Circuit Court for Montgomery County
Case No. 133176C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2088

September Term, 2018

ERIC E. FRAZIER

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: July 3, 2019

Appellant, Eric E. Frazier, was convicted by a jury in the Circuit Court for Montgomery County of possession of phencyclidine ("PCP") with intent to distribute. Frazier presents for our review three questions, which for clarity we rephrase:[1]

1. Did the court err in denying Frazier's motion to suppress evidence?

2. Did the court abuse its discretion in allowing a police corporal to testify as to why he did not request that certain evidence be tested for DNA?

3. Did the court abuse its discretion in instructing the jury as to the quantity of a controlled dangerous substance necessary to show intent to distribute?

For the following reasons, we shall affirm the judgment of the circuit court.

Facts and Proceedings

Prior to trial, Frazier moved to suppress "evidence seized resulting from [his] unlawful, warrantless stop and arrest . . . and the illegal search incident to that arrest of the vehicle in which he was travelling [sic]." At a hearing on the motion, the State called

[1]Frazier's questions presented *verbatim* are:

1. Did the circuit court err in denying Appellant's motion to suppress evidence?

2. Did the circuit court abuse its discretion in overruling Appellant's objection to testimony of Cpl. Scott Smith where the evidence was more prejudicial than probative?

3. Did the circuit court abuse its discretion in overruling defense counsel's objection to its jury instruction regarding the significance of quantity in its definition of intent to distribute?

Montgomery County Police Officer Melissa Kiley,[2] who testified that on November 15, 2017, she "was conducting surveillance in the Del Mar Carter . . . .shopping center in Silver Spring, which is known for high drug activity in the area." Officer Kiley observed a black GMC Terrain "pull into the shopping center" and drive "parallel to the store fronts." The officer "observed the female that was in the front passenger seat looking all around the shopping center with her head on the swivel." The vehicle "continued to drive slowly along the storefronts of the shopping center," "did a full circle," and "parked behind [a] McDonald's that was at the entrance where they had initially come in." The vehicle "then backed into a spot up against Bel Pre Road and blacked out [its] lights." Officer Kiley "observed the two occupants, [Frazier] in the driver seat, and the female in the front passenger seat[,] just sit there . . . without either of them exiting the vehicle."

"Approximate five minutes later, [the vehicle] turned on its lights and . . . pulled back out . . . towards Bel Pre Road." Officer Kiley "lost sight of" the vehicle, but "[l]ess than two minutes later, the vehicle emerged from the neighborhood on Northgate Drive behind . . . where [the officer] was sitting at the stop sign for Bel Pre Road." Officer Kiley "observed two black males exit the back seats of the Terrain" and cross Bel Pre Road toward a neighborhood that the officer knew "based on [her] knowledge, training, and experience[] to be a high-drug neighborhood." The vehicle "then made a right turn onto Bel Pre Road back towards Layhill where [Officer Kiley] started following it."

The following colloquy then occurred:

[2]Elsewhere in the record, Officer Kiley is identified as "Kylie." To avoid confusion, we shall identify the officer as "Kiley."

[PROSECUTOR:] And what, if any, observations did you make when you followed the vehicle?

[OFFICER KILEY:] After the vehicle cross[ed] Layhill Road where Bel Pre turns into Bonifant, I continued to follow it between Layhill Road and Notley Road. The vehicle crossed the solid white line three times on the right shoulder and then once over the double yellow just prior to Notley Road where it made the right turn.

[PROSECUTOR:] And, did you make any other observations about the driving?

[OFFICER KILEY:] Yes. When I got onto Notley Road, I paced the vehicle going approximately 40 miles per hour in a 30-mile per hour zone.

[PROSECUTOR:] Is your vehicle calibrated for speed?

[OFFICER KILEY:] I am unsure about that vehicle, as it was assigned to me in a temporary capacity that I can attest that I've done over 1000 traffic stops in my career. And, many of those have been for speeding, and I can testify to the fact that the vehicle was going over the speed limit.

[DEFENSE COUNSEL]: Objection. Move to strike.

THE COURT: Overruled, with respect to a lay person. I'll receive it as a testimony of a lay person with respect that another vehicle was speeding.

[PROSECUTOR:] At some point, did you initiate a traffic stop?

[OFFICER KILEY:] Yes, just prior to the vehicle approaching New Hampshire, I activated my emergency equipment to initiate a traffic stop. The vehicle was very slow to stop and continued slowly driving towards New Hampshire Avenue. At which point [Montgomery County Police] Officer [Christopher] Massari . . . came up from behind me and actually got [in] front of the vehicle, activating his equipment as well just prior to New Hampshire Avenue, because we believed it was not going to stop.

[PROSECUTOR:] Did the vehicle eventually stop?

[OFFICER KILEY:] Yes, it did.

Officer Kiley "approached the driver's side" of the vehicle and "made contact with [Frazier], who was the driver." Frazier stated "that he was distracted while driving, and had dropped his cell phone, [and] that's why he must have been swerving." During their conversation, Officer Kiley "was overwhelmed by the odor of PCP emanating from the vehicle." After Frazier was "placed into handcuffs," Montgomery County Police Corporal Scott Smith searched Frazier and discovered "a small bag [of] marijuana in his front left pant pocket, and four dealer folds amounting to $410." Officer Massari and Montgomery County Police Sergeant Gregory Chmiel subsequently searched the vehicle and discovered a vial "containing suspected PCP under the driver's seat," a "wet stain on the driver's seat [that] smelled like the odor of PCP," and a "McDonald's cup that . . . was emanating a strong odor of PCP."

Following Officer Kiley's testimony, defense counsel argued, in pertinent part, that "momentary crossing of . . . traffic lines was not a sufficient basis to stop the vehicle," and there was "really nothing to establish that the vehicle was, in fact, speeding other than" the officer's testimony. The court denied the motion on the ground, among others, that "the stop was a valid stop based upon the traffic violations that [Officer Kiley] had witnessed."

At trial, the State called Officer Kiley, who gave testimony consistent with her testimony at the hearing on the motion to suppress. The State also produced evidence that the vial, McDonald's cup, and seat cushion tested positive for the presence of PCP. Finally, the State called an expert witness who, "after reviewing all of the evidence," opined that Frazier "was in possession [of the PCP] with intent to distribute."

Discussion

I.

Frazier contends that the court erred in denying the motion to suppress, because "the police did not have probable cause to believe that a traffic infraction had occurred." But, the Court of Appeals has stated that "probable cause is *not* ordinarily required" to justify a routine traffic stop. *State v. Williams*, 401 Md. 676, 690 (2007) (emphasis in original). Instead, "a stop is justified under the Fourth Amendment if the officer had a reasonable articulable suspicion that a traffic law has been violated." *Id.* "In assessing whether the articulable reasonable suspicion standard is satisfied, it is well settled that the police have the right to stop and detain the operator of a vehicle when they witness a violation of a traffic law." *Steck v. State*, 239 Md. App. 440, 454 (2018) (citations omitted), *cert. denied*, 462 Md. 582 (2019).

Here, Officer Kiley witnessed Frazier cross a solid white shoulder line, which constitutes a traffic control device as defined by Md. Code (1977, 2012 Repl. Vol., 2017 Supp.), § 11-167 of the Transportation Article ("TA") (defining "traffic control device" as "any sign, signal, marking, or device that . . . [i]s placed by authority of an authorized public body or official to regulate, warn, or guide traffic"). Frazier's crossing of the line constituted a violation of TA § 21-201(a)(1) ("the driver of any vehicle, unless otherwise directed by a police officer, shall obey the instructions of any traffic control device applicable to the vehicle and placed in accordance with the Maryland Vehicle Law"). Officer Kiley also witnessed Frazier cross a double yellow line, in violation of TA § 21-301(a) ("[o]n every roadway that is wide enough, a vehicle shall be driven on the right half

of the roadway"). Finally, Officer Kiley witnessed Frazier exceed the maximum speed limit, in violation of TA § 21-801.1 (a "person may not drive a vehicle on a highway at a speed that exceeds" the maximum lawful speed of "30 miles per hour on . . . [u]ndivided highways in a residential district"). Hence, Officer Kiley had the right to stop and detain Frazier.

Frazier contends that, with respect to whether Officer Kiley was "justified in stopping [him] for crossing over the white shoulder line three times," *Rowe v. State*, 363 Md. 424 (2001), is instructive. We disagree.

> [I]n the early morning hours, . . . a State Trooper observ[ed] the van [Rowe] was driving cross, by about eight inches, the white edge-line separating the shoulder from the traveled portion of the highway, return to the travel portion and, a short time later, touch the white edge line. In view of the trooper's knowledge that, at the time of the occurrence, people are coming home from bars and are getting tired, he effected a stop, allegedly for the benefit of [Rowe]. The trial court found that the stop was legal and, therefore, denied [Rowe's] motion to suppress evidence uncovered as a result of the stop. Affirming [Rowe's] convictions, [we] agreed.

Id. at 427.

Rowe appealed to the Court of Appeals. *Id.* at 431. Reversing our judgment, the Court concluded that Rowe's "momentary crossing of the edge line of the roadway and later touching of that line did not amount to an unsafe lane change or unsafe entry onto the roadway, . . . and, thus, cannot support the traffic stop[.]" *Id.* at 441.

Here, Frazier crossed the edge line of the roadway not once, but three times. Also, Frazier's crossing of the edge line was not the only violation for which Officer Kiley stopped Frazier. Hence, *Rowe* is inapplicable.

Frazier next contends that, with respect to whether Officer Kiley was justified in stopping Frazier for crossing the double yellow line, this Court's opinion in *Edwards v. State*, 143 Md. App. 155 (2002), required Officer Kiley to provide further "information about her observation," such as the length by which Frazier crossed the double yellow line, before the court "could . . . conclude[] whether any part of . . . Frazier's vehicle actually entered the opposite lane of traffic." But, Frazier misreads *Edwards*. In *Edwards*, we reviewed "whether the police executed a valid traffic stop of [Edwards's] vehicle under [TA] § 21-309 . . . after it crossed over the center line of a two lane divided highway." 143 Md. App. at 157. The circuit court found "as fact that [the officer who stopped Edwards] observed at least one occasion where the vehicle crossed the center line by at least a foot into the oncoming traffic lane." *Id.* at 161. Affirming the court's judgment, we concluded

> that the circuit court properly determined that, under the circumstances of this case, crossing the center line of an undivided, two lane road by as much as a foot, on at least one occasion, provided a legally sufficient basis to justify the traffic stop. . . . .
>
> Unlike in *Rowe*, which involved a brief crossing of an edge line separating the slow lane from a shoulder area, the driver here entered the lane designated for oncoming traffic. Given the danger associated with veering into an opposing lane of traffic, even briefly, we agree with the circuit court that the traffic stop was valid.

Edwards, 143 Md. App. at 171.

We reach a similar conclusion here. In *Edwards*, we did not affirm the circuit court's judgment because the State presented evidence as to the length by which Edwards's vehicle crossed the double yellow line. Instead, we affirmed the circuit court's judgment because the State presented evidence that Edwards's vehicle entered the lane designated

for oncoming traffic. As in *Edwards*, Officer Kiley presented evidence that Frazier's vehicle entered the lane designated for oncoming traffic, and this evidence was sufficient to justify her stop of the vehicle for crossing the double yellow line.

Finally, Frazier contends that "[w]ithout radar or evidence that Officer Kiley was capable of accurately pacing . . . . Frazier's speed, [her] lay opinion that . . . Frazier was exceeding the speed limit did not amount to probable cause to stop [him] for speeding." We disagree. We have stated that a "police officer is permitted to express a non-expert opinion as to the basis for his or her reasonable articulable suspicion," including whether a vehicle is exceeding the speed limit, and "an experienced, licensed operator of a car can express an opinion regarding the apparent speed of another car." *Smith v. State*, 182 Md. App. 444, 462-63 (2008) (citations omitted). The State was not required to produce evidence that Officer Kiley used radar or other evidence to support her lay opinion as to the speed of Frazier's vehicle, and hence, the court did not err in denying the motion to suppress.

II.

At trial, the State called Corporal Smith, who testified that he "assisted with [the] collection of" the McDonald's cup, glass vial, and seat cushion, and "submitted [them] into evidence." During cross-examination, the following colloquy occurred:

> [DEFENSE COUNSEL: D]id you request any or ask for any additional testing of the items that were submitted?
>
> [CPL. SMITH:] In addition to what?
>
> [DEFENSE COUNSEL:] I mean, did you ask for items to be evaluated by a chemist?

[CPL. SMITH:] Yes.

[DEFENSE COUNSEL:] Did you ask for items to be fingerprinted?

[CPL. SMITH:] I believe Officer Kiley handled the – the, the requests are done by different forms, so I filled out the form for the, the test for the drug identification, and then there's a different form where the lab, the request is made for the lab to do fingerprints of any other –

[DEFENSE COUNSEL:] Or DNA testing, anything like, any kind of testing?

[CPL. SMITH:] Yeah, that, that would be a different form to request that type of test.

During redirect examination, the following colloquy occurred:

[PROSECUTOR: D]o you ask for DNA to be tested in every case?

[CPL. SMITH:] No.

[PROSECUTOR:] And why is that?

[CPL. SMITH:] My understanding is the lab won't –

[DEFENSE COUNSEL]: Objection.

THE COURT: Sustained.

Well, can you approach the bench on that last one?

[PROSECUTOR]: Yes.

(Bench conference follows:)

* * *

[PROSECUTOR: H]e's going to say that he did not, that he doesn't request DNA in every case when it's clear to them, you know, who's in possession of something; that they don't do it a lot; that they didn't do it in this case. So I think if that question's going to be asked by the [d]efense, we should be able to clarify it for the jury.

THE COURT: I think it addresses the negligence argument on the part of the police. It certainly doesn't need that. You still have your argument. So I think I'll overrule the objection, and that he can answer why he didn't submit it. And you can go from there. It's a two-edged sword on some of these answers, but I'll leave that up to you folks, how you're going to argue it.

[DEFENSE COUNSEL]: My concern is, I think he was saying, it's my understanding –

THE COURT: Right.

[DEFENSE COUNSEL]: – and that's what concerns me, because what's the basis of that understanding, and counsel –

THE COURT: Well, it could be weak, it could be strong. I don't know, but he's saying this is why he didn't do it. Because you asked him – it is proper redirect because you did ask him, did he submit a form for DNA testing. And I think it's – you've made it relevant, and the whole world lives and dies by some kind of DNA, so I think it's an appropriate area.

[DEFENSE COUNSEL]: I understand the [c]ourt's (unintelligible) I objected.

* * *

(Bench conference concluded.)

THE COURT: All right. I'll reverse myself. Overruled. You can answer.

* * *

[CPL. SMITH:] I deferred to the investigating officer and the State's Attorney's Office in deciding which pieces of evidence are needed for additional testing. From my experience, items that, where the identity of the person that possessed it is known, there's no need for the extra test to be done.

Frazier contends that "the court abused its discretion in admitting Cpl. Smith's testimony on this matter," because the "unfair prejudice of permitting [him] to testify that

the police and . . . State already knew who possessed the PCP outweighed the probative value of the evidence." We disagree. We have stated that the

> trial judge's discretion in controlling the scope of redirect examination is wide. Even inquiry into new matters not within the scope of cross-examination may be permitted, and a party is generally entitled to have his witness explain or amplify testimony that he has given on cross-examination and to explain any apparently inconsistencies. The judge's discretion is particularly wide where the inquiry is directed toward developing facts made relevant during cross-examination or explaining away discrediting facts.

Daniel v. State, 132 Md. App. 576, 583 (2000) (internal citations and quotations omitted). We have further stated that "an investigating police officer may properly testify about the conclusions he draws in the context of an investigation," so "long as the officer is able to provide the basis for his testimony, and the testimony is not inadmissible for other evidentiary reasons." *Id.* at 590.

Here, the State was attempting to have Corporal Smith explain or amplify testimony that he gave on cross-examination and explain any apparent inconsistencies, and the State's inquiry was directed toward developing facts made relevant during the cross-examination or explaining away discrediting facts. The State was generally entitled to elicit this testimony, and the judge's discretion to allow the examination was particularly wide. Also, Corporal Smith's testimony concerned a conclusion that he drew in the context of an investigation, and he was able to provide the basis for that testimony. Such testimony was proper, and hence, the court did not abuse its discretion in allowing the testimony.

III.

Following the close of the evidence, the court instructed the jury, in pertinent part:

> The defendant is charged with a crime of possession of phencyclidine with intent to distribute it. In order to convict the defendant, the State must prove two things. One, that the defendant possessed phencyclidine or PCP and two, that the defendant possessed phencyclidine with the intent to distribute some or all of it.
>
> Distribute means to sell, exchange, or transfer possess[ion] of the substance or to give it away. No specific quantity is required for you to find the intent to distribute. There is no specific amount below which the intent to distribute disappears and there's no specific amount above which the intent to distribute appears. You may consider the quantity of the controlled dangerous substance along with all the circumstances in determining whether the defendant intended to distribute the controlled dangerous substance.
>
> Let's go over one sentence just, it might be little confusing if you're hearing it for the first time. There's not [sic] specific amount below which the intent to distribute disappears. What does that mean? That means there is no small quantity of any drugs where'd you say automatically a person can't have the intent to distribute. So it doesn't disappear because it's low. So, it's going to depend on all of the other factors in the case. And there's no specific amount in which the intent to distribute appears.
>
> So, if the quantity goes up, it doesn't all of a sudden hit a certain line, oh, that's an automatic, that person intended to distribute it. There are factors to consider but there's no automatic disappearance of the intent to distribute and there's no automatic appearance of it when it gets to a certain level. So, if you use it like a water level, let's say you're walking into the bay and you go up to your ankles, that doesn't, oh it's only up to my ankles so there's no intent to distribute the water. No, it doesn't mean that but you would factor in that it's only up to your ankles.
>
> Now you walk in further[,] you walk in up to your neck. Does it automatically mean if you have that much cocaine or whatever it is that there's an automatic intent to distribute? No, but it's a factor that you consider. So, we're talking about an automatic cut-off disappearing or appearing and that's all that means. It doesn't mean you don't consider how much and all the rest of the testimony that you heard. It just means that there's no automatic like at 212 degrees water boils. That's a scientific fact. And at 32 degrees it freezes. That you know. There's no exact science on

> the amount but you look at the amount and you look at all of the factors that you heard in testimony and the evidence.

Following the rest of the court's instructions, defense counsel objected to the aforementioned instruction on the grounds that "[i]t was not read as it's written," "the manner in which it was provided by the [c]ourt overly emphasized the role [of] the amount [and] quantity," and "it was confusing." The court recognized the objection and proceeded to closing argument.

Citing *Joyner-Pitts v. State*, 101 Md. App. 429 (1994), Frazier contends that "[i]n light of the likelihood of confusion resulting from the homespun extended instruction, the court abused its discretion in taking no curative action in response to defense counsel's objection." We disagree. In *Joyner-Pitts*, the court gave a "lengthy, home-spun instruction" on reasonable doubt which failed to "convey[] to the jury the proper degree of certainty that the jury must have in order to find guilt." *Id.* at 437, 444. Reversing Joyner-Pitts's conviction, we stated:

> However laudable it may be to attempt to translate sometimes abstract, sometimes ancient legal concepts and principles into prosaic images intended to better communicate meaning, great care must be exercised in undertaking such experiments, particularly in criminal jury trials. The danger lies, of course, mostly in the potential for unintentionally trivializing these important concepts and principles. We are not unmindful of the leeway that should be accorded trial courts in the matter of jury instructions. We note only that, in this instance, the court went too far in its creativity.

Id. at 442.

Here, the trial court's supplemental instructions that "there's no automatic appearance of [the intent to distribute] when it gets to a certain level" and "[t]here's no exact science on the amount" were consistent with the pattern instruction on possession of

a controlled dangerous substance with intent to distribute.[3] The court also repeatedly emphasized that the quantity of PCP was only one of the circumstances to be considered in determining whether Frazier intended to distribute the PCP. The court did not trivialize the concepts and principles enunciated in the pattern instruction, and hence, the court did not abuse its discretion in so instructing the jury.

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

[3]MPJI-Cr 4:24.1 states:

> The defendant . . . is charged with the crime of possession of [a controlled dangerous substance] with intent to distribute. In order to convict the defendant, the State must prove:
>
> > (1) that the defendant possessed [the controlled dangerous substance]; and
> >
> > (2) that the defendant possessed [the controlled dangerous substance] with the intent to distribute some or all of it.
>
> Distribute means to sell, exchange, or transfer possession of the substance, or to give it away. No specific quantity is required for you to find the intent to distribute. There is no specific amount below which the intent to distribute disappears and there is no specific amount above which the intent to distribute appears. You may find the intent to distribute a substance from the possession of such a quantity of it, which, when considered with all the other circumstances in this case, reasonably indicates the intent to distribute.