Circuit Court for Baltimore City
Case No.: 119224012

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0198

September Term, 2020

ANTONIO ZAGARIS

v.

STATE OF MARYLAND

Arthur,
Beachley,
Battaglia, Lynne, A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Battaglia, J.

Filed: August 27, 2021

In January of 2020, Antonio Zagaris, Appellant, was convicted by a jury in the Circuit Court for Baltimore City of possession of a firearm after a disqualifying conviction, transporting a handgun in a vehicle, transporting a loaded handgun in a vehicle, and illegal possession of ammunition. Prior to trial, Zagaris had moved to suppress a handgun and marijuana recovered from the car that he was driving at the time of his arrest in July of 2019. After a hearing at which Detectives Charles Baugher, Demario Harris, and Christopher Lehman testified, the trial judge, the Honorable Lawrence Fletcher-Hill, denied Zagaris's motion.

Prior to trial, the State also had filed a motion *in limine* to prevent the use of Internal Investigations Division (hereafter "Internal Affairs") files with regard to the testifying officers in the case. After hearing arguments, the judge granted the motion.

Further, during the testimony of Detective Harris, Zagaris asked that a clear plastic bag containing marijuana, already admitted, and made available to the jury, be opened for inspection and "smelling" by the jury; the trial judge denied the request. At the culmination of the proceedings, Zagaris was convicted.

In this appeal, Zagaris poses three questions for our consideration:

> 1. Did the trial court err in denying Appellant's motion to suppress evidence?
> 2. Did the trial court err in limiting defense cross-examination of police witnesses?
> 3. Did the trial court abuse its discretion by refusing to permit the jury to fully examine State's Exhibit #2?

For the reasons set forth below, we shall answer Zagaris's questions in the negative

and shall affirm the judgment of the Circuit Court.

The Search and Motion to Suppress

During the late evening of July 24, 2019, Detectives Demario Harris and Christopher Lehman of the Baltimore Police Department stopped a vehicle, which was being driven by Zagaris, who, based upon an observation made earlier by Detective Charles Baugher, had failed to stop at a stop sign. Detective Baugher had instructed Detectives Harris and Lehman to initiate a stop, but otherwise did not participate in any other activities.

Detective Harris testified that as he approached the driver's side, he "smelled a strong pungent odor of suspected marijuana" emanating from the car, and he asked Zagaris and the passenger to step out of the automobile, so that it could be searched. During the search, a handgun was discovered underneath the driver's seat, and Zagaris and the passenger were placed under arrest. Detective Harris testified that, after Zagaris and the passenger were arrested, he collected pieces of marijuana from the floor of the automobile.

Prior to trial, Zagaris moved to suppress evidence collected during the search of the car, based on his assertion that the search was unreasonable under the Fourth Amendment of the United States Constitution due to a lack of reasonable articulable suspicion to initiate the stop and probable cause to conduct the search.[1] The judge heard arguments regarding

[1] The State had argued that the stop of the automobile was lawful, not only because of the car's failure to stop at a stop sign, but also because the automobile was suspected to have dark window tinting. The lawfulness of the stop has not been challenged on appeal and, therefore, we shall not address it.

Zagaris's motion to suppress during a hearing in which Detectives Baugher, Harris, and Lehman testified. According to Zagaris, the amount of marijuana recovered was insufficient to cause an odor of marijuana to emanate from the vehicle and, therefore, the police lacked probable cause to conduct the search. The State countered that Detective Harris's body camera footage confirmed that he commented on the odor of marijuana emanating from the car within ten seconds of confronting Zagaris.

In denying Zagaris's motion to suppress, the judge opined:

> I've had the chance to observe both Detectives Baugher and Harris testify. I had a chance to assess their credibility and I do generally find their testimony to be credible in this instance. The Fourth Amendment analysis requires that I look at two different stages of the police activity, both the traffic stop and whether there was an adequate basis to stop the vehicle in the first place and then at the next stage, whether there was an adequate basis to conduct a search of the vehicle. The State bears the burden at both stages.

After finding that the police had an adequate basis to stop the vehicle, the judge addressed whether there was probable cause to conduct the car search:

> Once the stop was made, it is notable that Detective Harris made some observation concerning marijuana almost immediately upon reaching the driver's side window of the vehicle. And it is true that he asked the occupants whether they had been smoking marijuana, not whether there is marijuana in the vehicle. But I find credible Detective Harris's observation within his training that he smelled a strong odor of marijuana coming from the vehicle immediately upon approaching it. Under the *Robinson* case,[2] that observation provides probable cause to believe that there is either evidence

[2] The trial judge was referring to *Robinson v. State*, 451 Md. 94 (2017).

> of a crime or contraband in the vehicle and to make a *Carroll* Doctrine[3] search of the vehicle pursuant to the stop there obviously because the observation is immediate. There is not an issue about whether the stop is prolonged unnecessarily while probable cause was obtained in order to make the search. It was an immediate observation by Detective Harris.

In order to conduct a warrantless search of an automobile, a law enforcement officer must have probable cause. *See Carroll v. United States*, 267 U.S. 132 (1925). A law enforcement officer may have probable cause to search a car when there is a reasonable belief that it may contain contraband or evidence of a crime. *See Robinson v. State*, 451 Md. 94, 112-13 (2017) (reviewing Supreme Court cases concerning probable cause as applied to warrantless searches of automobiles). In Maryland, the odor of marijuana emanating from a vehicle, generally, is sufficient to establish probable cause to search the vehicle. *Id.* at 125. *See also, Norman v. State*, 452 Md. 373, 379 (2017) (reaffirming the holding in *Robinson*).

Zagaris herein asserts that the trial judge's conclusion that there was probable cause to search the automobile was based on a clearly erroneous factual finding that Detective Harris smelled an odor of marijuana emanating from the car. Zagaris asserts that "there was no way that he could have smelled a 'strong pungent odor' of raw or burnt marijuana

[3] The "*Carroll* Doctrine" refers to *Carroll v. United States*, 267 U.S. 132 (1925), in which the Supreme Court articulated an "automobile exception" to the general requirement of having a warrant to search, such that a warrantless search of a car may be reasonable if a law enforcement officer has "reasonable cause [to] belie[ve] that the contents of the automobile offend against the law." *Id.* at 159. Warrantless searches of automobiles are generally permitted under *Carroll* when the police have a "reason to believe contraband or evidence of criminal wrongdoing is hidden in the car." *Robinson v. State*, 451 Md. 94, 112 (2017) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 297 (1999)).

so as to furnish probable cause to search [Zagaris's] vehicle." Zagaris reasons that Detective Harris's statement regarding the odor of marijuana was so incredible that it was clear error for the judge to credit his testimony.

The State contends that Detective Harris's testimony, as well as his body camera footage, supported the judge's credibility determination and conclusion that probable cause did exist.

We review the disposition of a motion to suppress based upon the following standard:

> "Our review of a circuit court's denial of a motion to suppress evidence is 'limited to the record developed at the suppression hearing.'" *Pacheco v. State*, 465 Md. 311, 319, . . . (2019) (quoting *Moats v. State*, 455 Md. 682, 694, . . . (2017)). "We assess the record 'in the light most favorable to the party who prevails on the issue that the defendant raises in the motion to suppress.'" *Id.* (quoting *Norman v. State*, 452 Md. 373, 386, . . . (2017)). We review the circuit court's factual findings under the clearly erroneous standard, and we review legal questions *de novo*, making an "independent constitutional evaluation by reviewing the relevant law and applying it to the unique facts and circumstances of the case." *Id.* (quoting *Grant v. State*, 449 Md. 1, 15, . . . (2016)).

In re D.D., 250 Md. App. 284, 289 (2021).

Although Zagaris asserts that Detective Harris's testimony was so incredible that it was clear error for the judge to credit it, the judge was still exercising a credibility determination. We recognized in *State v. Brooks*, 148 Md. App. 374, 403 (2002), that "the exclusive prerogative of the fact-finding trial judge to weigh the evidence and to assess the credibility of witnesses is taken into account when we review the judge's fact-finding for

clear error[.]" *Accord Smith v. State*, 182 Md. App. 444, 463 (2008) (explaining that appellate courts "accord deference to the circuit court's assessment of [a witness's] credibility and its subsequent findings of fact.").

Judge Fletcher-Hill's determination of credibility regarding Detective Harris's testimony was based not only on what the detective said about the smell of marijuana, but also on Detective Harris's training, as well as the body camera footage, about which Judge Fletcher-Hill opined: "Once the stop was made, it is notable that Detective Harris made some observation concerning marijuana almost immediately upon reaching the driver's side window of the vehicle." We shall not disturb his findings and credibility determination on appeal.

The Internal Affairs Investigations and Motion *in Limine*

Through discovery, Zagaris's counsel had obtained records of Internal Affairs investigations into potential misconduct by the three police detectives, Detectives Charles Baugher, Demario Harris, and Christopher Lehman, who had participated in Zagaris's arrest and who were expected to testify during the trial.

The State moved *in limine* to prevent Zagaris from questioning the officers regarding the misconduct allegations, and the judge heard arguments on the State's motion prior to the trial. According to the State, Zagaris lacked a sufficient factual basis, under Rule 5–608(b),[4] to question the officers regarding the investigations, because each of them

[4] Rule 5–608(b), which governs impeachment of a witness with evidence of prior (continued . . .)

had concluded with a finding that the allegations were "not sustained."[5] Zagaris countered that the "sole" fact that the officers had been investigated for misconduct went to their credibility and was, therefore, a sufficient factual basis for cross-examination.

According to the proffers made by Zagaris's attorney, Detective Baugher had been investigated based on an allegation in a complaint that he allegedly stole money during the execution of a search warrant that occurred in 2019 and that he had planted evidence during an arrest, which took place in 2016. Zagaris proffered that an Assistant State's Attorney was a complainant against Detective Baugher regarding the allegations of planting

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bad acts that did not result in a conviction, provides:

> **Impeachment by Examination Regarding Witness's Own Prior Conduct Not Resulting in Convictions.** The court may permit any witness to be examined regarding the witness's own prior conduct that did not result in a conviction but that the court finds probative of a character trait of untruthfulness. Upon objection, however, the court may permit the inquiry only if the questioner, outside the hearing of the jury, establishes a reasonable factual basis for asserting that the conduct of the witness occurred. The conduct may not be proved by extrinsic evidence.

[5] The Baltimore Police Department's Office of Professional Responsibility initiates an internal affairs investigation when a complaint is filed. Such investigations result in one of four possible conclusions regarding the charges: "Unfounded," "Not Sustained," "Exonerated," or "Sustained." "Unfounded" charges are those for which "the investigation determines, by Clear and Convincing Evidence that the alleged misconduct did not occur or did not involve the employee under investigation. Charges are "Not Sustained" when "the investigation is unable to determine, by a Preponderance of the Evidence, whether the alleged misconduct occurred." An officer under investigation is "Exonerated" when "the investigation determines, by a Preponderance of the Evidence, that the alleged conduct did occur, but did not violate BPD policies, procedures, or training." Charges are "Sustained" when "the investigation determines, by a Preponderance of the Evidence, that the alleged misconduct did occur." Baltimore Police Department Policy 308, GENERAL DISCIPLINARY PROCESS (Sept. 13, 2017). https://www.baltimorepolice.org/transparency/bpd-policies/308-general-disciplinary-process. [archived at https://perma.cc/7UUU-5WMX].

evidence. With respect to Detective Lehman, Zagaris's attorney offered that he would rely in impeachment on the fact that Detective Lehman was present during the 2016 arrest in which Detective Baugher was involved.[6] Judge Fletcher-Hill found that the Internal Affairs investigations resulted in "not sustained" determinations and that Zagaris had not borne his burden of proof to show an "adequate factual basis" to be able to use the allegations in impeachment:

> I've reviewed the issues in connection with the Motion in Limine concerning impeachment of Detectives Baugher, Harris, and Lehman. I erroneously said 5–407(b). I meant 5–608(b) in terms of the rule under which the impeachment would fall. And because none of the charges were sustained, in fact, all were not sustained after investigation, I conclude that the Defense has not shown an adequate factual basis to permit cross examination on those grounds and, therefore, grant the Motion in Limine and prohibit the Defense from questioning those detectives for credibility purposes concerning those specific instances of alleged wrongdoing.

Zagaris asserts that Judge Fletcher Hill erred when he ruled under Rule 5–608(b),

[6] During the trial, Zagaris offered the files he received of the Internal Affairs investigations, which were admitted into evidence, under seal, as Defense Exhibit's #1, #2, and #3. In an appendix to the Appellant's brief, counsel for Zagaris on appeal filed an affidavit stating that the exhibits were not found in the case file following the trial and that she had been unable to locate them, and, as a result, the documents were not included in the appellate record. Regarding the impact on the instant appeal, Zagaris's counsel conceded:

> As there was never any dispute from the State as to the accuracy of the defense counsel's factual representations regarding the substance of the misconduct allegations, and as the trial court based its ruling solely on the act that the [Internal Affairs] had bound the misconduct allegations to be "unsustained," the missing documents are not necessary to this Court's review of this issue.

as interpreted by the Court of Appeals in *Fields v. State*, 376 Md. 661 (2003), that he had failed to prove a reasonable factual basis for the allegations to permit impeachment by them. We disagree.

The Sixth Amendment, made applicable to the States by the Fourteenth Amendment, *see Pointer v. Texas*, 380 U.S. 400 (1965), provides, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The Confrontation Clause guarantees a defendant the right to confront witnesses through, mainly, cross-examination. *Crawford v. Washington*, 541 U.S. 36 (2004); *Ashton v. State*, 185 Md. App. 607, 621 (2009) ("'Central to that right is the opportunity to cross-examine witnesses.'") (quoting *Pantazes v. State*, 376 Md. 661, 680 (2003)). Cross-examination to undermine a witness's credibility, or impeachment, may include confronting a witness with prior bad acts, even where those acts did not result in a conviction. Rule 5–608(b).

In *Pantazes*, 376 Md. at 686-78, the Court of Appeals explained the limitations on cross-examination by prior bad acts imposed by Rule 5–608(b), those being that the prior conduct must be probative for untruthfulness and there must be a reasonable factual basis for asserting that the conduct occurred:

> [T]he right to cross-examine witnesses regarding the witness' own prior conduct not resulting in a criminal conviction is limited by Rule 5–608(b) in several ways. First, the trial judge must find that the conduct is relevant, i.e., probative of untruthfulness. Second, upon objection, the court must hold a hearing outside the presence of the jury, and the questioner must establish a reasonable factual basis for asserting that the conduct of the witness occurred. Third, the questioner is bound by the witness' answer and may not

> introduce extrinsic evidence of the asserted conduct. Finally, as with all evidence, the court has the discretion to limit the examination, under Rule 5–403, if the court finds that the probative value of the evidence is outweighed by unfair prejudice.

An appellate court will overturn a ruling of the trial court limiting cross-examination regarding prior bad acts "only if the court 'exercise[d] discretion in an arbitrary or capricious manner or . . . act[ed] beyond the letter or reason of the law.'" *Thomas v. State*, 422 Md. 67, 73 (2011) (quoting *King v. State*, 407 Md. 682, 696 (2009)). In determining whether a proponent has carried his burden under the Rule, "'the relevant inquiry is not whether the witness has been accused of misconduct by some other person, but whether the witness actually committed the prior bad act.'" *Fields v. State*, 432 Md. 650, 674 (2013) (quoting *State v. Cox*, 298 Md. 173, 181 (1983)).

In *Fields v. State*, upon which both Zagaris and the State rely, two men, Colkley and Fields, were convicted of crimes related to a shooting, during which one person was killed and two others were wounded. *Id.* at 657. Prior to the trial, a judge granted the State's motion to quash a subpoena issued by Colkley and Fields in an attempt to obtain Internal Affairs files of investigations of alleged misconduct by two police officers, who were to testify against them. *Id.* at 664.

During the trial, "the State made a motion *in limine* to bar . . . cross-examination of the detectives about the subject of the [Internal Affairs] investigation." *Id.* In opposition, Colkley and Fields argued that "the existence of the [Internal Affairs] files was conceded and the allegations contained in that [Internal Affairs] complaint had been found

'sustained' as a result of the initial [Internal Affairs] investigation of the detectives' alleged misconduct." *Id.* The trial judge ruled that without the records of the investigation, "there is no way you can establish a factual basis for asserting that the conduct occurred[,]" and declined to conduct a hearing regarding whether there was "a reasonable factual basis for cross-examination of the detectives, under Maryland Rule 5–608(b)." *Id.* at 665.

Both Colkley and Fields were convicted. Before this Court, they raised numerous issues, including the denial of access to the Internal Affairs files and the preclusion of cross-examination regarding the alleged misconduct that had precipitated the Internal Affairs investigations. With respect to the Internal Affairs issue, we held that in denying Colkley and Fields the ability to cross-examine with the "sustained" allegations, the motions court judge had not abused his discretion. *Id.* at 630-31.

The Court of Appeals reversed. The Court's analysis rested, in part, on "the undisputed facts that the [Internal Affairs] investigator had investigated the allegation . . . and found the allegation 'sustained,' and that finding was not challenged, much less overturned, by a Trial Board." *Id.* at 674. Given those facts, the Court concluded that the trial judge had misapplied Rule 5–608(b), when he ruled that a reasonable factual basis for cross-examination did not exist. *Id.*

Zagaris, however, relies on dicta in *Fields* to support the use of "not sustained" allegations to cross-examine: "To be sure, 'if the bad acts are not conclusively demonstrated by a conviction, the trial judge must exercise greater care in determining the proper scope of cross-examination.' Nevertheless, such inquiry is allowed 'when the trial

judge is satisfied that there is a reasonable basis for the question[.]'" *Fields*, 432 Md. at 673-74 (citations omitted).

The misconduct allegations in the present case against all the detectives were "not sustained," so that Zagaris was obligated to show that there were reasonable bases for questioning the officers regarding the allegations. Zagaris, however, failed to do more than proffer the allegations and offer the investigative files, which resulted in "unsustained" conclusions, for review by the trial judge. We agree with Judge Fletcher-Hill that Zagaris's actions were not sufficient to establish a reasonable factual basis for the acts of misconduct having actually happened, and thus, cross-examination was appropriately limited.

Opening the State's Exhibit

During the trial, the State offered as evidence the contents of a clear plastic bag, housing items, which had been collected by Detective Harris and which had been identified as marijuana. During the cross-examination of Detective Harris, Zagaris's attorney asked that the plastic bag not only be "published" to the jury but also that Detective Harris go into the well of the courtroom and open the plastic bag so that the jury would be able to smell its contents:

> [DEFENSE COUNSEL]: Your Honor, may I ask Detective Harris to publish—actually, may we approach?
>
> THE COURT: Yes.
>
> [DEFENSE COUNSEL]: With the Court's permission, to ask Detective Harris to bring the bag of marijuana down that he recovered and open it and just show it to the jury with the bag opened, can we do that?

> [THE STATE]: So I asked the same question, and we don't know what it is because our lab didn't test it. I don't think anybody should handle - - and I'm not - -
>
> [DEFENSE COUNSEL]: He was picking it up with his bare hands off the floorboard, Judge. It's not a safety issue. I mean, if he needs to wear gloves, that's fine. But what I'm trying to get at here is that this was scattered all about the floorboard. It's not here in a condensed area. If you open it up, presumably, you'd have the same smell that Detective Harris smelled.
>
> THE COURT: You can make that argument. It's an argument of weight. But I'm not going to permit it to be opened and smelled by the jury. You can have him come down and show it sealed, up close to them, if you'd like it to be published in that way.

Zagaris asserts that the trial judge's decision not to allow the jury to open the bag and smell the odor emanating from the bag was an abuse of discretion, because it was central to his argument that Detective Harris could not have detected the strong odor of marijuana emanating from the car from such a miniscule amount. The State disagrees.

It is clear that evidence, once admitted, can be published or provided to the jury for review. Zagaris, though, has provided no authority, and we have found none that mandates that evidence, once admitted, must be opened in order for a jury to smell its contents.

Zagaris appears to rely, in part, on the case of *Dyson v. State*, 328 Md. 490 (1992). In that case, Dyson had been convicted of second-degree rape and battery. During the trial, the victim had testified that, following the assault, Dyson had stolen a "Sharp" radio from her home. *Id.* at 494. The State had proven that Dyson had given a "Sharp" radio to an individual, who had subsequently turned it over to the police. *Id.* The victim testified that, "she could identify it as hers because the radio's indicator needle did not move when the

tuning knob was turned." *Id.* at 495. She explained that she had repaired the radio and, if the radio was taken apart, the knot she had tied to reconnect a line to the tuning dial would be visible. *Id.*

During deliberations, the jury requested that the victim "show[] us the knot in the radio[.]" *Id.* at 496. Over the objections of defense counsel, the judge directed the victim to "come up, without saying anything to the jurors, open the box and point to the area where you are talking about, and then just go ahead and sit down, because the evidence is all finished and we can't put on any more." *Id.* at 497. The victim complied with the judge's instructions. *Id.* at 497-98.

On appeal, Dyson argued that the victim's act of pointing to the knot constituted additional evidence, which could not be put before the jury after it had begun deliberations. We disagreed, holding that the victim's act of pointing to the knot in the radio was "supplementary" and "simply a further clarification of previously introduced evidence." *Dyson v. State*, 89 Md. App. 651, 658-59 (1991).

The Court of Appeals disagreed with our characterization of the additional evidence as "supplemental" and held that the trial judge should have denied the jury's request to have the victim identify the knot because, "The evidence was concluded, and the jurors should have been instructed to decide the case on the evidence before them." *Dyson*, 328 Md. at 504. The Court then explained that, "We are not to be understood as holding that there was any error in allowing the jurors to open the radio or even in having the radio opened for them. The radio was in evidence, and the jury was entitled to have it and to fully

examine it." *Id.*

Zagaris also directs us to *Adams v. State*, 415 Md. 585 (2010), a case in which the issue was whether the jury in a drug case should have been allowed to re-watch a videotape, which had been admitted into evidence and had been viewed during the trial, within the jury room during deliberations. The trial judge denied the jury's request. *Id.* at 588. Adams was convicted.

We affirmed the judge's decision, concluding that he had not abused his discretion in preventing the jury from re-watching the videotape. We reasoned that were the judge to have allowed the jury to re-watch the videotape, that would have overemphasized its significance. *Id.* at 588-89. The Court of Appeals reversed, concluding that once the videotape had been admitted into evidence, the jury should have been allowed to re-watch it during their deliberations. *Id.* at 599.

Analogy, though, to the opportunity of the jurors to open the radio in *Dyson* or to re-watch a videotape in *Adams*, to violating a clear plastic bag of marijuana already admitted, with its contents fully visible, in order to get a whiff of the contents, is not apt. Judge Fletcher-Hill got it right when he spoke of the fact that once admitted, the jury could give the marijuana in the bag whatever weight was appropriate and that smelling the contents of the bag was not a precondition or postcondition of its publication to the jury.

For all of the foregoing reasons, we affirm the judgment of the Circuit Court.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.