UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1528

September Term, 2015

HEZE JONES, JR.

v.

STATE OF MARYLAND

Krauser, C.J.,
Wright,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: November 9, 2016

On March 15, 2014, police stopped and searched a vehicle driven by appellant, Heze Jones. Appellant and the other passengers in his vehicle were also personally searched, leading to the discovery of a controlled dangerous substance ("CDS") on appellant. The trial court suppressed the evidence found during this search after concluding that the search had violated the Fourth Amendment. The evidence recovered from that search was also used to obtain two subsequent arrest warrants for appellant, both of which led to the discovery of significant amounts of heroin and cocaine in appellant's possession. The trial court declined to suppress this evidence under the good faith exception to the exclusionary rule. After a trial in the Circuit Court for Carroll County, appellant was convicted of both possession with intent to distribute heroin and possession with intent to distribute cocaine. Appellant appealed his convictions, and now presents one question for our review:

Did the lower court err in denying the motions to suppress?

For the following reasons, we answer yes to the question and reverse the judgments of the circuit court and remand to the circuit court for further proceedings if the State believes it has evidence independent of the searches that would justify a new trial.

BACKGROUND

On the night of March 15, 2014, Officer Corey Lightner of the Westminster Police Department conducted a traffic stop of a white Buick for a broken headlight. Officer Lightner approached the vehicle and found appellant behind the wheel, along with three

other passengers. Officer Lightner detected "the faint odor of marijuana burnt" and called for a canine unit to respond. The occupants were removed from the vehicle while the canine scan was conducted. After the canine gave a positive alert, the officers searched the car. When no drugs were found in the car, the officers then searched the occupants. The search of appellant revealed that he possessed a large amount of cash and synthetic marijuana in a green foil package labelled "Scooby Snacks." Officer Lightner seized the Scooby Snacks because they are known to sometimes contain XLR-11, which is classified as CDS. Because Officer Lightner did not know if the Scooby Snacks contained the illegal substance, appellant and the other passengers were allowed to leave. Over two months later, lab tests came back confirming that appellant's Scooby Snacks contained XLR-11. Based on this discovery, Officer Lightner applied for charges against appellant, and a commissioner issued an arrest warrant on June 4, 2014. Appellant was charged with possession of XLR-11 and possession of drug paraphernalia.

The next day, June 5, 2014, Officer Lightner arrested appellant pursuant to the warrant. Officer Lightner conducted a search incident to appellant's arrest, and again found a large sum of cash and Scooby Snacks on appellant. Appellant was then taken to the police station and searched again, where officers found eighty-seven grams of heroin on him. A search of appellant's vehicle yielded another large amount of cash and CDS paraphernalia, the kind of which is typically used for drug distribution. Appellant was charged with possession of heroin, possession with intent to distribute heroin, and possession of drug paraphernalia.

The Scooby Snacks found on appellant's person were also taken to a lab and tested positive for XLR-11. Based on those results, Officer Lightner obtained another arrest warrant for appellant on August 28, 2014. On September 3, 2014, Officer Laser[1] identified appellant driving an Acura. Officer Laser had no involvement in the prior investigations of appellant, but was aware that appellant had an open arrest warrant. Officer Laser conducted a traffic stop and arrested appellant. A search incident to arrest revealed thirty-four pieces of cocaine and twenty-five pieces of heroin on appellant's person, as well as a large amount of cash. Appellant was charged with possession with intent to distribute heroin, possession with intent to distribute cocaine, and possession of drug paraphernalia.

Appellant moved to suppress all of the evidence that had been seized from him. Appellant argued that the positive canine alert on March 15, 2014 gave the police the right to search his car, but not the right to search his person; therefore, that evidence should be suppressed. Additionally, appellant argued that each subsequent piece of evidence was inadmissible fruit of the poisonous tree, because none of the later discovered evidence would have been found were it not for the first illegal search on March 15, 2014. The State argued that the smell of marijuana and canine alert gave Officer Lightner probable cause to arrest and search appellant. Alternatively, the State argued that even if the initial search was invalid, the evidence seized later was admissible because the later searches were sufficiently attenuated from the first search and were also

[1] There is no first name in the record.

based on valid warrants and, thus, admissible under the good faith doctrine. The circuit court suppressed the evidence found at the initial search on the basis that appellant was never arrested, thus there was no search incident to arrest. The court declined to suppress the remaining evidence, concluding that it was admissible under the good faith doctrine.

The State nol prossed all counts related to the suppressed evidence from the March 15 search. The parties proceeded to trial on an agreed statement of facts on two remaining charges: (1) possession with intent to distribute heroin from the June 5 arrest and (2) possession with intent to distribute cocaine from the September 3 arrest. The court found appellant guilty on both counts. The State nol prossed the remaining charges. Appellant was sentenced to fifteen years of incarceration, with all but ten years suspended without the possibility of parole for the cocaine conviction. Appellant was sentenced to a concurrent fifteen-year sentence, with all but five years suspended without the possibility of parole for the heroin conviction.

STANDARD OF REVIEW

> 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.

State v. Wallace, 372 Md. 137, 144 (2002) (Internal citations omitted).

DISCUSSION

The exclusionary rule prohibits the use of evidence seized during an unlawful search. *Wong Sun v. United States*, 371 U.S. 471, 484 (1963). Although searches conducted without a warrant typically constitute unlawful searches, there are certain exceptions in which warrantless searches are permissible. One such exception is the warrantless search of an automobile, under appropriate circumstances. *King v. State*, 16 Md. App. 546, 550 (1973). Another exception is a search conducted incident to a lawful arrest. *State v. Funkhouser*, 140 Md. App. 696 (2001).

The initial search of appellant on March 15, 2014 was conducted after a positive canine alert for drugs in his vehicle. Although no drugs were found inside the vehicle, Officer Lightner searched appellant and found what was later determined to be CDS. This discovery ultimately led to two arrest warrants being issued for appellant, both of which led to the discovery of more drugs on appellant. The State argued that the March 15 search was a proper search incident to arrest, a claim which the trial court rejected.

As the trial court articulated in its order, regardless of whether or not the canine alert gave the police probable cause to arrest appellant, they still needed to actually arrest him in order to conduct a search incident to arrest. Instead, appellant was simply

removed from his car and then searched. At no point was he handcuffed, nor was he ever told that he was under arrest.

On this particular issue, we have stated:

> 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.

Id. at 724-25 (Emphasis added). Without an actual arrest, there can be no lawful search incident to arrest. Accordingly, we agree with the trial court that the search was invalid because it did not follow an arrest. The issue before us then is whether the evidence from the two later searches was properly admitted.

I. First Arrest – June 5, 2014

The arrest, and subsequent search incident to arrest, of appellant on June 5, 2014 was done pursuant to a warrant. The arrest warrant was granted based on the evidence that was found during the invalid March 15, 2014 search. Evidence obtained during a prior illegal search may not be used as probable cause in a later warrant. *Carroll v. State*, 335 Md. 723, 728 (1994). "Under the 'fruit of the poisonous tree' doctrine, evidence tainted by Fourth Amendment violations may not be used directly or indirectly against the accused." *Miles v. State*, 365 Md. 488, 520 (2001). When appellant was searched on June 5, 2014, he was found with a significant amount of heroin. Under the fruit of the poisonous tree doctrine, this derivative evidence must be excluded unless an exception applies.

The trial court found that the good faith exception to the exclusionary rule applied. The good faith exception provides that the exclusionary rule shall not be used as a bar to evidence when that evidence is obtained by officers acting in reasonable reliance on a warrant issued by a detached and neutral magistrate, even when that warrant is ultimately found to be invalid. *United States v. Leon*, 468 U.S. 897, 919-21 (1984). In *Leon*, the Supreme Court concluded "that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated [ ] warrant cannot justify the substantial costs of exclusion." *Id.* at 922. Therefore, "[i]n the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." *Id.* at 926.

We have identified limits in the application of the good faith exception, most recently in *State v. Andrews*, 227 Md. App. 350 (2016). Much like the instant case, the police in *Andrews* used evidence from a Fourth Amendment violation as the basis for a search warrant. *Id.* at 355-56. The *Andrews* Court held that "[b]ecause the antecedent Fourth Amendment violation by police provided the only information relied upon to establish probable cause in their warrant application, those same officers cannot find shelter in the good faith exception, and the evidence seized in that search withers as fruit of the poisoned tree." *Id.* Therefore, when an antecedent Fourth Amendment violation is

the only basis for a warrant, "the fruit of the poisoned tree doctrine does, indeed, trump alleged good faith reliance on the part of [the police]." *Id.* at 419.

The *Andrews* holding is controlling in the instant case. The only evidence used in support of appellant's arrest warrant was obtained in violation of the Fourth Amendment. Consequently, the police cannot find shelter in the good faith exception. The fruit of the poisonous tree doctrine applies and the evidence recovered during appellant's June 5, 2014 arrest should have been suppressed.

Although the trial court only admitted the evidence under the good faith exception, we must note that the State has argued, both at trial and on appeal, that the evidence was also admissible because its discovery was sufficiently attenuated from the first improper search. We disagree. The attenuation doctrine recognizes

> that it is possible that the challenged evidence can become so attenuated as to dissipate the taint of the initial illegal activity. The attenuation doctrine is a method to determine whether there exists a strong enough causal connection between the primary taint and the challenged evidence to require the exclusion of that information.

Cox v. State, 194 Md. App. 629, 656-57 (2010), *aff'd*, 421 Md. 630 (2011) (Citations and internal quotation marks omitted). The first arrest warrant was based solely on the fact that Officer Lightner had recovered CDS from appellant during the first illegal search. There was no other independent basis for the arrest and search of appellant on June 5, 2014. Accordingly, we reject the notion that the arrest was sufficiently attenuated from the first search.

II. Second Arrest – September 3, 2014

Appellant's second arrest occurred three months later. The probable cause that served as the basis for this warrant was the evidence seized during his previous arrest, which itself was the derivative result of improperly obtained evidence from the original search. For the same reasons stated *supra* for the June arrest, neither the good faith exception nor the attenuation doctrine apply to the evidence seized during appellant's September 3, 2014 arrest. Although the arresting officer in this instance was unconnected to the two previous searches, the only basis for the warrant was still the derivative result of a Fourth Amendment violation. Therefore, the principle set forth in *Andrews* is controlling, and the fruit of the poisonous tree doctrine trumps any good faith reliance on the warrant by Officer Laser. See *Andrews*, 227 Md. App. at 419. The evidence recovered during the September 3, 2014 arrest should have been suppressed.

JUDGMENTS OF THE CIRCUIT COURT FOR CARROLL COUNTY REVERSED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY THE CARROLL COUNTY.