Circuit Court for Montgomery County
Criminal Case No. 130184

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 133

September Term, 2017

MICHAEL PACHECO

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Graeff,
Wilner, Alan M.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: January 24, 2018

Michael Pacheco, appellant, was charged in the Circuit Court for Montgomery County with possession of cocaine with the intent to distribute. Before trial, he filed a motion to suppress evidence that he claimed was obtained in violation of his constitutional rights, which the court denied.

Appellant entered a conditional plea of guilty, preserving his right to appeal the order denying the motion to suppress.[1] The court sentenced appellant to five years' incarceration, all but 18 months suspended, to be followed by three years of probation.

On appeal, appellant presents the following question for this Court's review:

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

For the reasons set forth below, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On May 26, 2016, at approximately 10:18 p.m., Officer Heffley and Officer Groger were on routine foot patrol on Veirs Mill Road in Wheaton.[2] They observed a vehicle parked with its windows open "in a dark parking spot" behind a laundromat. The vehicle was "secluded" and "nowhere near" the open laundromat. Officer Heffley stated that he found the situation suspicious, explaining that there were several laundromats in Wheaton, where he had worked for three years, and that, in his experience, "people take their laundry in and they stay in the [l]aundromat," and they "typically don't hang out in their cars."

[1] Md. Rule 4-242(d) provides that a defendant may enter a conditional guilty plea under certain circumstances, and if the defendant prevails on appeal, he or she may withdraw the plea.

[2] The officers' first names do not appear in the transcript of the suppression hearing.

The officers approached the vehicle and smelled the "strong odor of fresh burnt marijuana" emanating from inside the vehicle. Appellant, the only occupant, was seated in the driver's seat, and there was a marijuana joint in the center console of the vehicle. Officer Heffley asked appellant to hand the joint to him, and appellant complied. It was apparent to both officers that the quantity of marijuana in the joint was less than 10 grams.[3]

Officer Groger asked appellant to exit the vehicle. He testified that he searched appellant "incidental to the arrest of the fresh burnt odor of marijuana."[4] Officer Groger recovered from appellant's pocket a "plastic baggie containing a white powdery substance," which was field-tested by police at the scene and determined to be cocaine. Appellant was placed under arrest. During a search of appellant's vehicle, the police found two packs of rolling papers and a marijuana stem.

At the police station, appellant was issued a civil citation for possession of marijuana. After being advised of his *Miranda* rights, appellant told Officer Heffley that he was planning to "party" that weekend, and he got the cocaine "for everybody."

[3] In 2014, the Maryland General Assembly decriminalized the possession of less than 10 grams of marijuana, making it a civil, as opposed to a criminal, offense. *Robinson v. State*, 451 Md. 94, 97-98 (2017). Md. Code (2017 Repl. Vol), Criminal Law Article (CR), § 5-601(c)(2)(ii). Possession of 10 grams or more remains a criminal misdemeanor. CR § 5-601(c)(2)(i).

[4] Officer Heffley testified that, because possession of less than 10 grams of marijuana is a civil offense, he did not believe that there was a basis to arrest appellant prior to the recovery of the cocaine from appellant's pocket. Officer Groger agreed that possession of less than 10 grams would have resulted in a civil citation, "if that was all that was recovered in the joint."

At the conclusion of the evidence, defense counsel argued that the cocaine seized during the search should be suppressed because the search of appellant's person was not justified by any exception to the warrant requirement. He argued that the search was not valid as a search incident to arrest because the officers knew that the marijuana recovered was less than 10 grams, and therefore, appellant was "arrested for something that is not a crime."[5]

The State argued that the odor of marijuana provided probable cause to search "both vehicle and [appellant]," and "once officers find the cocaine, [appellant was] under legal arrest for the cocaine." In rebuttal, defense counsel argued that the decriminalization of the offense of possession of less than 10 grams of marijuana meant that a person could not be arrested for "less than 10 grams," and therefore, appellant could not be searched.

The circuit court denied the motion to suppress, finding that the search was valid as a search incident to arrest for possession of marijuana. The court explained its ruling as follows:

> The evidence in this case reflects that on May 26, 2016, at approximately 10:18 p.m., the two officers [ ] were on foot patrol and they observed [appellant's] vehicle in a parking lot with the windows down. They felt the vehicle was suspicious given the circumstances that they have testified to.
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> As the two officers have both testified, they approached the vehicle. Officer Heffley from the passenger side of the vehicle and Officer Groger

[5] Defense counsel also argued that the statement appellant made to police should be suppressed because it was made after appellant requested to be brought before a commissioner. The circuit court denied the motion to suppress the statement, and that ruling is not challenged on appeal.

> from the driver's side of the vehicle. They both testified that as they approached the vehicle they smelled the odor of burnt marijuana emanating from the inside of the vehicle.
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> As Officer Heffley approached the passenger side of the vehicle he observed the marijuana joint on the console, which he asked [appellant] to hand to him, which [appellant] did. Officer Groger then told [appellant] to get out of the car. And Officer Heffley testified in looking at the marijuana joint, which was handed to him, he observed it was a marijuana joint. He did testify that a review of that joint would indicate that it was less than 10 grams.
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> Officer Groger had [appellant] exit the vehicle. At that point [appellant] was placed under arrest. The officers had probable cause to arrest [appellant] for possession of marijuana. As Officer Groger stated, he recognized that the joint itself was less than 10 grams. It would be a civil citation. But Officer Groger went on to say that it would only be a civil citation if that was all that was recovered.
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> The odor of marijuana clearly supported the probable cause to believe that [appellant] was in possession of marijuana, further confirmed by the recovery of the marijuana joint. The officers' arrest of [appellant] was appropriate and was pursuant to probable cause that [appellant] was in possession of marijuana. The search of [appellant] was incident to the lawful arrest of [appellant], which then resulted in the recovery of the cocaine.

DISCUSSION

Appellant contends that the circuit court erred in denying his motion to suppress. He argues that the odor of marijuana coming from his vehicle provided the police probable cause to conduct a warrantless *Carroll* doctrine search of his vehicle, but he argues that "the automobile exception does not authorize the search of Appellant's person once outside his vehicle, or the seizure of those items from his possession."[6] Appellant asserts that the

[6] The *Carroll* doctrine exception to the warrant requirement "allows the police to conduct a warrantless search of a vehicle based on probable cause to believe that the vehicle

court improperly ruled that the search was valid as a search incident to arrest for possession of marijuana because "[s]uch a search" is not lawful.

The State disagrees. It asserts that, based on the odor of the marijuana and the marijuana joint, the police had probable cause to arrest appellant. Therefore, the circuit court "correctly concluded that the cocaine on [appellant's] person was found during a lawful search incident to arrest." We agree.

In reviewing the grant or denial of a motion to suppress, "'we must rely solely upon the record developed at the suppression hearing.'" *Grimm v. State*, 232 Md. App. 382, 396 (quoting *Briscoe v. State*, 422 Md. 384, 396 (2011)), *cert. granted*, 456 Md. 54 (2017). We view the evidence adduced at the suppression hearing and any inferences that may be drawn therefrom "in the light most favorable to the party who prevails on the motion," which, in this case, is the State. *Id.* Moreover, we "'accept the suppression court's factual findings unless they are shown to be clearly erroneous.'" *Id*. at 397 (quoting *Raynor v. State*, 440 Md. 71, 81 (2014)). "We, however, make our own independent constitutional appraisal of the suppression court's ruling, by applying the law to the facts found by that court." *Raynor*, 440 Md. at 81.

Subject to certain exceptions, "a search conducted without a warrant supported by probable cause violates the Fourth Amendment's prohibition against unreasonable searches." *Agurs v. State*, 415 Md. 62, 76 (2010). A warrantless search of a person,

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contains contraband or evidence of a crime." *Barrett v. State*, ___ Md. App. ___, No. 530, Sept. Term 2016 (filed November 29, 2017), slip op. at 6.

therefore, is reasonable under the Fourth Amendment only if the State shows "an exception to the warrant requirement, such as consent, exigent circumstances, reasonable suspicion to conduct a protective frisk, or a search incident to an arrest based on probable cause." *Barrett v. State*, ___ Md. App. ___, No. 530, Sept. Term 2016 (filed November 29, 2017), slip op. at 7.[7]

In this case, the circuit court found that the search of appellant was valid as a search incident to an arrest based on probable cause. As explained below, this ruling was not erroneous.

"Probable cause to arrest 'exists where the facts and circumstances within the knowledge of the officer at the time of the arrest, or of which the officer has reasonably trustworthy information, are sufficient to warrant a prudent person in believing that the suspect had committed or was committing a criminal offense.'" *Id*. at 10 (quoting *Moulden v. State*, 212 Md. App. 331, 344 (2013)). This Court previously has stated that the smell of marijuana, "a contraband substance that is itself illegal to possess," emanating from a vehicle, gives the police probable cause to arrest the driver of the vehicle. *Ford v. State*, 37 Md. App. 373, 375, 380, *cert. denied*, 281 Md. 737 (1977). *Accord State v. Funkhouser*, 140 Md. App. 696, 721 (2001) (K-9 alert to the odor of illegal drugs in a vehicle gives police probable cause to search the vehicle and arrest the "driver and lone occupant.").

[7] We agree with appellant that the *Carroll* doctrine did not justify a search of appellant's person. That, however, was not the basis for the circuit court's ruling upholding the search.

Here, appellant was the driver and sole occupant of a vehicle that smelled of freshly burnt marijuana, and police observed a marijuana joint in the center console. These circumstances gave the police probable cause to arrest appellant. *See Johnson v. State*, 142 Md. App. 172, 191 (the odor of burnt marijuana from within a vehicle, along with the observation of a marijuana bud on the gearshift cover, within arm's reach of the passenger, provided probable cause to arrest the passenger), *cert. denied*, 369 Md. 180 (2002).[8]

"Once lawfully arrested, police may search 'the person of the arrestee' as well as 'the area within the control of the arrestee' to remove any weapons or evidence that could be concealed or destroyed." *Barrett*, slip op. at 8 (quoting *Conboy v. State*, 155 Md. App. 353, 364 (2004) (in turn quoting *U.S. v. Robinson*, 414 U.S. 218, 224 (1973))). The circuit court properly determined that the search of appellant was a valid search incident to arrest, and it properly denied the motion to suppress the cocaine found in appellant's pocket.

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

[8] Appellant does not argue on appeal, as he did in the circuit court, that the 2014 change in the law decriminalizing the possession of less than 10 grams of marijuana changed this analysis. We have, in any event, rejected such an argument, holding that "a police officer who has reason to believe that an individual is in possession of marijuana has probable cause to effectuate an arrest," and conduct a search incident to that arrest, "even if the officer is unable to identify whether the amount possessed is more than 9.99 grams." *Barrett*, slip op. at 15-16.