UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0806

September Term, 2015

ELIJAH GRAHAM BORKOWSKI

v.

STATE OF MARYLAND

Krauser, C.J.,
Nazarian,
Thieme, Raymond G., Jr.
Senior Judge, Specially Assigned,

JJ.

Opinion by Krauser, C.J.

Filed: April 24, 2017

*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.

Charged, in the Circuit Court for Carroll County, with possession with intent to distribute cocaine and related drug offenses,[1] Elijah Graham Borkowski, appellant, filed his first of two pretreial motions to suppress the cocaine recovered, by police, from his vehicle. That motion was subsequently granted by the Carroll County circuit court, on the grounds that the stop of Borkowski's car by police, was not supported by reasonable suspicion of criminal activity and therefore violated the Fourth Amendment. Challenging that decision, the State noted an appeal in *State v. Borkowski*, September Term, 2013 No. 2751 (filed August 26, 2014).

Disagreeing with the conclusion reached by the circuit court, this Court reversed that decision and remanded "this case to that court for it to . . . consider and address those issues it did not reach, but were raised, in the proceedings below." *Id.* Upon remand, Borkowski filed a supplemental motion to suppress, in which he largely reasserted the claims he had made in his first suppression motion, but that had not yet been addressed by the circuit court. After that motion was denied by the circuit court, Borkowski proceeded to trial on an agreed statement of facts, whereupon he was convicted of possession with intent to distribute cocaine. Thereafter, he noted this appeal, challenging the denial, by the court below, of his motion to suppress on two grounds: First, he maintains that the delay

[1] The "related charges" were the illegal manufacture, distribution, dispensing, storage, and concealment of CDS; possession with intent to distribute a prescription drug; possession of cocaine, Oxycodone, Alprazolam, and Diazepam; possession with intent to use drug paraphernalia; and failure to properly maintain his vehicle's registration plates.

that ensued, from the time he passed his sobriety tests to the moment that the K-9 unit arrived, constituted a "second stop," which was not supported by a reasonable suspicion of criminal activity and therefore was violative of the Fourth Amendment. And, second, he claims that, because there was "insufficient evidence that the police dog alerted to the presence of" CDS, the officers lacked probable cause to conduct either a warrantless search of his person or the interior of his vehicle.

For the reasons that follow, we hold that the circuit court did not err in denying Borkowski's supplemental motion to suppress and therefore shall affirm.

Facts

On the afternoon of January 20, 2012, a call was made by an unidentified individual (who, it appears, may well have been an off-duty police officer,[2] though the court below never made such a finding) to the Maryland State Police, over a "recorded line," to report reckless driving by a possibly intoxicated driver. That call lasted over five-and-a-half minutes, ending only after Borkowski's car was stopped by police. During the course of that telephone conversation, the caller advised dispatch that the driver was "either

[2] The transcript of the call to the Maryland State Police indicates that after the dispatcher answered the call, stating: "State Police Westminster, PCO Bennett, this is a recorded line [,]" the caller responded: "Hey Bennett, it's Wimmer, how are you?" PCO Bennett answered: "Fine, how are you?" Later, the caller said, "It's Becky." The dispatcher then asked for the car's number, and the caller responded, "G60, but I'm in my personal vehicle." Furthermore, at Borkowski's suppression hearing, defense counsel agreed "this isn't a citizen, it is a police officer who made the phone call."

hammered or he's so lost," as he was driving, in the caller's words, "pretty much in the median strip," and then "all over the road." The veering vehicle, she said, was a silver Lexus with a Maryland agricultural tag: "Adam 201917."

As the caller kept the dispatcher apprised of the vehicle's rapidly changing locations, the dispatcher notified Trooper Derrick Huffman and Sergeant Robert Stryjewski of the Maryland State Police, who were in the area to lookout "for a silver Lexus," traveling "on westbound 140," that was a "possible 10-55," that is, an "intoxicated driver." Then, after stating that he "just took off like a bat out of hell," the caller pleaded with the dispatcher to "get somebody here," as the Lexus, she averred, had "almost tail-ended somebody." Moments later, the caller advised that the Lexus was "ridin' on the shoulder" of the road, and that he was "tryin' to run into the back end of a tractor and trailer."

The dispatcher further advised the officers based on the information he had been receiving from the caller, that the Lexus was traveling at an "excessive speed, about 75" and that "when [the driver] stops at the light he just sits, and then takes off . . . ." Then, after conveying to the officers the caller's comment that the car in question was "ridin' off the road," the dispatcher told the officers that "the vehicle's behind the caller now" and that "the caller's in a black BMW," the officers responded that they were going to remain at their present location and wait for the vehicle in question to drive by. When the Lexus passed by the officers' location, the officers followed him for less than a quarter-mile

before initiating a stop by activating their vehicle's emergency lights. The front windows of the Lexus, Trooper Huffman believed, were illegally tinted, and its rear license plate bore, what the officer thought, was an illegal cover. The stop occurred at 1:48 p.m.

After Borkowski's vehicle pulled over to the side of the road, Trooper Huffman exited the officers' patrol car and approached the driver's side door of the Lexus. There, he briefly spoke with the driver, who identified himself as "Elijah Borkowski." Although, when asked about his current state of sobriety, Borkowski responded that he had not consumed any alcohol that day, Trooper Huffman noted that Borkowski was slurring his words, had droopy eyes, pinpoint pupils and food crumbs on his clothing. He further noted the fact that the interior of the Lexus was cluttered, that Borkowski possessed a strong odor of cigarette-smoke, which, as the Trooper later testified, is a "common masking agent for controlled dangerous substances," and that Borkowski's movements, inside the vehicle, were "slow and methodical." Consequently, Trooper Huffman asked Borkowski to drive to a flatter, safer area, in a nearby parking lot, so that the trooper could assess whether he was intoxicated.

After Borkowski completed the short drive to the nearby parking lot, Trooper Huffman ran a "1027" license check, a "1029" wanted check, and a "CH," a criminal history check. From the 1027 and 1029 checks, Trooper Huffman learned that Borkowski had a valid license, a prior arrest for resisting arrest and assault, but no outstanding

warrants. Approximately nine minutes after the stop, at 1:57 p.m., Trooper Huffman asked dispatch if any K-9 "narcotic dogs" were available.

A moment later, Trooper Huffman, leaving his vehicle for the second time at 1:58 p.m., approached Borkowski, and, after expressing his concern to Borkowski that he, Borkowski, was intoxicated, the trooper asked Borkowski to undergo field sobriety tests. The tests included a "turn-around," a horizontal gaze nystagmus test, a one-leg stand, and an arms-raised walk-and-turn. Although Borkowski passed the sobriety tests, the trooper noted that, while undergoing those tests, Borkowski "appeared" to be "a little uneasy on his feet during some of the test," and "had a little bit of problems with . . . following some of [the trooper's] instructions."

Still concerned about Borkowski's sobriety, and, presumably, troubled by the danger Borkowski might pose on the highway, given the rather frightening report of his recent recklessness at the wheel, the trooper, three minutes later, at 2:07 p.m., called dispatch to ascertain the status of the K-9 unit he had requested. Then, after briefly conferring with Sergeant Stryjewski, Trooper Huffman returned to their patrol car at 2:12 p.m., to complete the stop's traffic-related paperwork, which included a safety equipment repair order for car's window tint and a traffic ticket for the license plate cover violation. To complete such paperwork, usually takes, according to the trooper, about five to seven minutes. While, as noted, the "1027" license check and the "1029" wanted check had been received, the trooper, at that time, had not yet received the "criminal history check."

At 2:15 p.m., the K-9 unit, "Gero," along with his handler, Deputy Kathleen Yox, arrived at the scene. Explaining why he had summoned the K-9 to the scene, the trooper later testified:

> Based on my observations and also with the standardized filed sobriety, to my knowledge[,] training[,] and experience, without smelling any alcohol, I didn't believe Mr. Borkowski was under the influence of alcohol at that point. At that point, through my knowledge, training[,] and experience, it was possibly a controlled dangerous substances and any type of prescription medications or anything like that. Based on my observations of the criminal indicators and based on the field sobriety, I still wanted the K-9 to scan that vehicle and I was still conducting the routine traffic stop.

Four minutes later, at 2:19 p.m., which was approximately thirty-one minutes after the stop had occurred, Gero gave a "positive alert", while at the front right panel of the Lexus. Such an alert usually consisted of his sitting upon detecting narcotics. This alert, however, was not captured by the officers' dashboard video camera. Although Gero's handler was later unable to remember, at the suppression hearing, whether Gero had "sat," she did state, in the report she had prepared after this incident, that Gero had "alerted." Moreover, she did recall that "there was a change in [Gero's] behavior," and that change "was a signal" as to the presence of CDS.

After Gero "alerted," the officers patted Borkowski down a second time and searched the Lexus. Inside that vehicle, the officers found a clear plastic bag containing cocaine, and, inside Borkowski's pocket, "a clear plastic baggie containing small pills."

Charged with possession of controlled deadly substances, narcotics, with intent to distribute, and related charges, Borkowski filed a motion to suppress.

Suppression Proceedings

At the conclusion of the first suppression proceeding, the circuit court granted Borkowski's motion to suppress on the grounds that, when the arresting officers stopped his car, they lacked the necessary reasonable suspicion of criminal activity to do so, notwithstanding successive reports, from a caller, traveling behind Borkowski's vehicle, who described in considerable detail his reckless and dangerous operation of his car, as it was occurring. From that decision, the State noted an interlocutory appeal.

Subsequently, this Court, in *State v. Elijah Borkowski*, September Term, 2013, No. 2751 (filed August 26, 2014) (unreported), reversed the decision of the circuit court, concluding, among other things, that the information regarding Borkowski's erratic, reckless, and dangerous driving, provided by the caller, who was, at that time, driving her car behind Borkowski's vehicle, provided the officers with a reasonable suspicion that criminal activity was afoot, namely, that the driver of the Lexus was operating that vehicle while under the influence of drugs or alcohol. *See Navarette v. California*, — U.S. —, 134 S. Ct. 1683 (2014). But, because, in rendering its decision, the circuit court had not addressed other issues raised by Borkowski, we remanded the case to address the remaining issues raised in his motion to suppress.

On remand, Borkowski filed a supplemental motion to suppress, essentially raising the same issue that had been raised in his first motion, namely, that the traffic stop was unlawfully extended beyond the purposes of the stop, as he passed the sobriety tests he was given, shortly after that stop. Following a hearing, in which no additional testimony or further evidence was adduced by either side, the circuit court denied the motion, concluding that Trooper Huffman "did have reasonable suspicion that [Borkowski] was in possession of controlled dangerous substances . . . for which the continued detention was justified to await the K-9 unit."

Discussion

I.

While Borkowski appears to concede that the stop of his vehicle, by police, was supported by a reasonable suspicion of intoxication, he contends that that suspicion evaporated when he passed the field sobriety tests, and, consequently, he should have been released following the administration of those tests and that he was not released constituted an unlawful detention under the Fourth Amendment. We disagree and conclude that the continued detention of Borkowski, after completion of his sobriety tests, was lawful.

While the results of field sobriety tests may establish probable cause for an arrest, *see Blasi v. State*, 167 Md. App. 483, 510 (2006) ("[F]ield sobriety tests are used to determine whether probable cause exists for an arrest."), the successful completion of such tests does not necessarily establish the contrary – that the test taker is not intoxicated. *See*

State v. Mara, 987 A.2d 939, 943 (Vt. 2009) ("Although defendant's [successful] performance on the walk-and-turn and one-leg-stand tests might not, by itself, have supported a reasonable suspicion of DUI, it also did not as a matter of law compel the trooper to cease his roadside investigation."); *see also State v. Edgar*, 294 P.3d 251, 259 (Kan. 2013) ("[C]ompeting evidence of sobriety does not negate initial evidence of intoxication."). Rather, in determining if the roadside investigation should have ceased, upon the successful completion of field sobriety tests, we look at the totality of the circumstances, to determine if there remained reasonable suspicion of wrongdoing. *Nathan v. State*, 370 Md. 648, 660 (2002) ("The determination of whether reasonable suspicion existed is made by looking at the totality of the circumstances in each case to see whether the officer had a particularized and objective basis for suspecting illegal activity.").

The totality of the circumstances, in the instant case, clearly supported a reasonable suspicion of intoxication and possession of CDS, notwithstanding the fact that Borkowski passed the field sobriety tests. Those circumstances included the extended phone call from another driver, describing, in detail, and over an extended period of time, Borkowski's alarming and plainly reckless driving, as well as the trooper's subsequent observations, upon stopping Borkowki's vehicle, that Borkowski was slurring his words, had droopy eyes, pinpoint pupils and food crumbs on his clothing, and that the interior of his car was in disarray. What is more, Borkowski possessed, the trooper noted, a strong odor of cigarette-smoke, which, as Trooper Huffman later testified, is a "common masking agent

for controlled dangerous substances." Furthermore, he appeared, to the trooper, to be "uneasy" on his feet during the administration of the sobriety test and had problems following the instructions he was given during those tests.

Consequently, Borkowski's appearance and behavior before and during the administration of the sobriety tests provided the officer with a reasonable suspicion that he was under the influence of drugs and might be in possession of such drugs, which justified his continued detention to await the arrival of the K-9 unit. *See United States v. Hogan*, 539 F.3d 916, 921 (8th Cir. 2008) ("The officer suspected Hogan was under the influence of drugs. These observations provided the requisite reasonable suspicion to expand the scope of the stop, and to involve a drug detection dog."). That is to say, given the totality of the circumstances, "the evidence adduced at the suppression hearing, and the inferences fairly deducible therefrom, in the light most favorable" to the State, *see Corbin v. State*, 428 Md. 488, 497-98 (2012), the police had "a particularized and objective basis" that Borkowski was under the influence and in possession of drugs. *See Nathan v. State*, 370 Md. 648, 660 (2002) ("The determination of whether reasonable suspicion existed is made by looking at the totality of the circumstances in each case to see whether the officer had a particularized and objective basis for suspecting illegal activity.").

II.

Finally, Borkowski contends that the officer did not have probable cause to conduct a warrantless search of his person and vehicle, because Deputy Kathleen Yox, the handler

of "Gero," the K-9, testified that Gero "alerts" to drugs by sitting, and because the Deputy never testified that Gero did, in fact, sit. Consequently, there was no probable cause to justify the search of his person or vehicle, asserts Borkowski.

At the suppression hearing, Deputy Yox described her history as a K-9 handler, and, in so doing, in the words of the circuit court, provided a "plethora of information" as to "her training and experience with K-9 Gero." Furthermore, while Deputy Yox could not specifically remember whether Gero "sat," she had previously indicated, in her report, that Gero had alerted to the presence of CDS. Furthermore, she explained that Gero sometimes alerts by breathing deeply, and, when she was presented with Trooper Huffman patrol vehicle's video recording of Borkowski's stop, was able to identify when, based on Gero's movement in the video, she recalled the K-9 alerting, even though Gero, in the video, was obscured by Borkowski's car when he did so. The court, apparently finding Deputy Yox and her testimony credible, concluded that Gero had, in fact, alerted to the presence of CDS. Because we have no basis upon which to find that this conclusion was clearly erroneous, *see Corbin v. State*, 428 Md. 488, 497-98 (2012) (we "defer to the trial court's fact-finding at the suppression hearing, unless the trial court's findings were clearly erroneous."), we affirm the court's judgment that the officers had probable cause to search Borkowski and his vehicle based upon Gero's alert, the information provided by the caller, and by Borkowski's appearance and behavior after the stop.

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