Circuit Court for Anne Arundel County
Case No.: C-02-CR-19-001571

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1575

September Term, 2019

ROBERT MICHAEL HEAVEL, JR.

v.

STATE OF MARYLAND

Graeff,
Nazarian,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, J.

Filed: December 18, 2020

Appellant, Robert Michael Heavel, Jr., was charged in the District Court of Maryland for Anne Arundel County with possession of cocaine. Appellant requested a jury trial, and his case was transferred to the Circuit Court for Anne Arundel County. After his motion to suppress evidence was denied, appellant entered a not guilty plea on an agreed statement of facts to possession of cocaine, and he was sentenced to a suspended sentence of one-year incarceration, to be followed immediately by one-year supervised probation. On this timely appeal, appellant asks us to address the following question:

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

For the following reasons, we shall reverse the judgment of the circuit court.

BACKGROUND

These background facts are gleaned from the record of the hearing on the motion to suppress, at which Anne Arundel County Police Officer Conforti and appellant testified.[1]

On December 27, 2018, at approximately 1:54 a.m., Anne Arundel County Police Officer Conforti was on patrol with Officer Justin Duncan near the intersection of Hog Neck Road and Mountain Road in Pasadena, Maryland, when they observed a Honda Civic fail to come to a complete stop at a red light before turning right onto Mountain Road. Two people were in the vehicle: Nicholas Glenn Carter, the driver, and appellant, who was the front seat passenger.

As Officer Conforti approached the vehicle, he smelled a "strong odor of marijuana." At the time, Officer Conforti had been a member of the Eastern District Patrol

[1] Officer Conforti's first name is not in the record.

for around three months and was undergoing field training with Officer Duncan. Officer Conforti was familiar with the smell of marijuana from his training and experience as a police officer. Officer Conforti first spoke to the driver, Carter, and asked him if there was any marijuana in the vehicle. Carter replied that there was not, but that he had smoked marijuana in the vehicle approximately two hours prior to the stop. Officer Conforti had Carter step out of the vehicle, and he searched his person. The search did not reveal anything of significance.

After speaking to Carter, Officer Conforti then interacted with appellant. As the officer directed appellant to step out of the vehicle, he asked him if he had anything on his person. Officer Conforti confirmed that, when he asked appellant if he had anything on his person, appellant was not in handcuffs or under arrest, his sidearm was not drawn, and that Officer Duncan was with the driver, Carter.

According to Officer Conforti, appellant replied that "he had a bag of marijuana in his front right pants pocket and a couple of joints in his front left pants pocket." Appellant also showed the officer a "joint," a slang term for a marijuana cigarette, that was in his hand. This joint, ultimately weighing in at 0.30 grams, was a "small brown rolled basically marijuana joint that – rolling paper and marijuana inside of it. It was a burnt end." Officer Conforti testified that, based on his training and experience, he recognized the item in appellant's hand, with its distinctive odor, as marijuana. As for the unseen items appellant said were in his pants, Officer Conforti testified that he did not know the weight of the bag that appellant referred to or whether that bag contained ten grams or more of marijuana.

Officer Conforti searched appellant and, from his right front pants pocket, recovered a bag containing marijuana, later determined to weigh 2.81 grams. In addition, Officer Conforti recovered a package of "Backwoods Russian Cream Cigars" from appellant's left front pants pocket. Inside that package, the Officer found "two cigars and three small baggies with a white powder," which appeared to be cocaine.[2] (It is not clear from the record whether the cigars contained marijuana.) Officer Conforti handcuffed appellant.

A search of the vehicle subsequent to appellant's arrest uncovered a container of suspected marijuana in the trunk. The container and the marijuana weighed 10.03 grams. The driver, Carter, was given a civil citation for possession of less than ten grams of marijuana and released.

Appellant also testified at the motions hearing. His testimony was primarily limited to his attire on the day in question. He stated that he was wearing straight leg jeans at the time of the traffic stop. Those jeans were "not too tight, not too loose." He confirmed that he was carrying a bag of marijuana and a package of cigars at the time of the stop.

After hearing argument, the court denied appellant's motion to suppress the marijuana, ruling as follows:

> All right. Well, I think these things have to be viewed in the totality of their circumstances. In this case I think Officer Conforti's testimony was credible. And based on what I have heard here today I will make a couple of findings of fact.

[2] During the factual proffer in support of the not guilty plea, the court was informed that the substance recovered from all three baggies tested positive for cocaine, a Schedule II controlled dangerous substance, and weighed, in the aggregate, 0.69 grams.

> That at approximately 1:54 a.m. on December 27, 2018, a unit of the Anne Arundel County Police Department did make a *Whren*-type stop at or near the intersection of Mountain Road and Hog Neck Road in Pasadena.
>
> These are the circumstances that I believe lead to probable cause. First, there is the odor of marijuana emanating from the car. Second, there is a joint in plain view being held by the defendant. Third, there is a statement by the defendant that he has additional marijuana. Fourth, there is the statement by the driver of the vehicle that he had used marijuana. I think taken in their totality these circumstances lead to a reasonable finding of probable cause by Officer Conforti and that the search that was conducted incident to that is valid.
>
> So having found that, I must deny Defense's motion to suppress.

STANDARD OF REVIEW

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)). And, the record is examined "in the light most favorable to the party who prevails on the issue that the defendant raises in the motion to suppress." *Norman v. State*, 452 Md. 373, 386, *cert. denied*, 138 S. Ct. 174 (2017). The trial court's factual findings are accepted unless they are clearly erroneous, however, when there is a constitutional challenge to a search or seizure under the Fourth Amendment, this Court performs an "'independent constitutional evaluation by reviewing the relevant law and applying it to the unique facts and circumstances of the case.'" *Grant v. State*, 449 Md. 1, 15 (2016) (quoting *State v. Wallace*, 372 Md. 137, 144 (2002)); *accord Pacheco*, 465 Md. at 319-20.

DISCUSSION

Appellant contends that the court erred in denying his motion to suppress on the grounds that, under *Pacheco v. State*, 465 Md. 311 (2019), the odor of burnt marijuana and the observation of a burnt joint were inadequate to establish probable cause to arrest. The State replies that there was more than just the odor and one joint to support the arrest. The State indicates, "Heavel expressly told Officer Conforti that he possessed more marijuana than Officer Conforti could see." In reply, appellant counters that, even acknowledging his confession that he possessed additional marijuana on his person, it was unreasonable for the officer to assume that the total amount was at least ten grams.

The present issue is to be considered in light of the Fourth Amendment to the Constitution of the United States, made applicable to the States through the Fourteenth Amendment, *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

"The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). "To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them 'fair leeway for enforcing the law in the community's protection.'" *Heien v. North Carolina*, 574 U.S. 54, 60-61, (2014) (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).

Moreover, "[p]robable cause exists where 'the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Brinegar*, 338 U.S. at 175-76 (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)). Probable cause is a "'practical, nontechnical conception'" that deals with "'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (quoting *Illinois v. Gates*, 462 U.S. 213, 231 (1983), in turn quoting *Brinegar, supra*, at 175-176). As the Court of Appeals explained:

> "Probable cause, moreover, is 'a fluid concept,' 'incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances.'" *McCracken v. State*, 429 Md. 507, 519-20 (2012) (quoting *Pringle*, 540 U.S. at 370-71). For that reason, "[p]robable cause does not depend on a preponderance of the evidence, but instead depends on a 'fair probability' on which a reasonably prudent person would act." [*Robinson v. State*, 451 Md. 94, 109 (2017) (quoting *Florida v. Harris*, 568 U.S. 237, 244 (2013))]. In describing probable cause, the Supreme Court has "rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach." *Id*. at 110 (quoting *Harris*, 568 U.S. at 244).

Pacheco, 465 Md. at 324; *see also Whren v. United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

Although appellant was convicted of possession of cocaine, Officer Conforti searched appellant because he suspected that appellant possessed an illegal amount of marijuana. Generally, Section 5-601 prohibits the possession of a controlled dangerous substance, with certain enumerated exceptions such as medical necessity or by prescription.

See Md. Code (2002, 2012 Repl. Vol., 2019 Supp.) § 5-601 of the Criminal Law Article ("Crim. Law"). Section 5-601.1 qualifies that general prohibition when the substance and quantity involved is less than ten grams of marijuana. In that instance, possession is a civil offense: "A police officer shall issue a citation to a person who the police officer has probable cause to believe has committed a violation of § 5-601 of this part involving the use or possession of less than 10 grams of marijuana." Crim. Law § 5-601.1 (a).

After the briefs were filed in this case, the Court of Appeals decided *Lewis v. State*, 470 Md. 1 (2020). There, the Court considered whether the odor of marijuana, standing alone, provides probable cause to arrest and search an individual incident to the arrest. Baltimore City Police Officer David Burch, Jr., accepted at the suppression hearing as an expert in the identification and packaging of marijuana, testified that he received a tip about a potentially armed individual in the 400 block of Saratoga Street, known to police as a high crime area. 470 Md. at 10. Having identified a suspect via the CitiWatch surveillance system standing near a convenience store that was known as an "open air drug market," Officer Burch and five other police officers responded to the scene where he encountered Lewis inside the store along with other unidentified patrons. *Id*. at 10-11. As Lewis passed by Officer Burch on the way to the exit, the officer detected the odor of marijuana emanating from his person. *Id*. at 11. Officer Burch, assisted by the other police officers, seized Lewis by grabbing him around the shoulder and by the hand. *Id*. Lewis was then handcuffed and searched. *Id*. at 12. The police found a handgun inside a red bag that had been strapped around Lewis's chest. *Id*. After Lewis then admitted he was carrying a small amount of marijuana, the police found a sealed, one-inch baggie of the contraband in one

of his pockets. *Id*.

On appeal, Lewis maintained that the police lacked probable cause to arrest him based solely on the odor of marijuana, and then to search him incident to that arrest. 470 Md. at 12, 16. Distinguishing *Robinson v. State*, 451 Md. 94 (2017), because that case concerned automobile searches under the *Carroll* doctrine, *see Lewis*, 470 Md. at 25-26, and relying primarily on *Pacheco, supra*, the Court of Appeals agreed with Lewis that, under the facts therein, "the odor of marijuana, without more, does not provide law enforcement officers with the requisite probable cause to arrest and perform a warrantless search of that person incident to the arrest." *Id.* at 10, 17.

The *Lewis* Court then explained its recent decision in *Pacheco*, the case that was considered by the motions court and discussed by the parties, both then and on appeal. There, two Montgomery County police officers approached an occupied vehicle parked at around 10:00 p.m. behind a laundromat. When they were within a foot of the vehicle, both officers smelled the strong odor of burnt marijuana. *Pacheco*, 465 Md. at 317-18. When one of the officers looked inside the vehicle, they saw Pacheco in the driver's seat, and a marijuana cigarette, which appeared to be less than 10 grams, located in the center console. *Id*. at 318. Pacheco was ordered out of the vehicle and searched. *Id*. Cocaine was found in his left front pocket. *Id*. The police officers then searched the vehicle and recovered additional marijuana and paraphernalia. *Id.*

Considering that the possession of less than ten grams of marijuana was recently decriminalized, the issue presented was whether the police had probable cause to believe that Pacheco possessed an illegal amount of marijuana under these circumstances.

Pacheco, 465 Md. at 318-20. The Court of Appeals ultimately held that there was insufficient probable cause to support Pacheco's arrest. *Id*. at 317, 333-34. *See also Norman v. State*, 452 Md. 373, 411 (holding that, although a search of a vehicle is permitted upon the detection of the odor of marijuana, reasonable articulable suspicion is separately required before police can frisk a passenger in that same vehicle), *cert. denied*, 138 S.Ct. 174 (2017); *Robinson*, 451 Md. at 130 (concluding that "the mere odor of marijuana emanating from a vehicle provides probable cause that the vehicle contains additional contraband or evidence of a crime, thereby permitting the search of the vehicle and its contents").

The *Lewis* Court relied on *Pacheco* when it concluded:

> The search of Petitioner and the red bag strapped across his chest was based solely on the odor of marijuana emanating from his person. Under *Pacheco*, that information fell short of supplying the requisite probable cause to conduct that search. [465 Md. at 333-34]
>
> For such a search to be supported by probable cause, the police must possess information indicating possession of a criminal amount of marijuana. There is no indication in the record suggesting that Petitioner was in possession of that amount of marijuana; all the record does reflect is that Petitioner smelled of marijuana. 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.

470 Md. at 27.

The *Lewis* Court then held as follows:

> 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.

Id.

We conclude that *Lewis* and *Pacheco* control the outcome in this case. A distinction from those cases is that appellant admitted that he possessed an additional quantity of marijuana in his pockets and the driver admitted smoking marijuana, the primary evidence was only odor and the presence of a joint, but the distinction does not produce a different result. The information was insufficient to indicate possession of a criminal amount of marijuana. Probable cause requires "more than bare suspicion," *Brinegar*, 338 U.S. at 175.

The court erred in denying the motion to suppress.

JUDGMENT REVERSED.

COSTS TO BE ASSESSED TO ANNE ARUNDEL COUNTY.