Circuit Court for Frederick County
Case No. 10-K-16-058046

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2172

September Term, 2016

TIMOTHY B. MILLER

v.

STATE OF MARYLAND

Meredith,*
Nazarian,
Wells,

JJ.

Opinion by Meredith, J.

Filed: September 24, 2020

*Meredith, J., now retired, participated in the argument and conference of this case while an active member of the Court; after being recalled pursuant to Maryland Constitution, Article IV, Section 3A, he also participated in the decision and adoption of this Opinion.

Timothy Miller, the appellant, filed an unsuccessful motion in the Circuit Court for Frederick County to suppress evidence of cocaine that was found on his person when a police officer searched him after detecting an odor of marijuana on his person during a traffic stop. After the denial of the suppression motion, Miller proceeded to trial via a not-guilty plea to an agreed statement of facts. He was convicted of possession of cocaine with intent to distribute, and sentenced to fifteen years' incarceration.

In this appeal, Miller challenges the denial of his motion to suppress, contending that the police officer lacked probable cause to search or arrest him, and therefore, any evidence obtained from the search of his person should have been suppressed. Based upon the Court of Appeals's recent decision in *Lewis v. State*, ___ Md. ___, No. 44, Sept. Term 2019 (filed July 27, 2020), we agree that the circuit court erred in denying Miller's motion to suppress. We will reverse the judgment.

FACTS AND PROCEDURAL BACKGROUND

At the suppression hearing, Corporal Kevin Riffle, of the Frederick County Sheriff's Office, testified that he was on routine patrol on Interstate 70 westbound in his marked cruiser on the evening of February 7, 2016, when he passed a 2004 PT Cruiser and noticed that the vehicle lacked illumination of the rear license tag. The PT Cruiser was the only other vehicle on the road at the time. Cpl. Riffle stopped the PT Cruiser on the shoulder of the ramp from I-70 to Route 15 northbound. He approached the vehicle and questioned the driver, Nicole Busch, who did not have a driver's license in her possession. Ms. Busch told Cpl. Riffle that she and her three passengers were traveling

from Baltimore to Cumberland. Cpl. Riffle testified that he found Ms. Busch's demeanor, and that of the occupants, to be "overly nervous."

He returned to his cruiser to perform warrant checks on the occupants of the car. He learned that Ms. Busch's license was suspended, and that none of the passengers had a valid license. He began to prepare the paperwork to issue Ms. Busch a citation for driving on a suspended license, as well as a formal warning for her failure to properly illuminate her rear license tag. Upon his initial contact with the vehicle, Cpl. Riffle did not smell or observe any marijuana or other controlled dangerous substance, but he nevertheless called for a K-9 officer because, he said, "[b]ased on the contact with Ms. Busch, the overly nervous behavior, [and] the route, I suspected that there may be another crime occurring in the vehicle—that's why I requested the K-9—specifically a drug crime."

While Cpl. Riffle was writing up Ms. Busch's citation and warning, Officer Brian Payne, of the Frederick Police Department, arrived with his drug dog, "Maaska," and began scanning the PT Cruiser. Maaska alerted on the front passenger side of the car. Cpl. Riffle then asked each of the car's occupants, one at a time, to step out of the vehicle. Miller was the front-seat passenger. Cpl. Riffle testified that, when he walked Miller away from the vehicle and was "standing close to him," Cpl. Riffle could smell marijuana on Miller's person. When the officer informed Miller that he could smell marijuana on him, Miller explained that he "had smoked marijuana earlier." At that point, Cpl. Riffle searched Miller "to attempt to locate the marijuana contraband," and he found

a hard, round object that turned out to be cocaine hidden in Miller's boxer shorts. Miller was charged with possession with intent to distribute cocaine.

Miller filed a motion to suppress in which he argued that Cpl. Riffle lacked probable cause either to arrest him or search him based on the odor of marijuana, and therefore, the court should suppress the evidence discovered during the search.

At the suppression hearing, Cpl. Riffle testified that he had stopped the vehicle because the license plate was not illuminated, and, after he determined that the driver did not have a driver's license in her possession, he requested a K-9 unit come to scan the vehicle for possible drugs. Cpl. Riffle explained that he suspected "a drug crime" because of the driver's "overly nervous behavior, [and] the route," *i.e.*, traveling westbound on I-70 from Baltimore to Cumberland. After the drug dog scanned the car and gave a positive alert, Cpl. Riffle removed the occupants from the car one at a time, beginning with the driver. He described his interaction with Miller as follows:

> Q [BY THE PROSECUTOR:] And what happened when you asked Mr. Miller to exit the vehicle?
>
> A [BY CPL. RIFFLE:] He complied.
>
> Q Okay. Did you make any observations as he was exiting the vehicle?
>
> A As he was exiting the vehicle, I could detect a faint odor of marijuana coming from the vehicle, as I had with Ms. Busch when I asked her to exit the vehicle.
>
> Q And did you ask him about that odor?
>
> A . . . [W]hen we had walked back to my car.
>
> * * *

Q . . . So when you were away from the vehicle, you detected the odor of marijuana coming from Mr. Miller's person?

A Yes.

Q And what, if anything, did you ask him based on that?

A I advised him that I detected the odor of marijuana. I didn't ask him any questions.

Q So you just made that statement?

A Yes.

Q And what, if anything, happened after you made that statement?

A He said that he had smoked marijuana earlier.

Q And what, if anything, did you do based on, on that odor and that statement?

A I conducted a search of his person to attempt to locate the marijuana contraband – if there was any on his person.

Q What, if anything, did you locate on his person at time?

A I located a plastic baggie, round and hard in shape, or round and shapen [sic], packed hard, in his left boxer shorts leg, rolled up inside the leg.

On cross-examination, Cpl. Riffle testified similarly regarding the facts that were known to him at the time he searched Miller's person:

Q [BY DEFENSE COUNSEL:] As you approached [the vehicle after making the stop], did you see [Mr. Miller] making any furtive movements?

A [BY CPL. RIFFLE:] Not that I recall.

Q As you approached, was he doing anything with his hands?

A Not that I recall.

* * *

Q . . . [Based on] your training, if you had approached a car and somebody was hiding their hands, you would have, you would have –

A I would have noticed that.

* * *

Q As you approached the car, was there anything, as you approached, that heightened your, I guess, concern for safety?

A I took general safety precautions based on the, the time of day, it was dark – I'm by myself, but nothing that would have caused me alarm – if that's what you're asking me.

Q Nothing that was particularized to this car, correct?

A Nothing out of the ordinary – that would indicate some heightened level of officer's safety or tactics would be required.

* * *

Q When the K-9 comes, what did you tell him, excuse me, the K-9 officer?

A The reason for the traffic stop, my observations, and requested a K-9 scan.

Q And what were your observations at that point?

A That Ms. Busch, the driver, appeared to be overly nervous as she had a blank stare and that your defendant, Mr. Miller, would not make eye contact with me when I was speaking to him[,] and the route of travel.

* * *

Q After the K-9 did its scan, the officer came up to you and, and told you that the K-9 had alerted.

A Yeah, he said that the K-9 had alerted.

* * *

Q Who was the first [person] to be removed from the car?

A The driver.

* * *

Q You then next went to the passenger's side and took my client out of the car?

* * *

A That's correct. Mr. Miller was the next occupant who was contacted.

* * *

Q Okay. And as you took my client out of the car, that's when you said you smelled a faint odor of marijuana. Okay.

THE COURT: You have to answer out loud.

THE WITNESS: Yes.

Q [BY DEFENSE COUNSEL:] Was it raw marijuana? Was it burnt marijuana?

A Burnt.

Q At that point had you seen in plain view any drug paraphernalia?

A No.

Q Had you seen any, in plain view, any drugs?

A No.

* * *

Q Okay. You bring him back to your, to your cruiser, correct?

A Yes.

Q All right. It's your testimony, then, that you again smelled the faint odor of marijuana coming from his person?

A Yes, as I was standing close to him.

* * *

Q . . . And then at that point you told him that you smelled marijuana, and he, in your words, volunteered he had smoked earlier?

A Yes.

Q Okay. And then you searched my client?

A That's correct.

Q Okay. And then recovered during the search was the plastic bag located in his boxer shorts?

A That's correct.

* * *

Q After you recovered the items [sic], then my client was placed under arrest, correct?

A He was secured in handcuffs before the item was removed.

Q So you searched my client and then handcuffed him and then removed the item?

A I began the search. I located the item that I suspected was contraband based on its location. I secured him in handcuffs because it was going to be very difficult to retrieve while standing in front of him at a disadvantage, safety-wise. So I elected to secure him in handcuffs, because I would be unable to control his hands during the search – and completed the rest of the search and retrieved the contraband.

After the completion of testimony at the suppression hearing, defense counsel argued that the K-9 alert provided the officers probable cause to search the vehicle, "but the courts are also very clear that that does not give you probable cause to search anybody other than the driver." Defense counsel argued that, even after Miller admitted he had smoked marijuana earlier, "there was not probable cause to arrest and that's what we have here . . . because that's the only way the officer can search my client at that point."

The prosecutor argued in response that there was probable cause, stating:

> [PROSECUTOR:] I think, very clearly, there is probable cause. The odor of marijuana is probable cause for an arrest in the State of Maryland. No law has changed about that. The defendant admitted to smoking marijuana. The odor coming from the car was burnt marijuana. I think, very clearly, under existing case law, once the officer smelled that odor of marijuana, once the defendant made that statement, there was probable cause for an arrest, there was probable cause for a search of his –
>
> THE COURT: Well, he says it's only probable cause for arrest of the driver.
>
> [PROSECUTOR]: The odor of marijuana coming from the car, yes, but the, but the officer then smelled the odor of marijuana coming from the, from the defendant, ... [H]e smelled the odor of marijuana coming from the defendant's person, and the defendant then admitted to smoking marijuana.
>
> Marijuana is still contraband in the State of Maryland, Bolling v. State. Court of Appeals case law says it's still contraband and it's still [a] basis for a search. Nothing about this – under, under the case law, nothing about the change in the law has affected search and seizure.
>
> * * *
>
> . . . And I think at that point, very clearly, the officer had probable cause to arrest and search the defendant.

The circuit court then denied the motion, explaining:

> [THE COURT]: . . . Well, I've already ruled on the initial stop. I have no problem with the officer asking for identification of the other passengers, or all of the passengers, because upon stopping he approaches the car and asks for the driver's identification, license, registration, and learns that she's unlicensed or does not have a license at that point. He then asks for identification of others, receives from two, one being the defendant here, and I don't find that that is an unconstitutional request.
>
> He goes back to his car. At that point he makes note of certain observations, that the, the defendant as well as the driver, in particular, were very, very nervous. I-70 is a major route, but it's a major route for, as counsel was trying to get the officer to say, for anybody heading west from Baltimore. The days of going 144 or even 40 just are gone. People don't, don't do that. They travel --- and I travel 70 because, since --- I have sons who live in Baltimore and other, my wife's family is from Baltimore, so we're back and forth that road a good bit. I wouldn't want people to think I'm driving down for drugs just because I'm using 270, though. But I do think that there was enough. There was a second opinion as to that; that is, the K-9 officer provided an independent opinion that there was enough at least for the scan. So I find that the request for the scan is, is proper and the giving of the scan is proper.
>
> The [argument as to the] time frame has been withdrawn, but I would, would note --- and it's withdrawn rightly so, because the, given the fact that --- I think it is appropriate for the officer to, once he learns that the driver is in fact not allowed to drive the vehicle, it is appropriate then to check for the other passengers to see which of them may drive the vehicle, and he set about doing that, and that would have taken some time since he's entering that in one at a time to his computer. But even with that, the, the response time from the city police --- and this is probably, I don't know for a fact, it was not really an issue in the case, but it's probably still within city limits at that point; I think city limits go past 70, although I know the sheriff's office as well as state police have jurisdiction on the interstates --- so, but still, so admirable response time for the K-9 officer, got there, conducted a, a scan, and the dog alerted.
>
> At that point they were going to conduct the search of the car, and in taking people out, he did note he had the smell of burnt marijuana, which suggests, the, that in fact marijuana was smoked within the vehicle as opposed to it just being there, because I believe there was testimony that

> there was a hand-rolled marijuana cigar found in the rear of the car, which, had that been the only --- been all there was to it, then that certainly would not have been an odor of burnt marijuana, which was the point I took --- I didn't really know what was found at the time you were asking the question, but you were asking whether it was raw or burnt smell, and the officer specifically said burnt. And it's that, coupled with the smell that came from the defendant once he's removed from the car and the officer identifies that he has the smell also coming from him, that gives him the probable cause then to conduct the search, and so I will deny the motion.

Following his conviction, Miller noted the instant appeal to this Court. We requested supplemental briefing to address the impact of this Court's decision in *Lewis v. State*, 237 Md. App. 661 (2018), and later stayed Miller's appeal pending the outcome of another pertinent case then pending in the Court of Appeals, *Pacheco v. State*, No. 17, Sept. Term, 2018. We lifted the stay after the opinion was filed on August 12, 2019, in *Pacheco v. State*, 465 Md. 311 (2019), and we then received further briefing regarding the effect of that case on this appeal. In the meantime, *certiorari* was granted in *Lewis*, and that case was argued in the Court of Appeals in January 2020. As noted above, the Court of Appeals filed its opinion in *Lewis* on July 27, 2020. We view the holding in *Lewis* as dispositive of the issue in this appeal.

STANDARD OF REVIEW

In *State v. Wallace*, 372 Md. 137, 144 (2002), the Court of Appeals described the standard of appellate review of the denial of a motion to suppress 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 trial court's factual findings unless they are clearly erroneous.

(Citations omitted.)

DISCUSSION

In *Lewis*, the Court of Appeals held: "[M]ore than the odor of marijuana is required for probable cause to arrest a person and conduct a search incident thereto." Slip op. at 9-10. Pertinent to this case, the Court of Appeals held that Lewis's motion to dismiss should have been granted: "Consistent with our decision in *Pacheco*, we hold here that the mere odor of marijuana emanating from a person, without more, does not provide the police with probable cause to support an arrest and a full-scale search of the arrestee incident thereto." *Id*. at 21. The Court of Appeals concluded its opinion in *Lewis* by stating:

> The Fourth Amendment's protection against unreasonable searches and seizures prohibits law enforcement officers from arresting and searching a person without a warrant based solely upon the odor of marijuana on or about that person. Probable cause to conduct a lawful arrest requires that the arrestee committed a felony or was committing a felony or misdemeanor in a law enforcement officer's presence. Possession of less than ten grams of marijuana is a civil offense, not a felony or a misdemeanor[;] therefore law enforcement officers need probable cause to believe the arrestee is in possession of a criminal amount of marijuana to conduct a lawful arrest. The odor of marijuana alone does not indicate the quantity, if any, of marijuana in someone's possession.

Slip op. at 21-22.

In the instant case, Cpl. Riffle did not smell marijuana until after the K-9 had already alerted on the vehicle. The Court of Appeals held in *Wallace*, 372 Md. at 156, that, although an alert by a qualified K-9 does allow an officer to search *the car* without a warrant, it does not suffice as probable cause to arrest and search *a passenger*. In *Wallace*, the Court said: "[W]hen a properly trained canine alerts to a vehicle indicating the likelihood of contraband, sufficient probable cause exists to conduct a warrantless 'Carroll' search of the vehicle." *Id*. at 146. "In this opinion we focus solely on the narrow question of whether the police officers had probable cause to search respondent, who was not the owner or driver but a mere passenger of the automobile, based only upon a positive canine alert that drugs were somewhere in the interior of the automobile." *Id*. The Court concluded in *Wallace*: "[T]he canine sniff of the vehicle alone did not amount to probable cause to then search each of the passengers" *Id*. at 156. "Without additional facts that would tend to establish respondent's knowledge and dominion or control over the contraband before his search, the K-9 sniff of the car was insufficient to establish probable cause for a search of a non-owner, non-driver for possession." *Id*. at 156.

In this case, the only "additional facts" known to Cpl. Riffle about Miller after the K-9's alert was the fact that there was an odor of marijuana coming from Miller's person, and Miller admitted that he had smoked marijuana earlier. *Lewis* held that an odor of marijuana emanating from a person is not sufficient to justify a warrantless search "without more." Slip op. at 21.

Cpl. Riffle testified that he did not smell marijuana on Miller at first, but after he walked Miller to his cruiser, Cpl. Riffle detected an odor of marijuana coming from Miller's person. When Miller was told of the odor, he acknowledged that he had smoked marijuana "earlier." That vague admission did not provide the "something more" than odor required by *Lewis* to establish probable cause for Cpl. Riffle to believe that Miller was committing a crime in his presence. *See Lewis*, slip op. at 21-22. As the Court of Appeals held in *Lewis*, the information known to Cpl. Riffle before he searched Miller was not sufficient to indicate the quantity of marijuana, if any, then in Miller's possession. (Indeed, it turned out that, despite the odor, there was *no* marijuana in Miller's possession at the time of the search.)

As in *Lewis*, the officer did not have probable cause to arrest Miller for illegal possession of marijuana, and did not have probable cause to conduct a warrantless search of his person. Accordingly, the motion to suppress should have been granted. And, because there would have been no charge against Miller but for the evidence discovered during that search, we will reverse the judgment of the Circuit Court for Frederick County.

JUDGMENT OF THE CIRCUIT COURT FOR FREDERICK COUNTY REVERSED. COSTS TO BE PAID BY FREDERICK COUNTY.