Circuit Court for Baltimore City
Case No.: 211287005

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1583

September Term, 2017

ANTHONY WHARTON

v.

STATE OF MARYLAND

Graeff,
Shaw Geter,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon. J.

Filed: September 4, 2018

Anthony Wharton ("Wharton") was indicted in the Circuit Court for Baltimore City and charged with drug, firearms, and traffic offenses. After his motion to suppress evidence was denied, Wharton was convicted by a jury of possession of a firearm by a disqualified person; wearing or carrying a handgun in a vehicle; possession of oxycodone; resisting arrest; driving with a suspended license; and various traffic violations.[1] The court sentenced Wharton to five years for illegal possession of a regulated firearm; a consecutive two years for resisting arrest; a consecutive two years for possession of oxycodone; a concurrent three years for wearing, carrying or transporting a handgun in a vehicle; a concurrent one-year term for driving on a suspended license; and a $200 fine for speeding and unsafe lane change. A belated appeal was granted after Wharton filed for post-conviction relief. Appellant asks us to address the following question:

> Was it error to deny the defense motion to suppress evidence seized during a traffic stop?

We answer "yes" to that question, reverse the judgment and remand for new trial as to the following charges: possession of a firearm by a disqualified person, wearing and carrying or transporting a handgun in a vehicle, and possession of oxycodone. All other convictions shall be affirmed.

BACKGROUND

Around 9:50 p.m. on August 26, 2011, Detective Nick Montemarano and his partner, Detective Jason Giordano, were on patrol in an unmarked vehicle in the 5300 block

[1] The jury acquitted Wharton of possession with intent to distribute and possession of cocaine.

of Denmore Avenue in northwest Baltimore, following an earlier report of a shooting in the area. Traveling eastbound on West Belvedere Avenue, the detectives spotted a grey Nissan Altima driving at a high rate of speed and weaving in and out of the two-lane roadway without using a turn signal. The area had a posted speed limit of 25 miles per hour. Detective Montemarano's vehicle was travelling at approximately 30 miles per hour when the Altima passed his vehicle.

At one point, the Altima drove in front of the detectives' unmarked car, activated its turn signal to turn right onto Park Heights Avenue, but then, "swerved back left, back to stay straight" and then "cut back left" on Belvedere. Noting that the area was a "high traffic area," with "pretty high pedestrian" traffic as well, Detective Montemarano decided to stop the Altima for "[e]rratic driving, driving at a speed greater than reasonable, and unsafe lane change." Although the detective was driving an unmarked vehicle, the car was equipped with emergency lights and both detectives were dressed in a "modified uniform," with "black police vests" with the word "police" on the front and back.

After the Altima stopped, Detective Montemarano approached the driver's side of the car, while Detective Giordano approached the passenger's window. Appellant was in the driver's seat and Tonya Mickey, the owner of the vehicle, was in the passenger seat. Appellant was "breathing heavily," "[s]eemed a little fidgety" and "a little nervous," according to Detective Montemarano. Appellant also made "a couple furtive movements just towards his pants leg" area. Later, Detective Montemarano clarified that he meant that appellant was "fidgety" and "had been touching his legs and his waistband."

Appellant, upon request, produced his driver's license but volunteered that his license was possibly suspended. Detective Montemarano then used the Maryland Judiciary Case Search internet site to check whether what appellant had said was true and learned that appellant's license was suspended about a week earlier on August 19, 2011. The detective next asked appellant to exit the vehicle and appellant complied.

After appellant stepped out of the vehicle, the detective observed an open "medication pill bottle" which he described as "the orange pill bottle that everybody in the world has," sitting in the center cup holder. The bottle "had no top on it, no white top, it was just an open bottle[.]" Detective Montemarano, a narcotics detective who had made hundreds of traffic stops during his career, testified:

> [A]s a narcotics detective I find to be - - I know it to be common for, especially in the northwest we have a large problem with recreational use and sales of prescription medication. I also know it's a pretty common factor where people stash other packaged narcotics including cocaine, heroin, marijuana as well as Percocets, Oxy, Morphine in bottles.
>
> I also, due to his sporadic driving - - people that . . . recreationally use drugs become under the influence even if they are just prescription drugs, and we have a big problem with Oxy, Percocets, Vicodin and Demerol up in the northwest. It's actually a big issue we've been coming across a lot over the last few years.

Clarifying that he only saw the bottle after appellant stepped out of the vehicle, the detective then patted appellant down for purposes of officer safety. No weapons were found and appellant was then directed to stand at the rear of the vehicle, to wait with Ms. Mickey, the passenger, and Detective Giordano. Detective Montemarano further testified:

> And I leaned into the vehicle and maneuvered the pill bottle around, and I could see – you could see inside it when you lean in and I noticed there was

> five pills in there, five white pills. They were round. I turned it and observed a name on the pill bottle, which I knew was not Mr. Wharton's, because he had given me his ID and he was Mr. Wharton and the name on the pill bottle was Larry Coleman, which is a man's name and I was pretty sure Ms. Mickey was a female.

Detective Montemarano noticed that the top lid of the center console, located near the bottle, was "propped up because there was a lot of stuff in there, papers, all kinds of things." He saw a Styrofoam drinking cup inside the console and then saw .38 caliber bullets in that cup. The lid to the console was not completely closed. As a consequence, it was necessary for him to lean down to see the bullets in the console. At that point, the detective arrested appellant for possession of suspected illegal narcotics and possession of the ammunition found inside the vehicle.[2]

A search of the Altima uncovered a loaded Smith and Wesson .38 caliber special revolver in the back seat, located underneath a stack of clothes and a shopping bag. Detective Montemarano further testified that after appellant was arrested another officer found a clear plastic bag containing suspected cocaine in appellant's pants pocket. In addition, the pill bottle contained five white pills of Oxycodone.

Upon further examination, Detective Montemarano clarified that he saw the pills and the ammunition "when I leaned into the vehicle. I had not placed him under arrest yet."

[2] Photographs of the console, depicting the Styrofoam cup containing the live ammunition, as well as the open pill bottle, were admitted into evidence at the motions hearing.

On redirect examination, the detective said that, when he first spoke to appellant, the latter spoke "a little fast" but his speech was not slurred. Although appellant was nervous, he did not seem "unbalanced" or under the influence. The detective reiterated that when he first encountered appellant, "he was nervous and he was speaking quickly and he was breathing heavily. He was a little sweaty, but I mean he wasn't wobbling around, no."

Asked when he first noticed the pill bottle, Detective Montemarano testified that he stood behind the "pillar" on the side of the car when he spoke to appellant, for safety reasons and did not see it at first. He explained:

> I can't tell you exactly when. It was as he stepped out I saw it because it was the first time I'd seen kind of the center of the car because he – when he stepped out, that's when his body wasn't oblated [sic] towards me.

The detective also testified as follows:

> Q. When you looked into the car, what was your purpose of going for the pill bottle?
>
> A. To ascertain if there was anything inside. As I looked in, saw the pills inside of the pill bottle, again, as I stated, the thought process was twofold whether he could be under the influence or whether they'd be, you know, for use of recreational use or for narcotic sales, due to, as I stated, it is common practice for both in the northwest. And as a person, it's weird to see an open pill bottle in the center console of a vehicle at almost 10:00 at night, on a, you know, I believe it was a Friday night. It was a Friday or Saturday. Somebody driving quickly, it's, you know, it's pretty common that you're probably going to get a recreational use out of that. In the totality of circumstances, when you put everything on top of it, it's pretty common actually, when you see it.

At the end of the evidentiary phase of the suppression hearing, appellant argued that the detective lacked probable cause for the initial traffic stop. He also argued that there

was insufficient evidence even after the search on the Maryland Judiciary Case Search site, to arrest appellant for driving on a suspended license. Defense counsel argued, in the alternative, that even assuming, *arguendo*, that there was probable cause to arrest for driving while appellant's license was suspended, such an arrest did not support a search of the vehicle. Counsel also argued that, when the detective leaned into the vehicle and manipulated the pill bottle, those actions constituted an exploratory warrantless search unsupported by probable cause.

More specifically, appellant's counsel contended that there was nothing unusual about appellant's movements, he did not appear to be under the influence, and, that, "a pill bottle, in and of itself, is not contraband[.]" The court then questioned defense counsel's argument concerning the plain view doctrine, suggesting that leaving an open pill bottle exposed to a viewer outside the vehicle amounted to a diminution in a person's expectation of privacy. Appellant's counsel countered by insisting that any illegality associated with the pill bottle was not immediately apparent because the detective had to lean inside the vehicle to maneuver the bottle around to see the contents of the bottle.

The motions court denied the motion to suppress the evidence. The judge found that Detective Montemarano was credible, and that the initial traffic stop was justified by probable cause to believe that appellant was speeding and had made an unsafe lane change. The court also accepted the detective's testimony that appellant admitted that his driver's license possibly was suspended, and that, as confirmed by the Maryland Judiciary Case Search site, there was probable cause to detain and/or arrest appellant for the traffic

violation. The court continued, however, that under *Arizona v. Gant*, 556 U.S. 332 (2009), the officer could not search the vehicle incident to the arrest for driving on a suspended license.

Ultimately, however, the court ruled that the search of the interior of the Nissan was lawful, reasoning as follows:

> But in this case I credit Detective Montemarano's testimony that on looking into the vehicle he saw in plain view without entering the vehicle an open pill bottle in the console. And in this case I find that the combination of erratic driving, the observations of nervousness, and sweating that Detective Montemarano had made of Mr. Wharton on making the stop and then seeing the pill bottle, which in his experience he knew was sometimes used either to contain prescription drugs that might be being abused, or illegal drugs that might be illegal in any circumstances, is sufficient to amount to probable cause to believe at that point that Mr. Wharton may be in possession of illegal drugs and that the vehicle may contain evidence of those illegal drugs.
>
> Alternatively, although I think it is a close question, I think the exposed pill bottle in the console is also in plain view including the label on the pill bottle and that it is not a search for Detective Montemarano to turn it and to note that the name was different than the driver and that the pill bottle contained oxycodone, but I don't think that a finding of that information being in plain view is necessary to constitute the probable cause that Detective Montemarano had, either to make an arrest based on illegal possession of controlled dangerous substance, and/or to make a search of the vehicle.
>
> The search of the vehicle then revealed the weapon that was in the back seat which -- and also the drugs which, I think, are the main focus of the motion to suppress. On that basis -- on the basis of those findings I find that Detective Montemarano's actions at each stage were justified and therefore deny the Defendant's motion to suppress.

DISCUSSION

The motions court recognized that the suppression motions called into question three decisions by Detective Montemarano: "the decision to stop . . . the decision to arrest and the decision to search the vehicle."

As we will explain, the stop and the arrest for driving on a suspended license were lawful. The legality of the search of the vehicle, however, warrants further discussion.

Our standard of review is as follows:

> Appellate review of a motion to suppress is "limited to the record developed at the suppression hearing." *Moats v. State*, 455 Md. 682, 694 (2017). "We view the evidence and inferences that may be drawn therefrom in the light most favorable to the party who prevails on the motion," here, the State. *Raynor v. State*, 440 Md. 71, 81 (2014). "We accept the suppression court's factual findings unless they are shown to be clearly erroneous." *Id*. We give "due weight to a trial court's finding that the officer was credible." *Ornelas v. United States*, 517 U.S. 690, 700 (1996). "[W]e 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." *Grant v. State*, 449 Md. 1, 14–15 (2016) (quoting *State v. Wallace*, 372 Md. 137, 144 (2002)).

State v. Johnson, 458 Md. 519, 532-33 (2018).

The Fourth Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, protects against unreasonable government searches and seizures. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). And, relevant to the stop, the arrest and the search, is the Fourth Amendment standard for probable cause. That standard 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)). Probable cause is a "'fluid concept'" that "'exist[s] where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found.'" *State v. Johnson*, 458 Md. at 535 (quoting *Gates*, 462 U.S. at 232 and *Ornelas*, 517 U.S. at 696). It is "incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances," *Pringle*, 540 U.S. at 371. Ultimately, "[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt," and that the belief of guilt must be particularized with respect to the person to be searched or seized[.]" *Pringle*, 540 U.S. at 371 (citations omitted).

A. There was probable cause to stop appellant for speeding and for making an unsafe lane change.

"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." *Rowe v. State*, 363 Md. 424, 433 (2001) (citing *Whren v. United States*, 517 U.S. 806, 810 (1996)). "A traffic stop may also be constitutionally permissible where the officer has a reasonable belief that 'criminal activity is afoot.'" *Rowe*, 363 Md. at 433 (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). "Whether probable cause or a reasonable articulable suspicion exists to justify a stop depends on the totality of the circumstances." *Rowe*, 363 Md. at 433 (citing *United States v. Cortez*, 449 U.S. 411 (1981)).

In this case, appellant was charged with making an unsafe lane change, under section 21-309 (b), and speeding, under section 21-801 (a) of the Transportation Article.

See Md. Code (1977, 2009 Rep. Vol.), §§ 21-309 (b) and 21-801 (a) of the Transportation ("Trans.") Article. At the time of the stop, section 21-309 (b) provided:

> A vehicle shall be driven as nearly as practicable entirely within a single lane and may not be moved from that lane or moved from a shoulder or bikeway into a lane until the driver has determined that it is safe to do so.

Trans. § 21-309 (b).

Section 21-801 (a) provided:

> A person may not drive a vehicle on a highway at a speed that, with regard to the actual and potential dangers existing, is more than that which is reasonable and prudent under the conditions.

Trans. § 21-801 (a).

Detective Montemarano testified that appellant was driving at a high rate of speed and weaving in and out of the two-lane roadway without using turn signals. The area had a 25 mile per hour speed limit, and appellant passed the detective's vehicle while the latter was traveling at 30 miles per hour. Further, at one point, appellant "swerved back left, back to stay straight" and then "cut back left" on Belvedere Avenue, which the detective characterized as a "high traffic area," with "pretty high" pedestrian traffic as well. Accordingly, the stop for speeding and unsafe lane change was supported by probable cause and was lawful under the Fourth Amendment.[3]

[3] In his brief, appellant does not challenge the motion judge's finding that there was probable cause to stop his vehicle.

B. There was probable cause to arrest appellant for driving on a suspended license.

After he was stopped, appellant admitted that he was possibly driving on a suspended license. Detective Montemarano used the Maryland Judiciary Case Search and found that appellant's license was suspended about a week earlier. Appellant was charged with driving while suspended, under Section 16-303 (c) of the Transportation Article, which provides that:

> A person may not drive a motor vehicle on any highway or on any property specified in § 21-101.1 of this article while the person's license or privilege to drive is suspended in this State.

Trans. § 16-303 (c) (2011 Supp.).

The Court of Appeals has recognized that "'Case Search' is the Judiciary's online website that 'provides public access to the case records of the Maryland Judiciary.' Maryland Judiciary, Case Search, http://casesearch.courts.state.md.us/casesearch" *Moats v. State*, 455 Md. 682, 691 n.6 (2017). This Court has likewise concluded that it may "take judicial notice [of] records of the Maryland Judiciary [that] are made available by the Administrative Office of the Courts on the Judiciary website." *Marks v. Criminal Injuries Comp. Bd.*, 196 Md. App. 37, 79 n.17 (2010).

The issue here is not whether the Case Search information was sufficient to prove beyond a reasonable doubt that appellant was driving on a suspended license; the issue is only whether the information was sufficient to provide Detective Montemarano with probable cause to arrest appellant for driving on a suspended license. As the Court of Appeals has explained, "'[f]inely tuned standards such as proof beyond a reasonable doubt

or by a preponderance of the evidence, useful in formal trials, have no place in the [probable cause] determination.'" *State v. Johnson*, 458 Md. at 535 (quoting *Pringle*, 540 U.S. at 371) (in turn quoting *Gates*, 462 U.S. at 235). Probable cause "is not a high bar[,]" *Id.* (citations and quotation marks omitted), and:

> To determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide "whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to" probable cause[.]

Pringle, 540 U.S. at 371 (citation omitted).

Given appellant's concession that there was a possibility that he was driving on a suspended license coupled with the results of the Case Search, we hold that there was probable cause to arrest appellant for driving with a suspended license.

C. The detective did not have probable cause to search the vehicle.

The search in this case commenced when Detective Montemarano leaned inside the window of the car appellant was driving in order to: 1) see if the bottle was empty; and 2) read the label on the bottle. "Courts generally hold that an officer's physical intrusion into the interior of a vehicle through an open window or door constitutes a search under the Fourth Amendment." *Grant v. State*, 449 Md. 1, 17 (2016). This Court has recently restated the rules applicable to warrantless searches:

> The general rule is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions." *Arizona v. Gant*, 556 U.S. 332, 338, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)). *Accord Riley v. California*, ___ U.S. ___, 134 S.Ct. 2473, 2482, 189 L.Ed.2d 430 (2014). Thus, a warrantless search of a person is "reasonable only if it

> falls within a recognized exception." *Missouri v. McNeely*, 569 U.S. 141, 148, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013). The Court of Appeals has listed several exceptions to the warrant requirement, including: (1) hot pursuit; (2) the plain view doctrine; (3) the *Carroll* doctrine; (4) stop and frisk; (5) consent; (6) exigent circumstances; and (7) search incident to arrest.

Barrett v. State, 234 Md. App. 653, 662 (2017), *cert. denied*, 457 Md. 401 (2018).

Two of these exceptions, the *Carroll* doctrine and plain view, are at issue in this case. We shall address them in reverse order.[4]

1. The seizure of the pill bottle was not justified under the "plain view" doctrine.

The plain view doctrine is an exception to the warrant requirement, which permits police officers to seize items in plain view where they have probable cause to believe that

[4] The exceptions for hot pursuit, stop and frisk, consent, and exigent circumstances are not at issue. With respect to search incident, the State conceded, and the motions judge agreed, that the search could not be justified under that theory. Given that appellant was outside the vehicle and the basis for the arrest was driving on a suspended license, we agree. *See Arizona v. Gant*, 556 U.S. 332, 351 (2009) ("Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest").

In this case, appellant also argues that the search cannot be justified under a different exception, that is, the one permitting inventory searches, noting that the owner of the vehicle, Ms. Mickey, was present and available to drive the vehicle. *See Briscoe v. State*, 422 Md. 384, 397 (2011) (observing that inventory searches must be conducted when "the vehicle is in lawful police custody at the time of the search and the search is carried out pursuant to 'standardized criteria or [an] established routine' established by the law enforcement agency") (quoting *Florida v. Wells*, 495 U.S. 1, 4 (1990). Neither the State nor the motions judge attempted to justify the search by utilizing the inventory exception. Because the State's brief does not address this exception, we shall not comment further on it. *See Garner v. Archers Glen Partners, Inc.*, 405 Md. 43, 46 (2008) ("[A]n appellate court should use great caution in exercising its discretion to comment gratuitously on issues beyond those necessary to be decided"); *Thompson v. State*, 192 Md. App. 653, 677 (2010) (declining to address additional legal rationales under the Fourth Amendment).

the items are contraband or evidence of a crime. *See Horton v. California*, 496 U.S. 128, 133-37 (1990). The Court of Appeals has held:

> To invoke the "plain view" doctrine of the Fourth Amendment, the police must satisfy the following requirements: (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) (citation omitted); *see also Kentucky v. King*, 563 U.S. 452, 462-63 (2011) ("[L]aw enforcement officers may seize evidence in plain view, provided that they have not violated the Fourth Amendment in arriving at the spot from which the observation of the evidence is made") (citation omitted); *Pryor v. State*, 122 Md. App. 671, 681 ("The Fourth Amendment does not protect the motorist against the seizure of any incriminating evidence observed in 'open view'") (citation omitted), *cert. denied*, 352 Md. 312 (1998).

Prior to leaning into the vehicle, Detective Montemarano was lawfully in a position to view the object in question, *i.e.*, the pill bottle, because the stop was lawful. Moreover, it is well settled that the detective could order appellant out of the vehicle during the stop. *See Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977). The issue presented is whether the incriminating nature of the pill bottle itself was "immediately apparent," to the detective before he leaned into the interior of the vehicle. The Court of Appeals has explained:

> The requirement that an object's incriminating nature be "immediately apparent" ensures that the "plain view" doctrine is not used to engage in "a general exploratory search from one object to another until something incriminating at last emerges." "Immediately apparent," however, does not mean that the officer must be nearly certain as to the

> criminal nature of the item. Instead, "immediately apparent" means that an officer must have probable cause to associate the object with criminal activity.

Wengert, 364 Md. at 89 (citations omitted).

In our view, even an experienced police officer could not rationally infer from seeing an open pill bottle that the pill bottle contained contraband. Detective Montemarano himself testified that he "observed an open medication pill bottle, *the orange pill bottle that everybody in the world has*, sitting in the center cup holder. It had no top on it, no white top, it was just an open bottle[.]" (emphasis added). Moreover, before he leaned into the vehicle, the detective did not know whether the bottle was empty. The incriminating nature of the contents of the bottle was not "immediately apparent," until the detective leaned into the vehicle and inspected the label and the contents of the pill bottle. The search fails to meet the standards required under the plain view exception. *Cf. Arizona v. Hicks*, 480 U.S. 321, 325 (1987) (holding that officer's act of moving stereo components to look at the serial numbers was a search and stating that "the 'distinction between "looking" at a suspicious object in plain view and "moving" it even a few inches' is much more than trivial for purposes of the Fourth Amendment").

2. There was no probable cause under the *Carroll* Doctrine to authorize the search of appellant's vehicle.

The State argues:

> The observation of an open pill bottle in the vehicle, in combination with the other circumstances, gave rise to probable cause to believe that Wharton was driving while impaired and/or in possession of narcotics, and that the vehicle contained evidence thereof.

The "automobile search" exception to the warrant requirement of the Fourth Amendment was first recognized in the Prohibition-era case, *Carroll v. United States*, 267 U.S. 132 (1925), where the United States Supreme Court held that as long as an officer had "probable cause for believing that [a vehicle was] carrying contraband or illegal merchandise," the police could perform a lawful search of the automobile without a warrant. *Id.* at 154. As we have explained:

> A warrantless search of a vehicle is permitted if there is probable cause to believe that the vehicle contains contraband. In general, the automobile exception to the warrant requirement is premised upon the exigencies associated with the mobility of a vehicle, and the diminished expectation of privacy with regard to a vehicle.

Fair v. State, 198 Md. App. 1, 11 (2011) (quoting *State v. Cabral*, 159 Md. App. 354, 372-73 (2004)); *see also Nathan v. State*, 370 Md. 648, 665-66 (2002) ("Police officers who have probable cause to believe that there is contraband or other evidence of criminal activity inside an automobile that has been stopped on the road may search it without obtaining a warrant"), *cert. denied*, 537 U.S. 1194 (2003).

Here, the motions court concluded that the detective had probable cause to lean inside the vehicle due to a culmination of: 1) erratic driving; 2) nervousness and sweating on the part of the appellant; and 3) seeing an open "pill bottle, which[,] in [the detective's] experience[,] he knew was sometimes used either to contain prescription drugs that might be being abused, or illegal drugs[.]"

The Altima was observed traveling over 30 miles per hour, in a 25 mile per hour zone, and swerving and weaving in and out of the two-lane roadway without using a turn

signal. Although this provided probable cause to stop the Altima, this behavior, even considered in totality with the other factors, did not give the detective probable cause to believe that the bottle contained contraband.

We are similarly not persuaded that appellant's conduct after he was stopped, gave the detective probable cause to believe that the bottle contained contraband. According to the detective, appellant was "a little fidgety," "a little nervous," "breathing heavily," "a little sweaty," and made "a couple furtive movements just towards his pants leg" area. But, his speech was not slurred, he did not seem "unbalanced" or under the influence, and he "wasn't wobbling around." Further, Detective Montemarano admitted that he did not notice anything "out of the ordinary" about appellant's appearance. And, as appellant points out, there was no testimony indicating that the typical signs of drug use were apparent, *i.e.*, "pupils appearing dilated, red eyes, etc." Moreover, appellant was never charged with driving under the influence of drugs. We disagree with the motions judge's finding that prior to leaning into the vehicle, the detective had probable cause to believe he was driving under the influence of drugs.

While the Court of Appeals has recognized that extreme nervousness may provide probable cause, *see State v. Johnson*, 458 Md. at 542 (concluding that unusual nervousness that is "beyond ordinary" or "exaggerated" may be a factor in probable cause analysis), ordinary nervousness is not enough:

> The nervousness, or lack of it, of the driver pulled over by a Maryland State trooper is not sufficient to form the basis of police suspicion that the driver is engaged in the illegal transportation of drugs. There is no earthly way that a police officer can distinguish the nervousness of an ordinary citizen under

> such circumstances from the nervousness of a criminal who traffics in narcotics. An individual's physiological reaction to a proposed intrusion into his or her privacy cannot establish probable cause or even grounds to suspect. Permitting citizen's nervousness to be the basis for a finding of probable cause would confer upon the police a degree of discretion not grounded in police expertise, and, moreover, would be totally insusceptible to judicial review.

Ferris v. State, 355 Md. 356, 388 (1999) (quoting *Whitehead v. State*, 116 Md. App. 497, 505 (1997) (footnote omitted).

This Court reached a similar conclusion in *Seldon v. State*, 151 Md. App. 204, *cert. denied*, 377 Md. 114 (2003), wherein we observed that the trial court gave more weight to appellant's extreme nervousness than permitted under the dictates of the aforementioned passage from *Ferris*. *Seldon*, 151 Md. App. at 233. We stated:

> We take judicial notice that it is more likely so than not so that, when a uniformed law enforcement officer stops a motorist for speeding, the motorist will exhibit signs of nervousness. We reject the proposition that law enforcement officers are entitled to detain a motorist on the ground that the motorist fails to make "eye contact" and/or the motorist's "carotid pulse" is "pounding."

Seldon, 151 Md. App. at 233-34.[5]

The fact that appellant, when stopped, was observed to be "a little sweaty," on its face, could not be considered unusual inasmuch as the stop occurred in Baltimore City on an evening in August. And, the nervousness appellant exhibited would appear to have been of the ordinary variety. There was nothing incriminating about the open, and possibly empty, pill bottle, in and of itself, when the detective first saw it from outside the vehicle.

[5] We note that, in contrast to probable cause analysis, nervous and evasive behavior "is a pertinent factor in determining reasonable suspicion." *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).

Pictures of the bottle that were introduced at the suppression hearing shows that the bottle was of the ordinary orange variety with a white top. As Detective Montemarano acknowledged, the type of orange pill bottle he saw in appellant's car was the type of bottle "everyone in the world has[.]" In other words, possessing a pill bottle is a legitimate activity. The fact that such a common item is sometimes used to store illegal drugs, did not give the detective probable cause to believe that appellant was using the bottle to store illegal drugs or for some other illegal purpose.

In sum, appellant's behavior after the lawful stop and arrest was not sufficient to provide probable cause under the *Carroll* doctrine to authorize the search of the vehicle. Moreover, because the search was not lawful under any other exception, including, but not limited to, the plain view doctrine or as a search incident to his arrest for driving while his license was suspended, it follows that the handgun, the ammunition and the Oxycodone pills should have been suppressed as fruit of the poisonous tree. *See Myers v. State*, 395 Md. 261, 291 (2006) ("[T]he fruit of the poisonous tree doctrine excludes direct and indirect evidence that is a product of police conduct in violation of the Fourth Amendment"); *see also Utah v. Strieff*, __ U.S. __, 136 S. Ct. 2056, 2061 (2016) (observing that the exclusionary rule "encompasses both the 'primary evidence obtained as a direct result of an illegal search or search' and . . . 'evidence later discovered and found to be derivative of an illegality,' the so-called 'fruit of the poisonous tree'") (citation omitted); *accord Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

JUDGMENT AS TO THE CRIMES OF WEARING OR CARRYING A HANDGUN IN A VEHICLE, ILLEGAL POSSESSION OF A FIREARM BY A DISQUALIFIED PERSON, AND POSSESSION OF OXYCODONE REVERSED AND REMANDED FOR NEW TRIAL; ALL OTHER CONVICTIONS AFFIRMED. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.