UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2742

September Term, 2013

TERRANCE JAMAL GRANT

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Alpert, Paul E.
(Retired, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: July 24, 2015

Following denial of his motion to suppress, appellant, Terrance Jamal Grant, was convicted in the Circuit Court for Frederick County, Maryland, via a not guilty plea on an agreed statement of facts, to possession of marijuana. He was sentenced to thirty days, all suspended, to be followed by one year unsupervised probation. Appellant presents the following question for our review:

> Did the court err in denying appellant's motion to suppress where the officer conducted a warrantless search of a car during a traffic stop by sticking his head through the window?

For the following reasons, we shall affirm.

BACKGROUND

At approximately 6:03 p.m. on May 23, 2013, Deputy First Class Chad Atkins, of the Frederick County Sheriff's Office, was on patrol on Worthington Boulevard in an unmarked police vehicle when he observed a Saab being driven by appellant. Because the vehicle appeared to be speeding, Deputy Atkins, a certified radar and laser operator, activated his radar and determined that the Saab was traveling at a speed of 50 miles per hour in a 35 mile per hour zone. Deputy Atkins activated his emergency equipment and stopped appellant's vehicle for the traffic violation.

With traffic passing by the driver's side door, Deputy Atkins approached the passenger side of appellant's vehicle. Upon Deputy Atkins' initial contact with appellant, the officer could smell the odor of marijuana emanating from the vehicle. Deputy Atkins was familiar with the smell of marijuana from over 100 hours of police training and having made 100 drug-related arrests.

Testifying that the weather was "becoming windy" and that the smell of marijuana "quickly dissipated," Deputy Atkins decided to call a K-9 unit that he knew was nearby. He returned to his vehicle to begin the paperwork for the traffic stop and, at the same time, called for Corporal Eyler to respond with his K-9 partner. Atkins estimated he called for the K-9 at about two to three minutes after he initiated the stop, and Corporal Eyler arrived approximately 15 minutes later. Deputy Atkins conceded that, at this point during the stop, he was now engaged in a drug investigation.

Corporal Eyler arrived on the scene at around the same time Deputy Atkins completed his paperwork for the traffic violation and had run wanted and license checks. Deputy Atkins then exited his vehicle, approached appellant's vehicle, and asked appellant to step out of the Saab. Appellant and Deputy Atkins then stood behind the Saab, in front of Atkins' police vehicle, and Corporal Eyler began the scan of the Saab with his K-9 partner. Appellant was "calm and cooperative," was not placed in handcuffs, and Deputy Atkins had not displayed his weapon at any time during this encounter.

While Corporal Eyler was conducting the scan, Deputy Atkins told appellant that he smelled an odor of marijuana coming from the Saab. Appellant then told Deputy Atkins that there was, in fact, a pipe and a small amount of marijuana in the center console of his vehicle. Less than a minute later, Corporal Eyler completed his scan and informed Deputy Atkins that his K-9 partner alerted on the odor of narcotics coming

from appellant's vehicle. Deputy Atkins then searched appellant's vehicle and found a film canister containing suspected marijuana, as well as a smoking device containing burnt marijuana residue in the center console. Appellant was then placed under arrest. However, appellant ultimately left the scene on his own after Deputy Atkins simply issued him a criminal citation.

On cross-examination, defense counsel attempted to clarify when, precisely, Deputy Atkins first smelled the odor of marijuana. After testifying again that he smelled the marijuana on "initial contact," the following ensued on further cross-examination:

> Q. Okay. Ah, so the point at which you, you allege you smelled marijuana was when you kind of leaned in to get his, get his license and registration?
>
> A. If you call it leaning, it's when he rolled down his window and I made con– when I was speaking with him.
>
> Q. Okay. Do you recall how you, how you positioned yourself when you were speaking with him?
>
> A. Like I, I, I don't know how to explain it 'cause I do it on every single stop that I have. I, you know, put my head, he, they have the, they roll the window down and I have my head by their window. And –
>
> Q. Okay. Do you recall if your head entered the window or not?
>
> A. I don't know if my head entered through the window plane or not. I wouldn't of, you know, it, I, I don't know. Honestly.
>
> Q. Okay. You wouldn't be surprised to find out that it did.
>
> A. If I had crossed where the window glass was? No –

Q. Where the, where the pane –

A. – because sometimes –

Q. – would have been –

[PROSECUTOR]: Objection, Your Honor.

THE COURT: Let, let him answer. One at a time. We have all morning to finish the (unclear – one word). Go ahead.

BY [DEFENSE COUNSEL]:

Q. Thank you.

A. No, I, the, wouldn't, I wouldn't be surprised.

After watching a DVD of the stop, appellant contended that there was an illegal search when Deputy Atkins first approached the Saab and placed his head inside the vehicle's window. Appellant further argued the stop was unduly prolonged to await the arrival of the drug detection dog and that this violated the Fourth Amendment. The State responded that this traffic stop soon became a narcotics investigation after Deputy Atkins initially smelled the odor of marijuana and that the odor provided "at a minimum," reasonable articulable suspicion to justify appellant's detention.

After a brief recess, the court denied the motion to suppress finding, in pertinent part, as follows:

> On the date in question Deputy Atkins was on routine patrol in Frederick County, Maryland. While on routine patrol he observed a vehicle being driven by a person who we later discovered to be the Defendant, Mr. Grant, that was, appeared to be, to him to be exceeding the posted speed. Deputy

> Atkins was going in the opposite direction on Worthington Boulevard in Urbana and he did a U-turn and pulled the vehicle over. He approached the vehicle on the passenger side of the vehicle. The window was rolled down. The Defendant was in the driver's side, he was the only person in the vehicle. Deputy Atkins asked for his of course license and registration and during that process his, from the video his head appeared to have intruded somewhat into the window space, into the interior of the Defendant's car. The testimony of Deputy Atkins was that he didn't recall whether his head went in the vehicle or not. It was very possible (unclear) head would have broken the plane and it was at some point, it was not clear whether it was when his head was inside or when the window was rolled down, he smelled what he believed based on his training and experience smelled like marijuana. But he also testified that it dissipated rather quickly.

The court continued that, although there then existed probable cause to search the vehicle based on the smell of marijuana, Deputy Atkins decided not to do so because the odor dissipated. Nevertheless, the court ruled that "it did create an articulable suspicion which was reasonable under the circumstances to detain the Defendant for further investigation until a K-9 unit could arrive." The court found that the K-9 arrived within 20 minutes of the initial stop and that this period of detention was reasonable considering all the circumstances, including the odor of marijuana emanating from appellant's vehicle. The court also ruled that appellant's statements were admissible because appellant was not in custody at the time he volunteered that there was marijuana in the center console of the vehicle.

DISCUSSION

On appeal, appellant does not contest the lawfulness of the initial stop or its duration, but instead, contends that the court erred in denying his motion to suppress because Deputy Atkins conducted a warrantless search of his vehicle by placing his head through the passenger side window and then smelling marijuana. The State responds that, given that the motions court found that it was unclear when Deputy Atkins' head was inside the vehicle's window, that under principles of appellate fact-finding review, we should conclude that the officer smelled the marijuana before he placed his head in the window and that there was no warrantless search. The appellant, in turn, replies, that the motion court's finding that it was unclear when Atkins' head entered the vehicle, in relation to when he smelled marijuana, means that the State failed to meet its burden to show that this was not an illegal search.

The Court of Appeals has described the standard of review to be applied in motions to suppress:

> When we review a trial court's grant or denial of a motion to suppress evidence alleged to have been seized in contravention of the Fourth Amendment, we view the evidence adduced at the suppression hearing, and the inferences fairly deducible therefrom, in the light most favorable to the party that prevailed on the motion. We defer to the trial court's fact-finding at the suppression hearing, unless the trial court's findings were clearly erroneous. Nevertheless, we review the ultimate question of constitutionality *de novo* and must make our own independent constitutional appraisal by reviewing the law and applying it to the facts of the case.

Corbin v. State, 428 Md. 488, 497-98 (2012) (citation and internal quotation omitted).

The Court of Appeals has also explained what should be considered in evaluating a traffic stop under the Fourth Amendment of the United States Constitution:

> Where the police have probable cause to believe that a traffic violation has occurred, a traffic stop and the resultant temporary detention may be reasonable. *See Whren v. United States*, 517 U.S. 806, 810, 116 S.Ct. 1769, 1772, 135 L.Ed.2d 89, 95 (1996). A traffic stop may also be constitutionally permissible where the officer has a reasonable belief that "criminal activity is afoot." *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889, 911 (1968). Whether probable cause or a reasonable articulable suspicion exists to justify a stop depends on the totality of the circumstances. *See United States v. Cortez*, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981).

Rowe v. State, 363 Md. 424, 433 (2001).

And, the Supreme Court has recently reaffirmed:

> The Fourth Amendment permits brief investigative stops – such as the traffic stop in this case – when a law enforcement officer has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417-418, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); *see also Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The "reasonable suspicion" necessary to justify such a stop "is dependent upon both the content of information possessed by police and its degree of reliability." *Alabama v. White*, 496 U.S. 325, 330, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990). The standard takes into account "the totality of the circumstances – the whole picture." *Cortez, supra*, at 417, 101 S.Ct. 690. Although a mere "'hunch'" does not create reasonable suspicion, *Terry, supra*, at 27, 88 S.Ct. 1868, the level of suspicion the standard requires is "considerably less than proof of wrongdoing by a preponderance of the evidence," and "obviously less" than is necessary for probable cause, *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989).

Navarette v. California, 572 U.S. __, 134 S. Ct. 1683, 1687 (2014); *see also Wilson v. State*, 409 Md. 415, 427-428 (2009) ("In assessing whether a search or seizure was

reasonable, '[t]he touchstone of our analysis under the Fourth Amendment is always "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security."'" (citations omitted)).

We begin our analysis by observing that both the appellant and the State have focused their arguments on when Deputy Atkins smelled the odor of marijuana emanating from the appellant's vehicle, suggesting that this is the dispositive moment in the entire encounter. Although our standard of review of this stop requires us to assess the totality of the circumstances, we shall first summarize the parties' arguments.

Appellant recognizes that "odor is a valid consideration in the probable cause analysis." *Bailey v. State*, 412 Md. 349, 376 (2010); *see also Ford v. State*, 37 Md. App. 373, 377-78 (1977) (concluding that smell of marijuana provided probable cause to believe vehicle contained contraband). Relying on an extension of the "plain view" doctrine, appellant also observes that evidence in "plain smell" may be detected without a warrant, so long as the officer makes the "observations from a vantage point he rightfully occupies." *Fitzgerald v. State*, 153 Md. App. 601, 672 (2003) (citation omitted), *aff'd*, 384 Md. 484 (2004). Notably, under the "plain view" doctrine:

> (1) the police officer's initial intrusion must be lawful or the officer must otherwise properly be in a position from which he or she can view a particular area; (2) the incriminating character of the evidence must be "immediately apparent;" and (3) the officer must have a lawful right of access to the object itself.

Wengert v. State, 364 Md. 76, 88-89 (2001).

Pertinent to appellant's argument, the Supreme Court has held that, following a stop of a vehicle for observed traffic violations, when a police officer reaches into a vehicle to move papers that were obscuring a Vehicle Identification Number, that constitutes a search under the Fourth Amendment. *New York v. Class*, 475 U.S. 106, 114-15 (1986). The Court explained that although a vehicle's interior "is not subject to the same expectations of privacy that exist with respect to one's home," the vehicle interior "as a whole is nonetheless subject to Fourth Amendment protection from unreasonable intrusions by the police." *Id. See also United States v. Jones*, 132 S. Ct. 945, 949 (2012) (holding that installation of a GPS device to the exterior of a vehicle constitutes a search).

Other courts have held that, when an officer places his head into a car during a traffic stop and then smells marijuana, that constitutes a search under the Fourth Amendment. *See e.g., United States v. Ryles*, 988 F.2d 13, 15 (5th Cir. 1993) ("Irrespective of when he smelled the marijuana, Washington, without a search warrant, intruded inside a space that, under most circumstances, is protected by a legitimate expectation of privacy"), *cert. denied*, 510 U.S. 858 (1993); *United States v. Montes-Ramos*, 347 F. App'x 383, 389-90 (10th Cir. 2009) (concluding that, after officer noticed a burlap bag inside a stopped vehicle that he suspected contained drugs, that officer's act of then placing his head inside the vehicle to smell constituted a search); *State v. Hicks*, 749 P.2d 1221, 1224 (Or. Ct. App. 1988) (holding that officer's placing of

head inside vehicle window and then detecting odor of marijuana was an unreasonable search, and also and rejecting officer's claim that he did so for purposes of officer safety where there were no "specific and articulable facts to justify a reasonable suspicion that this defendant posed an immediate threat of injury to the officer or others present"). However, even in some of these same cases, courts have held that the overall stop may still be reasonable under the Fourth Amendment. *See New York v. Class*, 475 U.S. at 117-18 (holding that the search was reasonable under the circumstances, including the fact that the intrusion was minimal, the safety of the officers was served by that intrusion, and because the officer had some probable cause focusing on the a suspect due to the observed traffic violations);*United States v. Ryles*, 988 F.2d at 15 (ultimately holding that it was not unreasonable for officer to approach the vehicle where the driver smelled of alcohol and admitted he had no driver's license).

Our case of *Cruz v. State*, 168 Md. App. 149 (2006), is instructive. In that case, during the course of a K-9 scan, the K-9 briefly placed its paws on an open window, stuck its nose inside the vehicle, sniffed, and then alerted to the presence of drugs. *Cruz*, 168 Md. App. at 156, 160. Cruz argued that, because the dog's head entered the vehicle before the alert, that this was an illegal search. *Id.* at 158. This Court held that the scan was nevertheless lawful, reiterating that " a positive alert by a drug dog during an *exterior* scan of a vehicle gives rise to probable cause to search that vehicle." *Cruz*, 168 Md. App. at 161 (emphasis added). We recognized that some courts had held that a "dog's entry

into the *interior* of a vehicle during a canine scan constituted an unreasonable search" *id.* at 167 (emphasis added), but we also noted that those decisions included "evidence that the handler facilitated or encouraged the dog's entries into the vehicles." *Id.* Because there was no such evidence in *Cruz*, this Court affirmed. *Id.* at 168.

From these cases, we are persuaded that when an officer, just like a drug dog encouraged by its K-9 handler, intentionally enters a vehicle in order to sniff for contraband, then, absent some independent justification, there has been an illegal search under the Fourth Amendment. Indeed, we note that the State does not contend otherwise in its brief.

Instead, the State suggests that, in this case, the court's finding was ambiguous as to when, exactly, Deputy Atkins first smelled the marijuana. The court stated "it was *not clear* whether it was when his head was inside or when the window was rolled down, he smelled what he believed based on his training and experience smelled like marijuana." (emphasis added). The State then posits that we must look to supplemental rules of appellate review. This Court has stated that "the basic rule of fact-finding review, therefore, is that the appellate court will defer to the fact-findings of trial judge or jury whenever there is *some* competent evidence which, if believed and given maximum weight, could support such findings of fact. That is the prime directive." *Morris v. State*, 153 Md. App. 480, 489 (2003) (emphasis added). Recognizing, however, that the fact-finding may be ambiguous, we have also set forth the following guidelines:

> In determining whether the evidence was sufficient, as a matter of law, to support the ruling, the appellate court will accept that version of the evidence most favorable to the prevailing party. It will fully credit the prevailing party's witnesses and discredit the losing party's witnesses. It will give maximum weight to the prevailing party's evidence and little or no weight to the losing party's evidence. It will resolve ambiguities and draw inferences in favor of the prevailing party and against the losing party. It will perform the familiar function of deciding whether, as a matter of law, a prima facie case was established that could have supported the ruling.

State v. Ofori, 170 Md. App. 211, 217 (2006) (emphasis omitted, quoting *Morris*, 153 Md. App. at 489-90)).

Appellant replies that the court's statement that it was "not clear" when Deputy Atkins smelled the odor of marijuana was not an ambiguous statement, but instead, was a explicit finding. Accordingly, because it was the State's burden to justify the warrantless search and arrest in this case, appellant maintains that the motions court erred. *See Epps v. State*, 193 Md. App. 687, 704 (2010) ("Where, as in this case, the search in issue was warrantless, the burden of justifying such a warrantless search shifts to the State").

Looking to the record, Deputy Atkins maintained in his testimony that he could smell the odor of marijuana emanating from the vehicle upon "initial contact." But, on cross-examination, he conceded that he did not know if he placed his head through the vehicle's passenger side window while he was speaking with appellant. And, the video of the encounter, included with the record on appeal, shows that the officer did, in fact, place his head inside the vehicle at some point. From all this, the motions court stated that it was "not clear" when the officer smelled the odor of marijuana.

We are not persuaded that the court's statement was an express finding that the State failed to meet its burden in this case. Instead, the court's statement reflected the ambiguous nature of the evidence. As we have previously explained, we resolve any ambiguity by looking to the officer's testimony that he smelled the marijuana upon "initial contact." This can be interpreted to mean that Deputy Atkins detected the tell-tale odor of marijuana before he placed his head in the vehicle's window. If this was the case, and we must interpret the evidence in the light most favorable to the State, then there was no warrantless search of appellant's vehicle. Although there existed, at that moment, probable cause for Deputy Atkins to arrest appellant and search the vehicle he did not do so. Instead, he took the extra precaution of calling for a K-9 to respond to the scene to confirm his reasonable suspicion that criminal activity was afoot. Then he placed appellant placed under arrest and searched the vehicle. Under the totality of the circumstances, the stop and search were reasonable.

THE JUDGMENT OF THE CIRCUIT COURT FOR FREDERICK COUNTY IS AFFIRMED. APPELLANT TO PAY COSTS.