Circuit Court for Dorchester County
Case # 09-K-16-016078

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2281

September Term, 2016

FLOYD LAW, JR.

v.

STATE OF MARYLAND

Wright,
Friedman,
Thieme, Raymond G. Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: October 13, 2017

Tried in the Circuit Court for Dorchester County, appellant, Floyd Law, Jr., was convicted of attempting to elude uniformed police officers by fleeing on foot.[1] The trial court sentenced Law to two years in prison, suspending all but one year. Law timely noted this appeal, in which he presents the following questions for our consideration:

> (1) Did the trial court err in denying Appellant's motion to suppress?
>
> (2) Did the trial 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?

For the reasons that follow, we shall affirm the judgment of the trial court.

FACTS AND LEGAL PROCEEDINGS

Hearing on Motion to Suppress

At the hearing on Law's motion to suppress the evidence of his flight from the police, the State presented the testimony of Dorchester County Sheriff's Deputy Joseph Carpenter and Town of Hurlock Police Officer Matthew Minton. The officers' testimony was consistent and revealed the following.

On the evening of March 21, 2016, Deputy Carpenter was dispatched to the Vienna Shell gas station after an anonymous 911 caller raised concerns about the welfare of two young children. The 911 caller advised that she had observed two adults—a male and a female—yelling at the children as one of the children hid behind a dumpster at the gas station; the caller did not, however, report any injury to the children. When the adults placed the children into a tan sedan and quickly left the Shell station, the caller followed

[1] The court acquitted Law of driving a motor vehicle on a suspended license and driving a motor vehicle on a revoked license.

and remained on the line with 911 dispatch, providing the vehicle's license plate and route of travel.

The vehicle was registered to Kim Adele Modle, whom Deputy Carpenter knew from her "recent frequent" association with Law, including one occasion when Carpenter had observed Modle in the vehicle with Law, one occasion when he had observed her vehicle parked at a residence used by Law, and "through other checks." On the evening of March 21, 2016, Deputy Carpenter was aware there was an active warrant for Law's arrest. Officer Minton was also aware of an outstanding arrest warrant for Law.

As the 911 caller followed Modle's vehicle, she reported that the sedan was "all over the roadway, crossing both the double yellow center and the solid white to the right." Deputy Carpenter and Officer Minton, in separate police cruisers, located the vehicle as it entered the Hurlock town limits, and Officer Minton activated his emergency equipment to effectuate a stop.

The suspect vehicle pulled into a driveway. As the officers exited their vehicles, they observed Law, who they identified from "prior involvement," exit the driver's door of the sedan and flee on foot. A baby and a toddler inside the vehicle appeared to be safe.

After the police officers testified, the prosecutor began her argument that the officers had a right to investigate the 911 caller's claim that adults were yelling at children, pursuant to the community caretaking doctrine, the motions court interjected:

> THE COURT: Why does the court even have to get into that? Their attention was drawn to this vehicle by this reporter and we don't have a situation with the deputy or the Hurlock officer stopping the vehicle necessarily to investigate this complaint that happened at Vienna Shell.

> They were both familiar with Mr. Law and they both were familiar that there was a warrant. The deputy was familiar that he associated with the person to whom the car was registered. And certainly—and there had been reports of erratic driving.
>
> So why—the deputy and the officer had a right to be on Route 331. Mr. Law did not have an expectation of privacy that he would be the only one driving on 331 and 392. So why do we even get to that part?
>
> * * *
>
> I mean, it doesn't matter really what—it would be one thing if they were stopped based on the report at Vienna Shell and the car was just stopped and nobody knew, you know, the car or the occupants of the car.
>
> But at some point after attention was drawn their whole reason for continuing this investigation and making a stop was—I imagine what happened in Vienna was secondary, tertiary or not important at all to the police officers. So that's just my thought.

Defense counsel argued that, to justify their stop based on an outstanding warrant, the officers were required to know that Law was in the car, and the timeline was "a bit ambiguous" as to when the officers knew of his presence in the car. Therefore, defense counsel continued, the officers lacked probable cause to effectuate a traffic stop. When the court pointed out that the officers knew that the registered owner of the car was associated with Law, defense counsel reiterated that they had no knowledge he used or was in the vehicle. Moreover, defense counsel continued, although the 911 caller had reported erratic driving of the sedan, neither officer testified personally to observing any traffic violation, which would have supported a traffic stop. Finally, defense counsel argued that the officers

did not have sufficient information to support a welfare check of the children because they had no reason to believe anyone in the car was in actual danger.

The motions court ruled that the officers, who knew there was an outstanding warrant for Law's arrest—and presumably heard the police radio traffic that announced that Modle, Law's known associate, was the owner of the vehicle—coupled with reports of erratic driving, had probable cause to stop the vehicle "at the very least to investigate further," after which Law ran away. Finding the police contact permissible, the motions court denied Law's motion to suppress the evidence of his flight from the police.

Trial

Law proceeded by way of a not guilty plea on an agreed statement of facts. Following the trial court's finding that Law had knowingly and voluntarily given up his right to a jury trial, the prosecutor presented the agreed statement of facts, which included the information imparted by Deputy Carpenter and Officer Minton at the suppression hearing, with the addition of the following facts:

(1) The 911 caller identified the vehicle of concern as a four-door, tan Nissan;

(2) The officers knew Law's driver's license to have been suspended and revoked;

(3) Officer Minton announced that the driver had fled; he gave chase to the suspect, with orders to stop;

(4) Deputy Carpenter also ordered the suspect to stop and gave chase on foot through yards and around clotheslines and other objects. Multiple orders to stop were met with negative results;

(5) Finally, the suspect complied with the orders to stop, and Deputy Carpenter ordered him to get on the ground, where he was handcuffed

and advised he was under arrest for attempting to flee and elude uniformed police on foot;

(6) Law had previously been stopped by Officer Minton on March 24, 2014 for driving on a suspended and revoked license, with citations issued; one of his outstanding arrest warrants resulted from that traffic case;

(7) Law was taken into custody but refused medical services for injuries he sustained running into a clothesline; and

(8) Law's 16-page driving record was admitted into evidence.

On the fleeing and eluding charge, defense counsel argued that the officers had not effectuated the stop pursuant to the enforcement of any traffic laws. He conceded, however, that he had "no authority for the proposition that that makes any difference whatsoever," although he also professed to have no authority that it did not make a difference. Based on the agreed statement of facts, the trial court convicted Law of fleeing and eluding uniformed police on foot.

DISCUSSION

I.

Law first contends that the suppression court erred in denying his motion to suppress the evidence of his flight from police. He argues that the stop of the vehicle he was driving was illegal, as Deputy Carpenter and Officer Minton did not have a reasonable articulable suspicion of criminal activity on which to base the stop. While conceding that the officers were aware that there was an active warrant for his arrest, Law disputes that they had sufficient reason to believe he was in Modle's car when they attempted to stop it and,

therefore, any evidence obtained as a result of the stop should have been suppressed as the fruit of the poisonous tree.

Our review of a circuit court's denial of a motion to suppress is ordinarily limited to information contained in the record of the suppression hearing and not the record of the trial. *McCracken v. State*, 429 Md. 507, 515 (2012). When, as here, the motion to suppress has been denied, we are further limited to considering the facts in the light most favorable to the State as the prevailing party. *Id.*

In considering the evidence presented at the suppression hearing, we extend great deference to the fact-finding of the suppression court, and when conflicting evidence is presented, we accept the facts as found by the motions court unless it is shown that those findings were clearly erroneous. *Brown v. State*, 397 Md. 89, 98 (2007). We review *de novo*, however, all legal conclusions, making our own independent determinations of whether the search was lawful or a constitutional right has been violated. *Id.*

As we explained in *State v. Holt*:

> [t]he Fourth Amendment protects citizens against unreasonable searches and seizures by the government. It applies to the states through the due process clause of the Fourteenth Amendment. The detention of a motorist by a law enforcement officer is considered a "seizure" under the Fourth Amendment. Generally, if a seizure occurs without probable cause, it violates the Fourth Amendment. However, in *Terry v. Ohio*, the Supreme Court held that a law enforcement officer can conduct a brief investigative "stop" of a person if that officer has a reasonable suspicion that criminal activity is afoot. The officer may detain that person briefly only … to investigate the circumstances that provoked suspicion.
>
> Reasonable suspicion is more than an inchoate and unparticularized suspicion or hunch. Instead, there must be specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion. Reasonable suspicion is a significantly less

> demanding standard than probable cause or preponderance of the evidence and merely requires at least a minimal level of objective justification for making the stop. It is a common sense, nontechnical conception that considers factual and practical aspects of daily life and how reasonable and prudent people act.
>
> The court must analyze the totality of the circumstances to determine objectively whether the officer possessed reasonable suspicion. The officer's subjective state of mind or intent has no relevance to a reasonable suspicion determination. A string of otherwise innocent behavior may, when analyzed together as part of the totality of the circumstances, constitute reasonable suspicion. The court should not parse out each individual circumstance for separate consideration. In analyzing reasonable suspicion, the court must allow law enforcement officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person.

206 Md. App. 539, 552–53 (2012) (internal citations and quotation marks omitted).

Here, based on a totality of the circumstances, which must include "how an experienced police officer might objectively view the circumstances," *id*. at 557, Deputy Carpenter and Officer Minton possessed a reasonable articulable suspicion that Law, whom they knew was the subject of an outstanding arrest warrant, was in the vehicle when they were dispatched following the anonymous 911 call. We explain.

The officers responded to a 911 call describing the Nissan's location, appearance, and occupants, including a man, although the car was registered to Modle, a woman.[2] The caller indicated that the car's occupants had yelled at small children at the gas station, had

[2] In *Navarette v. California*, 134 S.Ct. 1683, 1689-90 (2014), the U.S. Supreme Court pointed out that a "caller's use of the 911 emergency system" is an "indicator of veracity" because "[a] 911 call has some features that allow for identifying and tracing callers, and thus provide[s] some safeguards against making false reports with immunity." The Court emphasized, however, that a 911 call is not "*per se* reliable." *Id*. at 1690.

left the gas station quickly, and did not stay within the lane markers of the road when it drove away.

The officers patrolling the small towns of Hurlock and Vienna, Maryland, were aware that Modle was a known associate of Law's, and Deputy Carpenter had personally observed Law in Modle's vehicle and seen her vehicle parked at Law's residence.[3] Officer Minton had stopped Law in 2014 for driving with a suspended and revoked license, and both officers knew that an arrest warrant had been issued for those crimes and that the warrant remained outstanding. All of the circumstances of which the officers were aware combined to create a reasonable articulable suspicion that Law was in the vehicle observed and followed by the 911 caller.

Because we find that the officers possessed a reasonable, articulable suspicion of criminal activity when effecting the investigatory stop of Modle's vehicle, we conclude that the trial court did not err in denying Law's motion to suppress the evidence of his flight from police.[4]

[3] The town of Hurlock, Maryland reports a population of 2125 residents, and the town of Vienna, Maryland reports a population of just 282 residents. *See* http://hurlock-md.gov *and* http://population.us/md/vienna (last visited August 22, 2017). It is reasonable to assume that police officers patrolling those towns are familiar with local scofflaws and their associates.

[4] We also note that no physical evidence was seized from Law's person or from his vehicle, nor was he charged with any crimes of possession. It is our view that Law's motion to suppress was inappropriate under the circumstances, because there was no evidence seized, and therefore there was no evidence to suppress. Additionally, we are unaware of any case law, nor does Law cite to any in his brief, to support his argument that a motion to suppress evidence is a proper procedure by which to exclude evidence of a defendant's flight from police. For this independent reason too, we affirm the denial of Law's motion to suppress.

II.

Appellant also argues that the trial court violated his constitutional rights when it failed to ensure that he knowingly and voluntarily waived his right to a jury trial to plead not guilty on an agreed statement of facts, pursuant to Maryland Rule 4-246. He claims that the trial court's failure to advise him that he is presumed to be innocent and could not be convicted unless the court were persuaded of his guilt beyond a reasonable doubt negated the knowledge element of his jury trial waiver and rendered it invalid. In addition, the court erred in failing to apprise him of the fact that he could change his election only for good cause.

Conceding that he failed to object to the trial court's determination that his jury trial waiver was knowing and voluntary, Law nonetheless suggests that the issue is reviewable by this Court. And, even should we disagree with him on that point, he claims that plain error review is warranted.

We agree with the State that Law has not preserved for appellate review the issue he now raises by failing to object at any time during the trial court's acceptance of his jury trial waiver. Pursuant to Md. Rule 8-131(a), if a party fails to raise an issue in the trial court or fails to issue a contemporaneous objection, "the general rule is that he or she waives that issue on appeal." *Nalls v. State*, 437 Md. 674, 691 (2014). Even a constitutional right, such as the right to a jury trial, may be waived by a criminal defendant. *Smith v. State*, 375 Md. 365, 377 (2003). And, although Rule 8-131(a) provides us with the discretion to consider an unpreserved issue, we do not invoke that discretion here.

The Court of Appeals specifically addressed the preservation issue with regard to Rule 4-246 in *Nalls.* In that case, the Court exercised its discretion to consider the issue, "based on the continued confusion surrounding this issue in the trial courts," notwithstanding the defendants' failure to object to the jury trial waiver procedure at the trial court level. 437 Md. at 693. Going forward, however, the Court explained that "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*. Accordingly, to the extent that *Valonis* [*v. State*, 431 Md. 551 (2013)] 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 693-4 (emphasis added).

Shortly thereafter, this Court, in *Meredith v. State*, 217 Md. App. 669, 674-5 (2014), heeded the Court of Appeals' admonition, succinctly holding that in the absence of an objection to the jury waiver procedure, its content, or the trial court's announcement that the waiver was "knowing and intelligent," rather than "knowing and voluntary," the defendant's "challenge to the effectiveness of his waiver is not preserved for our review and is not properly before this Court. We shall not exercise our discretion under Rule 8-131 to consider the issue." And, in *Spence v. State*, 444 Md. 1, 14-15 (2015), the Court of Appeals reiterated that *Nalls* did not create a change in procedure; rather, it reinforced "what long has been the preservation rule... which requires a contemporaneous objection."

Law did not contemporaneously object to the voluntariness of his waiver of his right to a trial by jury. He thus failed to preserve the issue for our review.

Law's argument, even had he preserved it, is unavailing. Md. Rule 4-246, which governs a defendant's waiver of a jury trial, states, in pertinent 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.[5]

As Maryland courts have recognized, for the waiver of the constitutionally protected right to a jury trial to be valid, the "'trial judge must be satisfied that there has been an intentional relinquishment or abandonment of a known right or privilege.'" *Kang v. State*, 393 Md. 97, 105 (2006) (quoting *Smith*, 375 Md. at 379). Pursuant to Rule 4-246, if a defendant chooses to waive his right to a jury trial, a waiver inquiry must be conducted on the record in open court. The defendant must make the waiver "knowingly and voluntarily," and the trial court must announce on the record its determination that the waiver was made knowingly and voluntarily. Md. Rule 4-246(b).

[5] Prior to an amendment to the Rule that took effect on January 1, 2008, there was no requirement that the trial court announce on the record that the defendant's waiver was knowing and voluntary. That change in the Rule was in response to *Powell v. State*, 394 Md. 632 (2006), in which the Court of Appeals upheld the defendant's jury trial waiver although the trial judge neglected to state on the record that he found the jury trial waiver to be knowing and voluntary. *Walker v. State*, 406 Md. 369, 377 n.1 (2008).

If the defendant's waiver is knowing and voluntary, then the waiver meets the test set forth in the Rule, and the trial court may properly accept the waiver. *Smith*, 375 Md. at 380. On the other hand, if the trial court does not comply fully with Rule 4-246(b), the failure to comply would constitute reversible error. *Id.* at 381.

A trial court "'need not recite any fixed incantation'" in determining whether a defendant's waiver of a jury trial is knowing and voluntary. *Abeokuto v. State*, 391 Md. 289, 317 (2006) (quoting *State v. Hall*, 321 Md. 178, 182 (1990)). So long as the court ensures that the defendant has "'some knowledge of the jury trial right before being allowed to waive it,'" the waiver will be knowing and voluntary. *Id*. at 317-18 (quoting *Hall*, 321 Md. at 182-83).

Whether a defendant's waiver of his jury trial right is valid depends on the facts and circumstances of each case. *Winters v. State*, 434 Md. 527, 537 (2013). Therefore, on review, we consider the "totality of circumstances." *Walker*, 406 Md. at 379.

Here, the detailed colloquy at Law's waiver hearing reveals that the trial court adequately examined Law regarding his waiver of his right to trial by jury. The trial court asked if he had talked with his lawyer about "what it means to give up your right to a jury trial," and Law responded that he had and that he was satisfied with the explanation defense counsel had given him. The court also asked Law's attorney if he were satisfied that Law was knowingly and voluntarily waiving his right to a jury trial, and defense counsel also responded in the affirmative. No facts from the record demonstrate that Law was not made aware of the rights being given up by waiver of a jury trial. Therefore, no further specific

examination was required in this case, and the circumstances support the trial court's finding of a knowing and voluntary jury trial waiver.

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