Circuit Court for Baltimore County
Case No. C-03-CR-22-005029

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 0459

September Term, 2023

JONATHAN ENGLISH

v.

STATE OF MARYLAND

Shaw,
Tang,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Moylan, J.

Filed: July 10, 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).

The appellant, Jonathan English, was convicted in the Circuit Court for Baltimore County by Judge Jan Alexander of the illegal possession of a regulated firearm by a person with a disqualifying conviction. The appellant entered a conditional guilty plea to the charge after his pre-trial motion to suppress physical evidence was denied. In exchange for the conditional guilty plea, other charges against the appellant were dismissed. He was then sentenced to two years in prison. The appellant was granted the right to appeal the denial of his motion to suppress. On his right to appeal, he raises the single question:

Did Judge Alexander erroneously deny his Motion to Suppress?

The suppression hearing in this case took place on April 24, 2023. The Carroll Doctrine search of the appellant's automobile that was the subject of the suppression hearing had taken place on September 21, 2022. *See* Carroll v. United States, 267 U.S. 132, 45 S. Ct. 280, 69 L.Ed. 543 (1925). The timing of the automobile search was of critical importance.

Narrowing The Issue

There was a single very narrow issue before the suppression hearing judge on April 24, 2023 and there is, therefore, a single very narrow issue before us on this appeal. As the police conducted a warrantless Carroll Doctrine search of the appellant's car at around 1:00 P.M. as it was parked on the parking lot of a convenience store on Stemmers Run Road, did they have the necessary probable cause to believe that the car contained contraband or evidence of crime? Nothing else mattered. In the ensuing search, the police recovered from underneath the front passenger seat a large Ziploc-style bag containing what appeared to

be marijuana and a loaded handgun. Those items were the subject matter of the motion to suppress.

In his appellate brief, the appellant tells us far more than we need to know. We must guard ourselves against having our attention diverted by extraneous matters. Whether the appellant, for instance, was seated in the right front passenger seat talking to someone standing on the parking lot really does not matter. Whether they exchanged anything really does not matter. Whether the behavior of the appellant was, on the one hand, highly suspicious or was, on the other hand, the epitome of innocent behavior actually does not matter. What does matter is that, as the investigating officer approached the car, the right front passenger window was open. Our attention must focus on that and on that alone.

Who else may have been in the car with the appellant does not matter. Why the appellant had driven to the convenience store does not matter. Whether the appellant was ultimately guilty of the possession of a firearm does not matter. Whether the appellant was ultimately guilty of the possession of marijuana does not matter. We are concerned with the suppression hearing and not with the ultimate trial. The single narrow issue before us is that of whether there was probable cause for the warrantless Carroll Doctrine search of the appellant's automobile.

From the far side of the trial table, the fact that that parking lot, to the knowledge of the investigating officer, had been the site of numerous citizen complaints about drug sales was of little importance. The fact that the investigating officer himself had conducted controlled buys on that parking lot was of little importance. The fact that the officer had

conducted "felony marijuana" arrests on that parking lot within the last week was of little importance. As they related to the subject of Carroll Doctrine probable cause, these facts were not technically irrelevant. On the critical issue in this case, however, they were superfluous.

The Smell Of Marijuana

What does matter is that as the investigating officer approached the appellant's vehicle, the right front passenger window was open. The officer testified that as he approached the car, he could smell "an overwhelming odor of marijuana emanating from the vehicle." That, ipso facto, was probable cause for a warrantless Carroll Doctrine search of the vehicle.

Notwithstanding the fact that the General Assembly of Maryland, as of October 1, 2014, made the possession of less than ten grams of marijuana a "civil offense" rather than a "criminal offense," the detectable smell of marijuana still gave the police probable cause for a warrantless Carroll Doctrine search of a vehicle. As Justice Watts stated for the Supreme Court of Maryland in Robinson v. State, 451 Md. 94, 99, 152 A.3d 661 (2017):

> [W]e hold that a law enforcement officer has probable cause to search a vehicle where the law enforcement officer detects an odor of marijuana emanating from the vehicle, as marijuana in any amount remains contraband, notwithstanding the decriminalization of possession of less than ten grams of marijuana; and the odor of marijuana gives rise to probable cause to believe that the vehicle contains contraband or evidence of a crime. Simply put, decriminalization is not synonymous with legalization, and possession of marijuana remains unlawful.

(Emphasis supplied.)

The Supreme Court in Robinson affirmed the earlier holding of this Court in Bowling v. State, 227 Md. App. 460, 134 A.3d 388 (2016). As Robinson explained, 451 Md. at 117:

> [W]e hold that a law enforcement officer has probable cause to search a vehicle where the law enforcement officer detects an odor of marijuana emanating from the vehicle, as marijuana in any amount remains contraband, notwithstanding the decriminalization of possession of less than ten grams of marijuana; and the odor of marijuana gives rise to probable cause to believe that the vehicle contains contraband or evidence of a crime. Simply put, decriminalization is not synonymous with legalization, and possession of marijuana remains unlawful.

(Emphasis supplied.)

The decriminalization of the possession of less than ten grams of marijuana had no impact on the status of marijuana, in any amount, as contraband. As Justice Watts wrote for the Robinson Court, 451 Md. at 130-31:

> We join the Court of Special Appeals and courts in other jurisdictions in holding that marijuana remains contraband, despite the decriminalization of possession of small amounts of marijuana, and that, as such, the odor of marijuana constitutes probable cause for the search of a vehicle.

(Emphasis supplied.)

The appellant attempts to avoid the otherwise dispositive effect of Robinson v. State by pointing out that by Ch. 802, Sect. 2, of the Acts of 2023, effective as of July 1, 2023, the General Assembly enacted what is now Criminal Procedure Article, Sect. 1-211, further downsizing the impact of the use and possession of marijuana. Sect. 1-211, in pertinent part, now provides:

> (a) A law enforcement officer may not initiate a stop or a search of a person, a motor vehicle, or a vessel based solely on one or more of the following:

> (1) the odor of burnt or unburnt cannabis;
>
> …
>
> (c) Evidence discovered or obtained in violation of this section, including evidence discovered or obtained with consent, is not admissible in a trial, a hearing, or any other proceeding.

(Emphasis supplied.)

The effective date of Sect. 1-211, on which the appellant bases his entire argument, was July 1, 2023. The critical Carroll Doctrine search of the appellant's vehicle took place on September 21, 2022, more than nine months before the effective date of the new law. The products of that warrantless search were received in evidence at the suppression hearing that took place on April 24, 2023, two and one-half months before the new law took effect. The appellant entered his conditional guilty plea and was sentenced two and one-half months before the new law became effective. Of necessity, the appellant is now contending that the new law was fully retroactive to that suppression hearing and to that Carroll Doctrine search of the appellant's vehicle.

The issue has been squarely decided by the recent decision of this Court in the case of Kelly v. State, ___ Md. App. ___, No. 68, September Term, 2023 (filed June 27, 2024). The issue before the Court in Kelly was precisely the same as the issue now before us:

> It is undisputed that the search of Kelly's vehicle was based solely on the odor of burnt or unburnt cannabis. It is equally undisputed that Kelly's subsequent conviction and sentencing all occurred prior to July 1, 2023, which is when CP § 1-211 became effective. Because Kelly does not challenge the search of his vehicle on any grounds other than that the search violated CP § 1-211, the sole question here is whether the exclusionary remedy provided by CP § 1-211 is applicable to a defendant who is convicted and sentenced before the statute's effective date.

Id. at ___, slip op. at 4-5 (emphasis supplied).

After thoroughly reviewing the laws regarding prospectivity and retroactivity, Senior Judge Zarnoch wrote for this Court:

> Applying those principles to the instant case, we hold that CP § 1-211 is not retroactive and is therefore inapplicable under the facts presented here. By wording the statute in such a manner, the Maryland General Assembly clearly and unambiguously required that, for a defendant to avail himself of the "remedy" of exclusion, the evidence at issue must have been discovered in violation of the "right" established by the statute. Clearly, that "right" did not exist before the statute became effective.

Id. at ___, slip op. at 11-12 (emphasis supplied).

We are dealing squarely with the Exclusionary Rule of evidence. The core command of the Fourth Amendment is that the State, represented in this case by the officer who conducted the vehicle search on September 21, 2022, must act reasonably when it searches and when it seizes. When the officer in this case searched the appellant's vehicle on September 21, 2022, he applied the law as it existed on that day. It would not be reasonable to impose on him the duty to anticipate what the law might become nine months later. For purposes of imposing the sanction of the Exclusionary Rule on any unreasonable conduct by the State, our focus is on that searching officer and on the reasonableness of his behavior as of the time that it occurred. In this case, his reasonableness was unimpeached.

Our Kelly opinion relied on and quoted with approval the decision of the Supreme Court of New Jersey in State v. Burstein, 427 A.2d 525, 531 (N.J. 1981):

> In cases where the new rule is an exclusionary rule, meant solely to deter illegal police conduct, the new rule is virtually never given retroactive effect.

> The reason is that the deterrent purposes of such a rule would not be advanced by applying it to past misconduct.

Kelly, ___ Md. App. at ___, slip op. at 15 (emphasis supplied).

The conduct of the officer in this case was clearly not unreasonable. Our Kelly opinion concluded that Sect. 1-211 of the Criminal Procedure Article would not apply retroactively:

> In sum, we hold that the text of CP § 1-211 demonstrates that it was intended to apply prospectively from its effective date of July 1, 2023. Because the search at issue and Kelly's subsequent conviction and sentencing all occurred prior to that date, neither the right nor the remedy provided by the statute is available to him.

Id. (emphasis supplied).

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.