UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0271

September Term, 2015

ANTIONNE LEON STEPHENSON

v.

STATE OF MARYLAND

Kehoe,
Leahy,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: March 3, 2016

On March 31, 2015, Antionne Leon Stephenson ("Appellant"), entered a conditional guilty plea[1] in the Circuit Court for Wicomico County to possession with intent to distribute heroin and was sentenced to fifteen years of incarceration with all but ten years suspended. The ten year active sentence was a mandatory minimum with limited possibility of parole, pursuant to Md. Rule 5-608(b). The court also imposed a three year period of supervised probation upon release. Appellant asks this Court to consider whether the trial court erred in denying Appellant's motion to suppress evidence seized from his vehicle following a traffic stop.[2]

We conclude that the purpose of the lawful stop of Appellant's vehicle was not completed before the K-9 positively alerted on the vehicle and, therefore, there was no second detention of Appellant for which additional probable cause was needed. As such, we find no error and affirm.

[1] Appellant's plea was entered pursuant to Md. Rule 4-242 (d) which reads in pertinent part:

> With the consent of the court and the State, a defendant may enter a conditional plea of guilty. The plea shall be in writing and, as part of it, the defendant may reserve the right to appeal one or more issues specified in the plea that (A) were raised by and determined adversely to the defendant, and, (B) if determined in the defendant's favor would have been dispositive of the case. The right to appeal under this subsection is limited to those pretrial issues litigated in the circuit court and set forth in writing in the plea.

[2] The Appellant phrased the question as:

Did the trial court err in denying Appellant's motion to suppress?

BACKGROUND

On September 18, 2014, Corporal Richard Hagel, Jr. and Trooper Mike Porta stopped Appellant for a traffic violation. During the traffic stop, a K-9 unit arrived and performed a scan of the vehicle, positively alerting to the presence of a controlled dangerous substance. In a subsequent search of the vehicle, a baggie of heroin and numerous empty baggies were recovered. After his arrest, another baggie of heroin was discovered on his person. Prior to trial, Appellant moved to suppress the heroin found both in his vehicle and on his person.

Suppression Hearing

On March 27, 2015, the circuit court held a hearing on Appellant's motion to suppress. Appellant's counsel specified that he was not challenging the sufficiency of the stop itself, but argued that the police did not have "reasonable articulable suspicion to warrant calling in the K-9."

Trooper Porta and Corporal Hagel testified to the following events. At approximately 11:18 a.m. on September 18, 2014, Corporal Hagel and Trooper Porta were on patrol together in the area of Route 13 and Naylor Mill Road in Salisbury when they saw a Lincoln Town Car change lanes during a turn and fail to use a turn signal. Corporal Hagel then initiated a traffic stop of the Lincoln for "failure to use a turn signal and failure to remain in the same lane throughout his turn." Corporal Hagel and Trooper Porta made contact with Appellant, who was the driver and sole occupant of the vehicle. Corporal Hagel testified that Appellant appeared "extremely nervous." He elaborated: "His hands were shaking when he handed over his documents. Failure [sic] to make eye contact when

we were speaking with him regarding the violations. And his speech was cracking a little bit when he was talking." During this conversation, Corporal Hagel asked Appellant for his identification and the vehicle's registration card. Appellant did not have a drivers' license, and produced only a learner's permit and registration card. Corporal Hagel took those items back to his vehicle to conduct a "warrant check" and a "traffic check" while Trooper Porta stayed with Appellant.

Believing, based upon these violations and his observations of Appellant's extra-ordinary nervousness, "that criminal activity was afoot far more than just a traffic violation," Corporal Hagel requested a K-9 unit respond to the scene. The K-9 took "[m]aybe 7, 8 minutes, if that" to arrive. Corporal Hagel was still in his vehicle running Appellant's criminal history when Corporal Thomas Esham of the Delmar Police Department arrived with his K-9 partner. After briefly talking with Corporal Hagel regarding the situation, Corporal Esham asked Appellant to exit his car while his K-9 partner conducted a scan of the vehicle. The K-9 alerted to the presence of the odor of drugs. Trooper Porta then conducted a search of the vehicle.[3] Appellant was issued a "warning" citation for the traffic violation and arrested following a search of the vehicle.

The court denied the motion to suppress, ruling that "the reason for the initial encounter had not terminated, and therefore, the Court finds there is no violation to the fourth amendment, and that there was no unreasonable search and seizure."

[3] When asked what the search revealed, Appellant's counsel objected, stating "that's irrelevant to this proceeding."

STANDARD OF REVIEW

When reviewing a trial court's denial of a motion to suppress, we are limited to the record of the suppression hearing and must not consider the trial record. *Brown v. State*, 397 Md. 89 (2007). "[W]e view the evidence and inferences that may be reasonably drawn therefrom in a light most favorable to the prevailing party on the motion...." *State v. Rucker*, 374 Md. 199, 207 (2003). "We defer to the fact finding of the suppression court and accept the facts as found by that court unless clearly erroneous." *Williams v. State*, 372 Md. 386, 401 (2002) "Although we extend great deference to the hearing judge's findings of fact, we review independently, the application of the law to those facts to determine if the evidence at issue was obtained in violation of the law, and accordingly, should be suppressed." *Laney v. State*, 379 Md. 522 (2004). "We will review the legal questions *de novo* and based upon the evidence presented at the suppression hearing and the applicable law, we then make our own constitutional appraisal." *Wilkes v. State*, 364 Md. 554, 569 (2001).

DISCUSSION

Appellant argues that his "nervousness alone was not sufficient to establish reasonable articulable suspicion that he was engaged in criminal activity," and, therefore, the K-9 scan was an impermissible search. Notably, Appellant does not argue that the traffic stop, which he concedes was valid, was impermissibly prolonged to conduct the K-9 scan. His sole complaint is that the police lacked reasonable suspicion to support calling the K-9 to the scene to conduct a scan. The State responds that "[r]easonable suspicion

was not required to conduct the K-9 scan while the valid traffic stop was ongoing." We agree with the State and assign no error.

A traffic stop is lawful when the police have probable cause to believe that the driver has committed a traffic violation. *Whren v. United States,* 517 U.S. 806, 810 (1996). The detention of the driver "'must be temporary and last no longer than is necessary to effectuate the purpose of the stop.'" *Byndloss v. State*, 391 Md. 462, 480 (2006) (quoting *Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality opinion)). This is because "[t]he Fourth Amendment protects against unreasonable searches and seizures, including seizures that involve only a brief detention." *Ferris v. State*, 355 Md. 356, 369 (1999). "The purpose of a traffic stop is to issue a citation or warning. Once that purpose has been satisfied, the continued detention of a vehicle and its occupant(s) constitutes a second stop, and must be independently justified by reasonable suspicion." *Munafo v. State*, 105 Md. App. 662, 670 (1995).

There is no dispute that Corporal Hagel had reasonable suspicion to conduct a traffic stop when he observed Appellant's vehicle fail to use a turn signal, and fail to stay in its lane for the duration of a turn. Once he was pulled over, the Appellant was found to be driving alone without a driver's license and produced only a learner's permit. Corporal Hagel testified that due to Appellant's extreme nervousness, he believed that "criminal activity was afoot far more than just a traffic violation" and called for a K-9. Corporal Hagel was still in his vehicle running Appellant's criminal history and preparing the "warning" citation when the K-9 unit arrived and the K-9 made a positive alert on the vehicle for drugs. Clearly, the purpose of the traffic stop—to issue a "warning" citation

and run Appellant's driving record and criminal history—was not concluded before the time the K-9 arrived and performed the scan of the vehicle.

Appellant's contention that the officers required independent reasonable suspicion that Appellant was involved in criminal activity after the stop and before calling the K-9 unit is not supported by controlling law. Because the K-9 scan occurred within the scope of the lawful traffic stop, there was no second stop needing the justification of independent reasonable suspicion. *See State v. Funkhouser*, 140 Md. App. 696, 711 (2001). "The Fourth Amendment, *Whren* taught, is unconcerned with the actual subjective motivation or purpose of an officer who makes a traffic stop. *Id*. at 702. Where evidence of a crime unrelated to the stop is discovered, it will "not be suppressed so long as it was obtained within the scope of the original traffic stop." *Padilla v. State*, 180 Md. App. 210, 222 (2008). "Using a dog is accepted as a perfectly legitimate utilization of a free investigative bonus as long as the traffic stop is still genuinely in progress." *State v. Ofori*, 170 Md. App 211, 235 (2006). "[A] scan by a drug detection dog during a lawful traffic stop 'generally does not implicate legitimate privacy interests,' and is thus permissible, without any additional justification, so long as the stop is not prolonged for the purpose of conducting the scan." *Id.* at 223 (quoting *Illinois v. Caballes*, 543 U.S. 405, 409(2005)).

Once a trained drug-sniffing dog makes a positive alert signaling the likely presence of narcotics somewhere inside a vehicle, there is "*ipso facto*, probable cause for a *Carroll*–Doctrine search of the automobile." *Jackson v. State*, 190 Md. App. 497, 504 (2010). In this case there was sufficient probable cause for the search of the vehicle once

there was a positive K-9 alert, and therefore, the suppression court correctly denied Appellant's motion to suppress the fruits of that search.

Appellant's reliance on *King v. State*, 193 Md. App. 582 (2010) for the proposition that additional reasonable suspicion was needed to justify a K-9 scan is misplaced. *King* did not involve a traffic stop, but rather, the search of a parked car. *Id*. at 589. The police officer in King was investigating an "anonymous citizen complaint regarding the flickering of a lighter in a darkened vehicle in an unlighted portion of a roadway after midnight." *Id.* at 599. After approaching the parked vehicle and questioning its occupants, the police officer requested and obtained the driver's license of the individual in the driver's seat. *Id.* at 589. The police officer continued to question the occupants and called a K-9 unit *after* running the driver's license and finding it clear. *Id.* The resulting search revealed weapons and ammunition. *Id.* at 591. We held that the initial purpose of the encounter had been satisfied before the weapons and ammunition were discovered. *Id.* at 599. When the officer informed the occupants that he was calling a canine, the encounter became a seizure, thus implicating the Fourth Amendment. *Id.*

One of the justifications the police advanced for the continued search was the fact that King, a backseat passenger, was observed by the police to be "profusely sweating." *Id.* at 590. We determined, however, that "[n]either McBride's nor King's perspiration or nervous appearance, alone, was enough to suggest criminal wrongdoing." *Id*. at 407 (citing *Russell v. State,* 138 Md. App. 638, 653, 773 A.2d 564, 572 (2001) ("[O]rdinary nervousness, unaccompanied by other suspicious circumstances, cannot justify the

continued detention of a lawfully detained person after the initial detention should be terminated.")).

The present case is dissimilar in that the K-9 scan was conducted *before* the purpose of the initial encounter had been satisfied. Reasonable suspicion was not required to call for and conduct the K-9 scan while the lawful traffic stop was ongoing.

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