Circuit Court for Baltimore City
Case Nos. 123167003

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1901

September Term, 2023

BRANDON E. RIDDICK

v.

STATE OF MARYLAND

Graeff,
Tang,
Meredith, Timothy E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Tang, J.

Filed: May 17, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Brandon E. Riddick, the appellant, was indicted in the Circuit Court for Baltimore City and charged with five counts of possessing a firearm and one count of possession with intent to distribute cocaine. After his motion to suppress the physical evidence was denied, the appellant entered into a conditional plea agreement as to one count of possessing a firearm and possession with intent to distribute cocaine. The court sentenced him to a concurrent sentence of 15 years, suspending all but five years without parole.

The appellant timely appealed, and he presents the following question for our review: Did the motions court err in denying his motion to suppress?[1] We answer in the affirmative and therefore reverse the judgments of conviction.

FACTS

On May 1, 2023, Detective Nevin Nolte and other officers with the Baltimore City Police Department arrested the appellant pursuant to an open warrant. The open warrant was for the appellant's "[f]leeing and eluding" from a traffic stop on an earlier occasion and for "several narcotics violations to include distribution of controlled dangerous substance[.]"

During the arrest, Detective Nolte seized the appellant's keys to his silver BMW sedan. Detective Nolte, who was familiar with the appellant's vehicle and knew where it

[1] The appellant's question presented in his brief is:

> Under the Fourth Amendment to the U.S. Constitution or Article 26 of the Maryland Declaration of Rights, Did the Motions Court Err in Denying a Motion to Suppress Where Officers—Without a Warrant—Conducted a K-9 Scan of a Car and Subsequently Entered the Car Using Seized Keys?

was typically parked, directed two officers to find the appellant's car. The officers located the vehicle legally parked on the street in the 400 block of North Patterson Park Avenue.

The officers requested a K-9 unit to conduct a scan of the vehicle. K-9 Loci arrived and "hit" on the vehicle. Once Loci alerted on the appellant's car, the officers used the BMW keys to open and search the vehicle. The officers located "a handgun containing live rounds as well as a plethora of CDS, controlled dangerous substances" and a "decent amount of U.S. currency."

Detective Nolte was not present during the K-9 scan and was the State's sole witness at the suppression hearing. He testified that Loci had "hit[,] which is what they used to describe it, that indicates a narcotic or what it's trained to indicate on, on the vehicle." Detective Nolte explained that a "hit" on the vehicle meant "that the K-9 indicates that there's–that it is sensing whatever it's—that there's something in that vehicle." He stated that when Loci "hit" on the vehicle, the officers "were good to search the vehicle[.]"

On cross-examination, Detective Nolte indicated that he was familiar with Loci but knew nothing about the K-9's training or testing:

> **[DEFENSE COUNSEL:]** And you were not there when the K-9 hit on the car; correct?
>
> **[DET. NOLTE:]** I was not.
>
> **[DEFENSE COUNSEL:]** And you don't know anything in particular about this particular K-9?
>
> **[DET. NOLTE:]** I know that it was K-9 Loci.

* * *

[DEFENSE COUNSEL:] Are you familiar with K-9 Loci?

[DET. NOLTE:] I believe I have worked with that dog on previous occasions, yes.

[DEFENSE COUNSEL:] And do you know what K-9 Loci is trained to sniff for?

[DET. NOLTE:] I know in previous experiences it was for narcotics.

[DEFENSE COUNSEL:] And that would include marijuana; correct?

[DET. NOLTE:] I do not believe so, no.

[DEFENSE COUNSEL:] Not for marijuana?

[DET. NOLTE:] No.

[DEFENSE COUNSEL:] And do you know anything about K-9 Loci's training or testing?

[DET. NOLTE:] No[.]

MOTION TO SUPPRESS

Before the suppression hearing, the defense filed a motion followed by a supplemental motion to suppress all evidence seized as violative of the appellant's rights under the Fourth Amendment and Article 26 of the Maryland Declaration of Rights.[2] First,

[2] Article 26 of the Maryland Declaration of Rights states:

That all warrants without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted.

the defense argued that the K-9 scan constituted a search that required reasonable articulable suspicion, of which the officers had none.

Second, the defense claimed that the K-9 alert did not amount to probable cause to search the vehicle because the K-9 was unreliable. At the hearing, the defense argued that Detective Nolte, who was not present during the K-9 scan, could not testify to the "accuracy" of Loci's alert nor provide details about the scan. Detective Nolte was not "even sure exactly what K-9 Loci [was] trained to sniff for[.]"

Even if the K-9 alert established probable cause, the appellant argued that the officers could have obtained a search warrant for the car but did not. According to the appellant, not only did the officers violate the Fourth Amendment, but their conduct was also "grievous and oppressive" under Article 26.

The circuit court denied the appellant's motion to suppress. The court explained that a K-9 scan was not a search, and thus the Fourth Amendment was not implicated. It noted the appellant's "argument for the record" that Detective Nolte "couldn't articulate what the K-9 in this instance was trained to do or train to hit on or anything of that nature. But be that as it may, the K-9 hit, the officers then decided to search the vehicle." The court explained: "[I]f a K-9 hit on a parked car and officers get into the car and search the vehicle, the way the case law is written now is that the Fourth Amendment is not implicated." Accordingly, it denied the motion on Fourth Amendment grounds.

Regarding Article 26, the court remarked that it was "conflicted" because it did not "like" that the officers did not obtain a search warrant before using the appellant's keys to

access and search his vehicle. It commented that the officers' conduct was "outrageous" but concluded that their actions were neither grievous nor oppressive under Article 26.

After the court denied the motion to suppress, the appellant entered a conditional plea and noted a timely appeal.

STANDARD OF REVIEW

"When reviewing the denial of a motion to suppress, the record at the suppression hearing is the exclusive source of facts for our review." *Darling v. State*, 232 Md. App. 430, 445 (2017) (citation omitted). We review the evidence "in the light most favorable to the party that prevailed on the motion[,]" *Scott v. State*, 247 Md. App. 114, 128 (2020) (citation omitted), and "give due regard to the [suppression] court's opportunity to assess the credibility of witnesses." *Spell v. State*, 239 Md. App. 495, 506 (2018) (citation omitted). In doing so, "[w]e accept the suppression court's factual findings unless they are shown to be clearly erroneous." *Raynor v. State*, 440 Md. 71, 81 (2014). "Nevertheless, we must make our own independent constitutional appraisal by reviewing the law and applying it to the facts of the case." *Darling*, 232 Md. App. at 446.

DISCUSSION

The appellant argues that the circuit court erred in denying his motion to suppress on Fourth Amendment and Article 26 grounds. As to the Fourth Amendment, the appellant contends that (1) officers lacked reasonable articulable suspicion to support a K-9 scan of his car; and (2) even if the K-9 scan did not implicate the Fourth Amendment, the officers lacked probable cause to conduct a warrantless search of his car because the State failed to

establish that the K-9 alert was reliable. Regarding Article 26, the appellant argues that the officers' failure to obtain a search warrant before searching his car demands suppression of the physical evidence discovered in his vehicle.

The State responds that the appellant's Fourth Amendment rights were not violated. First, a K-9 scan is not a search. Second, the K-9 alert established probable cause to support the warrantless search of the car under the automobile exception. As to Article 26, the State argues that the claim is foreclosed as a matter of law in part because Article 26 is viewed in *pari materia* with the Fourth Amendment.

We conclude that the court erred in denying the motion to suppress on Fourth Amendment grounds. Because we reverse on that basis, we need not address the appellant's Article 26 argument.

I.

K-9 SCAN OF VEHICLE PARKED ON PUBLIC STREET

The appellant contends that a K-9 scan of his car was a search under the Fourth Amendment. We disagree. It is well-established that a "K-9 scan alone constitutes neither an intrusive search in the traditional sense nor a seizure and thus, there are few Fourth Amendment implications." *Wilkes v. State*, 364 Md. 554, 581 n.20 (2001); *see United States v. Place*, 462 U.S. 696, 707 (1983) (holding that a canine "sniff" of luggage in a public place is not a search within the meaning of the Fourth Amendment).

Darling v. State, 232 Md. App. 430 (2017), is on point. There, we expressly held that "a canine scan of an empty car in a public area does not implicate the Fourth

Amendment." *Id*. at 453 (involving a K-9 scan of the defendant's car parked on the street, which later revealed evidence tying the defendant to the murder). For support, we cited *Wilkes*, 364 Md. at 581–82, 581 n.20, *United States v. Jacobsen*, 466 U.S. 109, 114 (1984), and *Place*, 462 U.S. at 707. The appellant contends, however, that the cases on which *Darling* relied pre-dated *United States v. Jones*, 565 U.S. 400 (2012), which purportedly changed the Fourth Amendment landscape in a way that casts doubt on *Darling*'s holding. The appellant also relies on *Florida v. Jardines*, 569 U.S. 1 (2013), to argue that there was no reason to expect the presence of a K-9 around his car, just as homeowners do not expect the presence of trained detection K-9s around their homes.

Neither case is relevant to our analysis. *Jones* did not involve a canine search. Rather, the case arose from a narcotics investigation in which law enforcement officers attached a GPS tracking device to the underside of a vehicle controlled by the defendant. *Jones*, 565 U.S. at 403. The government used the device to track the defendant's movements for a month, generating evidence that resulted in a multiple-count indictment against him. *Id.* The U.S. Supreme Court held that when the government attaches a GPS tracking device to a vehicle and uses that device to monitor the vehicle's movements on public streets, the action constitutes a Fourth Amendment search. *Id.* at 404.

Likewise, the appellant's reliance on *Jardines* is inapt. Although the case involved a K-9 search, it involved a home rather than a car. *See* 569 U.S. at 3-4. There, the defendant moved to suppress evidence seized pursuant to a search warrant obtained after a canine sniff of the front porch of the defendant's home. *Id.* at 4–5. The U.S. Supreme Court held

that the use of a drug-sniffing dog on the front porch of a home constituted a Fourth Amendment "search." *Id.* at 11-12. While the common law recognized an implicit license "to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave[,]" the Court held that a canine forensic investigation lay outside that license. *Id.* at 8–9 (explaining that "introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do *that.*"). Therefore, the Court found that the police officer's conduct, which involved a trespass on land outside the implied license to seek entry to the home, constituted a "search." *Id.* at 10–12.

Neither *Jones* nor *Jardines* affects whether a K-9 scan of a vehicle parked on a public street constitutes a search under the Fourth Amendment.[3] Here, there is no dispute that the appellant's car was parked on a public street. Because the K-9 scan was not a search under these circumstances, Fourth Amendment issues did not arise, and the officers did not need reasonable articulable suspicion to support the scan. *See Darling*, 232 Md. App. at 452–53.[4] Accordingly, the circuit court did not err in concluding that the K-9 scan was not a search under the Fourth Amendment.

[3] The Ohio Court of Appeals recently rejected a similar argument where the defendant relied on *Jones* and *Jardines* for the proposition that sometimes a dog's sniff is a search and requires probable cause. *State v. Netter*, 2024-Ohio-1068, ¶ 29, 2024 WL 1236166, at *7 (Ohio Ct. App. Mar. 20, 2024).

[4] There are ample decisions by courts in other jurisdictions that hold that a K-9 scan of a vehicle in a public area does not constitute a search under the Fourth Amendment. *See, e.g.*, *Kern v. State*, 463 P.3d 158, 161 (Wyo. 2020) ("Because it is not a search, law enforcement does not need probable cause, reasonable suspicion, or consent to run a trained

II.

PROBABLE CAUSE TO SEARCH VEHICLE

We reach a different conclusion about whether there was probable cause to search the vehicle based on the K-9's alert. "[W]hen a properly trained canine alerts to a vehicle indicating the likelihood of contraband, sufficient probable cause exists to conduct a warrantless '*Carroll'* search of the vehicle." *State v. Wallace*, 372 Md. 137, 146 (2002). Implicit in this statement is the assumption that a K-9's positive alert for contraband must be reliable for the alert to establish probable cause. *See Grimm v. State*, 458 Md. 602, 675 (2018) (Adkins, J., concurring) ("[T]he alert itself is meaningless unless the alert is reliable. An alert does not establish probable cause without reliability."); *United States v. Koon Chung Wu*, 217 F. App'x 240, 245 (4th Cir. 2007) ("implicit in our statement [that the detection of narcotics by a trained dog is generally sufficient to establish probable cause] is the assumption that a drug dog's positive alert for contraband must possess some indicia of reliability for the alert to establish probable cause."); *Diaz*, 25 F.3d at 394 ("For a

drug dog around vehicles in a public parking lot.") (collecting cases); *United States v. McKenzie*, No. 1:14-CR-169, 2015 WL 13840885, at *8 (N.D.N.Y. Nov. 4, 2015) ("to the extent that Defendant is arguing that the canine sniff of the Jeep violated his Fourth Amendment rights, his claim is without merit, since the Jeep was parked on a public street"); *United States v. Friend*, 50 F.3d 548, 551 (8th Cir. 1995), *vacated and remanded on other grounds*, 517 U.S. 1152 (1996) (K-9 sniff of a car parked on a public street or alley does not amount to a search under the Fourth Amendment); *United States v. Diaz*, 25 F.3d 392, 396-97 (6th Cir. 1994) (motel guest did not have a reasonable expectation of privacy in the motel parking lot where his car was parked and K-9 drug sniff of exterior of guest's vehicle did not violate the Fourth Amendment).

positive dog reaction to support a determination of probable cause, the training and reliability of the dog must be established."). The State does not contend otherwise.

In *Florida v. Harris*, 568 U.S. 237 (2013), the U.S. Supreme Court explained that a probable cause hearing focusing on a drug detection dog's alert should proceed "much like any other." *Id*. at 247.

> If the State has produced proof from controlled settings that a dog performs reliably in detecting drugs, and the defendant has not contested that showing, then the court should find probable cause. If, in contrast, the defendant has challenged the State's case (by disputing the reliability of the dog overall or of a particular alert), then the court should weigh the competing evidence. In all events, the court should not prescribe, . . . an inflexible set of evidentiary requirements. The question—similar to every inquiry into probable cause—is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. A sniff is up to snuff when it meets that test.

Id. at 248.

"[E]vidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert." *Id.* at 246. The *Harris* Court provided examples of such evidence:

> If a bona fide organization has certified a dog after testing his [or her] reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search. The same is true, even in the absence of formal certification, if the dog has recently and successfully completed a training program that evaluated his [or her] proficiency in locating drugs.

Id. at 246–47.

A.

Appellant's Challenge to the Reliability of the K-9's Alert

Preliminarily, the State contends that the appellant did not challenge below the reliability of Loci's alert on the basis that there was no evidence of the K-9 handler's testimony, training records, and reports demonstrating the dog's satisfactory performance, or the handler/K-9 certifications. We disagree.

In his supplemental motion to suppress, filed before the suppression hearing, the appellant argued that "[t]he police did not have probable cause to search the vehicle" because "[t]he alert by the K-9 dog was unreliable." Even though the appellant did not specifically challenge the reliability of the alert based on the absence of the K-9's training and certification, the appellant's statement should have alerted the State that it was necessary to provide evidence about the reliability of the K-9's alert.[5] *See*, *e.g.*, *Southern v. State*, 371 Md. 93, 105 (2002) ("Defense counsel's statement that she sought to 'suppress the stop' should have put up a red flag for the State, and should have alerted the State that it was necessary to provide evidence concerning the initial stop." (quoting *Southern v. State*, 140 Md. App. 495, 506 (2001))); *see also United States v. Stewart*, No. 5:10-cr-149-JMH-HAI, 2014 WL 3818112, at *6 (E.D. Ky. Aug. 4, 2014) ("[T]he logical conclusion is that, when probable cause is challenged and the United States attempts to use a drug dog to establish probable cause, some evidence of the dog's reliability must be presented.");

[5] At no point during the suppression hearing did the prosecutor claim that the State lacked fair notice of the appellant's challenge to the reliability of the K-9's alert.

United States v. 46,000 In U.S. Currency, No. CIV.A. 02-6805, 2003 WL 21659180, at *6 n.12 (E.D. Pa. Jun. 30, 2003) (although claimant did not expressly challenge probativeness of positive dog sniff, he explicitly contended in his motion to suppress, and at the hearing, that his removal and detention constituted an impermissible seizure; this was sufficient to shift the burden of proof to government to establish that it had probable cause). Without evidence of the dog's reliability, a trial court cannot determine whether the dog's alert amounted to probable cause. *See Stewart*, 2014 WL 3818112, at *6; *United States v. Swanger*, No. CRIM.A.05–53–JBC, 2005 WL 2002441, at *6 n.7 (E.D. Ky. Aug. 18, 2005) ("[I]t is the government's burden to prove that the warrantless search was justified. Proving the qualifications of the canine is part of meeting that burden.").

In addition, during the suppression hearing, defense counsel cross-examined Detective Nolte and questioned his knowledge of Loci's "training or testing." At the end of the hearing, the defense argued that "dogs are fallible," the detective was unable to testify to Loci's "accuracy," the detective expressed uncertainty about what Loci was trained to sniff for and could not provide the details of the K-9's scan as he was not present for it. Furthermore, the court, in its ruling, understood the line of cross-examination to be an "argument" that the detective could not articulate Loci's training "or anything of that nature." Thus, we reject the State's contention that the appellant did not expressly challenge the reliability of the K-9's alert based on the lack of training and certification records.

B.

Reliability of the K-9's Alert

"[A]n appellate court reviews for clear error a trial court's finding as to whether a drug detection dog is, or is not, reliable." *Grimm*, 458 Md. at 650. But the circuit court did not appear to make a finding about whether Loci's alert was reliable. Rather, the court's ruling seemed to suggest incorrectly that if the K-9 scan was not subject to the Fourth Amendment, neither was the subsequent K-9 alert.

The warrantless search of the appellant's car was only lawful if the K-9 alert was reliable. "[W]here evidence of a lawful warrantless search is 'inconclusive[,]' the defendant must prevail." *Grant v. State*, 449 Md. 1, 28–30 (2016) (whether deputy detected odor of marijuana before or after inserting his head into vehicle was not clear; where such evidence was not clear, State failed to meet burden of showing that warrantless search was lawful). Furthermore, our appellate courts generally reverse a lower court's judgment where the factual findings and legal conclusions are inconsistent. *Id*. at 32 (citing *Cartnail v. State,* 359 Md. 272, 289–90 (2000) (reversing Appellate Court's judgment that officer had reasonable suspicion to conduct a *Terry* stop because record of suppression hearing addressing critical factor of petitioner's description was not sufficiently particular to uphold that judgment), and *Goodwin v. Lumbermens Mut. Cas. Co.,* 199 Md. 121, 129–30 (1952) (declining to sustain circuit court's conclusion in favor of prevailing party, *inter alia,* "in the absence of any specific finding of fact by the [circuit] court.")).

In this case, evidence of the reliability of Loci's alert to support probable cause to search the appellant's car was not just inconclusive, it was lacking. Detective Nolte was the State's only witness at the suppression hearing; Loci's handler did not testify. He admitted that he knew nothing about Loci's training or the details of the K-9 scan. Although the detective testified to being familiar with Loci from prior occasions and knowing that it was trained to detect narcotics rather than marijuana, the testimony provided no information concerning the dog's reliability, such as satisfactory performance in a certification or training program. Nor was evidence of the dog's certification or training separately admitted. *See*, *e.g.*, *United States v. Jenkins*, 671 F. Supp. 3d 704, 713 (N.D.W. Va. 2023) (search of vehicle stemming from K-9's alert was unconstitutional where government failed to introduce evidence of dog's training and certification; testifying officer, who was not dog's handler, did not testify about dog's training or certification). The State did not satisfy its burden of showing that Loci's alert was reliable and thus failed to establish probable cause to search the appellant's car. Therefore, the circuit court erred in denying the motion to suppress. *See*, *e.g.*, *Grant*, 449 Md. at 28–30.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.