Circuit Court for Queen Anne's County
Case No.: C-17-17-000456

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1873

September Term, 2017

CORY JAMAHL DEMBY

v.

STATE OF MARYLAND

Woodward C.J.,
Friedman,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: October 2, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

On September 29, 2017, appellant, Cory Jamal Demby, was convicted by a jury sitting in the Circuit Court for Queen Anne's County of possession of phencyclidine ("PCP") and obstructing and hindering. The court sentenced him to one year of incarceration for possession of PCP and suspended all but thirty days. The court also sentenced him to one year of incarceration for obstructing and hindering and suspended all but four months. On appeal appellant argues that the evidence is insufficient to sustain his conviction for obstructing and hindering, and that the trial court erred in excluding testimony of a police officer. Appellant's claims are without merit.

BACKGROUND

At approximately 12:24 a.m. on March 21, 2017, Trooper Branden Carroll of the Maryland State Police was assisting Trooper Justin Fohs at a traffic stop on Maryland Route 300 at Duhamel Corner Road in Sudlersville. Trooper Carroll's marked patrol vehicle was equipped with license plate recognition system. The system automatically scans license plates attached to vehicles driving on the roadway, and accesses MVA records to determine if the registration or tags are suspended, and if the registered owner of the plate has a suspended license or an oustanding warrant. As Trooper Carroll was assisting in the traffic stop, his automated license plate recognition system scanned the plates of oncoming vehicles, and the system alerted Trooper Carroll that a white Hyundai that had passed the traffic stop had suspended tags. After receiving the alert, Trooper Carroll entered his patrol vehicle, caught up with the white Hyundai, and stopped it on westbound Route 300 at Harbor Court in Queen Anne's County.

The driver of the Hyundai was identified as Tanisha Elaine Walley. Appellant was seated in the front passenger's seat. Appellant did not make eye contact with Trooper Carroll when Trooper Carroll spoke to him, but instead, simply stared straight ahead. Trooper Carroll asked appellant for his identification, but appellant replied that he didn't have an ID. Trooper Carroll then asked appellant to write down his name. Appellant initially had difficulty writing his name, but eventually was able to provide it to Trooper Carroll. Appellant was "real short" with his answers to Trooper Carroll's questions and continued to stare straight ahead while Trooper Carroll spoke with him. Trooper Carroll then returned to his patrol vehicle to relay the information given to him by Walley and appellant to the police barracks. Based on his observations of appellant, and the presence of several scent-masking agents, such as air fresheners and freshly sprayed perfume, Trooper Carroll also called Trooper Fohs and requested that Trooper Fohs come to the traffic stop with his K-9.

Trooper Fohs, a certified K-9 handler, and his K-9 Euro, who is trained and certified in the detection of controlled dangerous substances, responded to the scene within five minutes after Trooper Carroll's call. Once at the scene, Trooper Fohs approached appellant and observed two loose cigarettes in his lap area. The cigarettes were not packed very tightly, and the white part of the cigarette was discolored. Despite asking appellant to step out of the vehicle several times, appellant did not respond and simply stared straight ahead. Trooper Carroll and Trooper Fohs then took off appellant's seatbelt, grabbed him, and carried him out of the vehicle. Once outside, they laid him on his stomach, handcuffed him behind his back, and advised him that he was not being arrested. While appellant was

being extracted from the vehicle and handcuffed, his eyes were open and he appeared to be awake. Appellant did not make any verbal responses, and while he wasn't "fighting," he was "really tense."

Trooper Fohs then led Euro on a scan around the vehicle. Euro "alerted" at the passenger door area where appellant had been seated. Trooper Carroll searched the vehicle and found two discolored cigarettes on the seat where appellant had been seated, a separate cigarette box containing non-discolored cigarettes, and a burnt cigar which had been in appellant's hand prior to his extraction from the vehicle. The two loose cigarettes and cigar were later analyzed by the Maryland State Police Forensic Sciences Division. No controlled dangerous substances were detected within the burnt cigar. The two discolored cigarettes tested positive for the presence of phencyclidine, a schedule II controlled dangerous substance.

DISCUSSION

Sufficiency of Evidence: Obstruction and Hindering

Appellant first contends that the "evidence is insufficient to sustain [his] conviction for obstructing and hindering" because "there is insufficient evidence the troopers were actually hindered, as well as insufficient evidence that Appellant, whom the State argued was high on PCP, had the requisite *mens rea*."

To review for sufficiency of evidence we determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). This "review standard applies to all criminal cases, including

those resting upon circumstantial evidence, because, generally, proof of guilt based in whole or in part on circumstantial evidence is no different from proof of guilt based on direct eyewitness accounts." *Neal v. State*, 191 Md.App. 297, 314 (2010). "We defer to any possible reasonable inferences the jury could have drawn from the admitted evidence and need not decide whether the jury could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence." *State v. Mayers*, 417 Md. 449, 466 (2010).

"In Maryland, obstructing and hindering a law enforcement officer in the performance of his duty is a common law offense." *Titus v. State*, 423 Md. 548, 558 (2011). The Court of Appeals in *Cover v. State*, 297 Md. 398 (1983) outlined a four-part test for analyzing the offense:

1) A police officer engaged in the performance of a duty;
2) An act, or perhaps an omission, by the accused which obstructs or hinders the officer in the performance of that duty;
3) Knowledge by the accused of facts comprising element (1); AND
4) Intent to obstruct or hinder the officer by the act or omission constituting element (2).

Id. at 413.

Obstructing is "an act or omission 'making it more difficult for the police to carry out their duties.'" *Titus*, 423 Md. at 561 (quoting *Cover*, 297 Md. at 410). The Court of Appeals in *Titus* further explained obstructing and hindering and distinguished it from resisting arrest:

> Several treatises are instructive in defining and explaining the terms necessary to constitute the element of actual obstruction or hindrance of an officer. Lewis Hochheimer, in his treatise, stated that the act of obstructing, in the context of the offense of obstructing and hindering, "includes any

> impediment, direct or indirect, active or passive, to the execution of process or exercise of authority." Lewis Hochheimer, *The Law of Crimes and Criminal Procedure* 436 (2d ed. 1904). In distinguishing the offense of resisting arrest from that of obstructing and hindering, it has been noted that "[t]o constitute obstruction of an officer in the performance of his duties it is not necessary that there be an actual or technical assault upon the officer, but there must be acts clearly indicating an intention on the part of [the] accused to prevent the officer from performing his duty...." 2 Hascal R. Brill, *Cyclopedia of Criminal Law* 1783 (1923). This Court in *Busch v. State*, 289 Md. 669, 677, (1981) (quotation omitted), recognized that "resisting an officer in the performance of his duties was an offense that could occur even before there was an arrest." Thus, it follows that "the offense of resisting arrest requires proof of an act different from or additional to the acts necessary to prove the offense of resisting, hindering, or obstructing an officer in the performance of his duties[.]" *Busch*, 289 Md. at 678; *see* Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 555 (3d ed. 1982) (noting that "there is a distinction between avoidance and resistance or obstruction" and that "[o]bstruction of justice may be committed by interference with an officer's discharge of duties other than that of making an arrest").

423 Md. at 562-63.

At trial Trooper Carroll testified as to what he observed after Trooper Fohs arrived at the traffic stop with his K-9:

> TPR. CARROLL: Yes. At that time, when TFC Fohs approached the vehicle, I saw him make contact with the passenger, not sure exactly what was said. But we both asked the passenger to step of [sic] the vehicle so TFC Fohs could conduct his K-9 scan of the vehicle.
>
> [STATE]: If I may interrupt you real quick. Have you been on traffic stops where you've had to call a K-9 before?
>
> TPR. CARROLL: Yes.
>
> [STATE]: And is it customary for the passengers and driver of the vehicle and all occupants to be outside of the vehicle during the course of a K-9 scan?

TPR. CARROLL: Yes.

[STATE]: So there was nothing out of the ordinary with asking the driver and the defendant to exit the vehicle, correct?

TPR. CARROLL: No. So at that time, like I said, we asked him to step out of the vehicle. He stared straight ahead. Asked him again, same thing. He never said no. He just stared straight ahead the entire time. Asked him a few more times and at that point, we realized he was not getting out of the vehicle.

[STATE]: What happened next?

TPR. CARROLL: At that point, we – TFC Fohs and I decide that we were going to extract him out of the vehicle.

Trooper Fohs testified that, while having persons in a vehicle while a K-9 scan is completed does not affect the ability of a K-9 to detect drugs, his agency requires that all occupants be out of a car before a K-9 scan is conducted. He further testified that the purpose of the agency rule is to assure the safety of the "police officers, the dog and any subjects in the vehicle," and that "[o]n almost every occasion [he] would not" conduct a K-9 scan with people in the vehicle.

Here, there is ample evidence that appellant's passive refusal to exit the vehicle impeded the officer's ability to carry out the K-9 scan. The impediment was so great that both troopers had to physically remove appellant from the vehicle before the K-9 scan could be conducted. Although, Trooper Fohs testified that it would have been possible for the dog to detect drugs in the vehicle with occupants remaining inside, agency regulations, prompted by security concerns, mandated that occupants be removed.

Appellant nonetheless contends that there "is also insufficient evidence on this record that [he] intended to hinder the troopers or that he knew that the troopers were engaged in an official duty," as "the troopers' testimony strongly suggested that appellant was intoxicated." While Trooper Carroll testified that appellant stared straight ahead while he was talking with him, and Trooper Fohs testified that appellant appeared "very out of it," a reasonable trier of fact could have found that appellant was aware that the troopers were engaged in police duties and that he intended to obstruct those duties. While appellant stared straight ahead while interacting with the troopers, appellant did in fact answer Trooper Carroll's questions. Further, appellant was able to write down his correct first and middle name and birthdate for the officers. Accordingly, we hold that the evidence was sufficient for a rational trier of fact to find appellant guilty of obstructing and hindering beyond a reasonable doubt.

Exclusion of Testimony

Appellant next contends that the "trial court erred in excluding the testimony of Trooper Carroll that Ms. Walley told him that the cigarettes belonged to her." We disagree.

Ordinarily, we review rulings on the admissibility of evidence using an abuse of discretion standard. *Gordon v. State*, 431 Md. 527, 533 (2013). "Whether evidence is hearsay," however "is an issue of law reviewed de novo." *Bernadyn v. State*, 390 Md. 1, 8 (2005). Hearsay is "a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Maryland Rule 5-801(c). Hearsay is not admissible "[e]xcept as otherwise provided by [the

Maryland] rules or permitted by applicable constitutional provisions or statutes." Md. Rule 5-802. "If the declaration is not a statement, or if it is not offered for the truth of the matter asserted, it is not hearsay and it will not be excluded under the hearsay rule." *Stoddard v. State*, 389 Md. 681, 689 (2005).

Md. Rule 5-804(b)(3) carves out an exception to the hearsay rule for statements against interest, and provides the following:

> **Statement Against Interest.** A statement which was at the time of its making so contrary to the declarant's pecuniary or proprietary interest, so tended to subject the declarant to civil or criminal liability, or so tended to render invalid a claim by the declarant against another that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

To admit a statement under this rule, the "trial court must determine that: 1) the declarant's statement was against his or her penal interest; 2) the declarant is an unavailable witness; and 3) corroborating circumstances exist to establish the trustworthiness of the statement." *Roebuck v. State*, 148 Md. App. 563, 578 (2002). "The corroboration requirement serves to deter 'criminal accomplices from fabricating evidence at trial.'" *Roebuck*, 148 Md. App. at 579 (quoting *United States v. Camacho*, 163 F. Supp. 2d. 287, 299 (S.D.N.Y. 2001)).

Prior to trial, the State advised the court that it did not intend on calling appellant's girlfriend, Tanisha Walley, to testify. Further, the State advised that Walley's attorney, who was present with Walley, had indicated that should Walley be called to testify, she would invoke her Fifth Amendment privilege not to testify. Defense counsel then called

Walley, who was also charged with possession of PCP, to the stand and she informed the court that if she was called to testify at trial she would invoke her Fifth Amendment privilege. Walley's attorney then left the courthouse, while Walley stayed for the duration of trial.

After opening statements appellant's counsel approached the bench and informed the court that Walley had changed her mind and wanted to testify. The court indicated that it would rule on the issue when Walley was called to the stand.

Trooper Fohs testified that when he approached the vehicle and spoke with appellant, he observed two discolored cigarettes in appellant's lap area. Trooper Carroll testified that during the subsequent search of the vehicle, he located the two discolored cigarettes in the passenger seat where appellant had been seated. He also recovered a box of cigarettes in the vehicle that did not appear discolored. Trooper Carroll did not suspect that the cigarettes in the box had been tampered with, because while they were the same brand as the two on the passenger seat, they were not discolored, nor were they broken. Trooper Carroll testified on cross-examination:

[DEFENSE COUNSEL]: You still had to send all this stuff to the crime lab?

TPR. CARROLL: Yes.

[DEFENSE COUNSEL]: Did the defendant tell you that the cigar was his?

TPR. CARROLL: Yes.

[DEFENSE COUNSEL]: And Ms. Walley told you that the –

[STATE]: Objection

[DEFENSE COUNSEL]: – cigarettes were hers?

[STATE]: Objection, hearsay.

THE COURT: Sustained.

[DEFENSE COUNSEL]: Your Honor, she's already testified and exercised her Fifth Amendment right.

[STATE]: Approach, please.

(Counsel approached the bench and the following occurred:)

[STATE]: You can't do this both ways. That is absolutely impermissible and I'm going to ask for a mistrial. That is absolutely ridiculous.

THE COURT: What do you say?

[DEFENSE COUNSEL]: Your Honor, I was just trying to establish that for the hearsay rule of a statement against party interest or a statement against interest, that she was a missing witness or a witness that can't be compelled to testify.

THE COURT: She's going to testify, that's what you just said.

[DEFENSE COUNSEL]: I haven't – I can't talk to her. I don't know if she's going to. I'm just giving this for my client.

THE COURT: Also, you have a real problem with the – getting it admitted because of whether or not it's reliable. She said she's not going to testify. Now, you're trying to put it in as a reliable statement, so I don't think it's admissible. She'd have to testify, if she's going to claim them, right? I mean, because there's no indicia or reliability because she said he didn't. She can say he said they're his.

[DEFENSE COUNSEL]: I understand.

THE COURT: You understand, Okay.

The court then advised the jury that it had sustained the objection and that they were to disregard the question and any response to it.

Tanisha Walley was later called to the stand by the defense, whereupon she explained that she had changed her mind and wanted to testify. The court advised her on the record, noting that she had earlier been advised by her attorney. The court, satisfied that she had not been induced or coerced into testifying stated, she "indicates she is making a decision freely and voluntarily and I will allow her to testify."

Walley testified that she is appellant's long-term live-in girlfriend and that they have two children together. She testified that the pack of cigarettes in the car that day were hers. She further testified that prior to picking appellant up that evening from work she had given a woman a ride and that the woman may have left the two loose cigarettes on the seat, but she wasn't sure. When asked what she told the police officers on the night of the stop about the cigarettes, she responded:

> I told him that I smoke. I had gave somebody a ride prior. I mean, they might have left them in the car, I'm not for sure. … I owned up to having the cigarettes because I smoke cigarettes, so I told them that they were mine because I smoke cigarettes. I didn't know that the cigarettes had PCP on them.

The trial court properly excluded Walley's statement to Trooper Carroll for several reasons. First, her purported statement, that the cigarettes were hers, was not against her penal interest. The police recovered a box of cigarettes from Walley's vehicle. These cigarettes did not test positive for PCP, so her ownership of them would not have exposed her to criminal liability. Only the two loose cigarettes, which were seen in appellant's lap during the traffic stop, tested positive for PCP. Even if she assumed ownership of the two

cigarettes in appellant's lap, it is not clear that she would have been exposed to criminal liability, as she would not have necessarily known that those cigarettes had been dipped in PCP after they left her box of cigarettes.

The court also properly excluded the statement because Walley was not an unavailable witness. At the time of Trooper Carroll's testimony, defense counsel had already notified the court that Walley had changed her mind and wished to testify. As the prosecutor at trial explained, appellant can't have it both ways. Walley's statement can't be admitted through Trooper Carroll as a statement against interest made by an unavailable witness, and then Walley become available and testify.

Finally, the court's determination that the statement lacked trustworthiness is not clearly erroneous. Walley's close relationship with appellant cuts "against the presumption of reliability normally attending a declaration against interest." *State v. Standifur*, 310 Md. 3, 17 (1987). Further, even if she claimed ownership to Trooper Carroll of the PCP laced loose cigarettes, that statement is inconsistent with Trooper Foh's observation of the loose cigarettes in appellant's lap at the traffic stop. It is also inconsistent with her testimony that they may have been left there by the woman to whom she gave a ride earlier in the evening. Nevertheless, even had the statement been erroneously admitted, any error was harmless as Walley ultimately testified as to what she told the police at the traffic stop and later that evening when they came to her home.

JUDGMENTS OF THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.