not a consequence or incident of a decision to arrest Funkhouser. The arrest of Funkhouser, rather, was a consequence of what was found in the search of the "fanny pack," notwithstanding the fact that the detectives may have had an alternative and independent basis for arresting him. They were not acting on such a basis. What was flawed was not the proximity in time between the search and the arrest, but the lack of a proper cause-and-effect relationship.
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> * * *
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> The shortness of the time period within which the arrest followed the search in this case could not transform the arrest into the cause of the search. The search had its own independent causation. The search was not an incident of the arrest.

Id. at 721, 724-25, 728, 730-34 (emphasis omitted).

Beck now contends that our "expatiat[ion] on the subject of search incident to lawful arrest" is controlling. We disagree for several reasons. First, in *Funkhouser*, we explicitly stated that our analysis on the subject of search incident to lawful arrest was *dicta*, and that

we "most definitely [did] not decid[e] the case on the basis of [that] non-preserved issue." Second, even if the analysis was controlling, Beck, unlike Funkhouser, was stopped for committing a *criminal* offense. The officers' search of Beck was based on that offense, not on the basis of what the search recovered, and hence, *Funkhouser* is inapplicable.

Finally, Beck contends that "[i]t is . . . clear that no decision had been made to arrest" him, because "[t]here was no testimony . . . that the officers would have placed [him] under custodial arrest based upon the suspended license information or how they would have processed an arrest on this basis." We reviewed a similar contention in *Conboy*. "In response to a question at [Conboy's] suppression hearing, Trooper Grinnan stated that he had arrested [Conboy] for 'leaving the scene of a property damage collision.'" *Conboy*, 155 Md. App. at 367. We noted that "[t]here is no provision of the Maryland Code that authorizes an officer to arrest a driver for leaving the scene of an accident where the property damage caused by the accident is confined to the driver's vehicle." *Id.* But, we stated,

> that misstatement is of no consequence. It does not vitiate the lawfulness of [Conboy's] arrest, as that arrest was otherwise justified.
>
> Moreover, it is clear from the trooper's testimony that his response was never intended to be a complete statement of all of the reasons he arrested [Conboy]. Indeed, he testified that, before arresting [Conboy], [Conboy] had confessed to driving while under the influence of alcohol. The clear implication of the trooper's testimony was that he arrested [Conboy] for more than simply "leaving the scene of a property damage collision."

Id. (internal citation and quotations omitted).

We reach a similar conclusion here. Trooper Clark's misstatement that Beck "was not arrested after the [K-9] alert" does not vitiate the lawfulness of Beck's arrest, as that arrest was otherwise justified. Moreover, it is clear from the trooper's testimony that Beck was arrested for more than just possession of cocaine. Indeed, Trooper Clark testified that, before stopping Beck, the trooper confirmed that Beck was driving on a suspended license. The clear implication of Trooper Clark's testimony was that Beck was arrested for both offenses, and hence, the court did not err in denying the motion to suppress.

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