Circuit Court for Wicomico County
Case No. C-22-CR-22-000247

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1333

September Term, 2023

YARIEL J. ROSA

v.

STATE OF MARYLAND

Graeff,
Nazarian,
Shaw,

JJ.

Opinion by Nazarian, J.
Concurring Opinion by Nazarian, J.

Filed: January 24, 2025

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

After a hearing, the Circuit Court of Wicomico County denied Yariel Rosa's motion to suppress a handgun that police officers found in his car following a traffic stop that evolved into a K-9 scan and, eventually, a search of his car. Mr. Rosa entered a conditional guilty plea to possessing a regulated firearm and transporting a loaded handgun in a vehicle and reserved his right to appeal his convictions. We affirm.

I. BACKGROUND

On December 17, 2021, Detective Garrett Ross of the Salisbury Police Department ("SPD") was patrolling Booth Street in an unmarked Chevy Impala when he noticed a black Kia sedan with a temporary Delaware registration exiting an apartment complex.[1] Although the Detective claimed later that nothing about the sedan aroused his suspicions immediately, he saw the driver fail to stop at the stop line at an intersection, then fail to use a turn signal until after beginning to turn. The Detective followed the sedan, saw the driver discard a cigarette, and effected a traffic stop at a 7-Eleven on the corner of Route 50 and Nanticoke Road.

The sedan had two occupants, and Detective Ross testified that he thought that they were nervous based on their "shaky" movements, the driver's "shaky" voice, and the driver lighting a cigarette as he approached the sedan. The Detective also noticed that the driver's hands were shaking as he handed over the occupants' identifications and the vehicle's registration document. From their identifications, the Detective learned that Mr. Rosa was

[1] The record doesn't state the exact time of the stop, but the body camera footage reveals that it was still daylight and that the windows of the Kia sedan were not tinted.

the driver of the sedan.

The Detective was in the area, he said, because it was a high-crime area. He testified that he was aware that individuals came from Crisfield to Salisbury to partake in drug transactions and noted that Mr. Rosa lived in Crisfield. In response to the Detective's questions, Mr. Rosa told him that the passenger's family member had passed away and that Mr. Rosa had come to Salisbury to pick the passenger up from the apartment complex. He explained that he was driving there from his workplace at Mountaire in Selbyville, Delaware. Although the Detective found the explanation suspicious, he told Mr. Rosa that he was "sorry to hear that." The Detective then retreated to his vehicle.

Once back in his vehicle, the Detective radioed for a K-9 handler, then asked the dispatcher to verify that Mr. Rosa's license was valid and to check for any outstanding warrants. While awaiting the results, the Detective began writing Mr. Rosa a warning. Before he finished writing the warning, the K-9 handler arrived. Detective Ross then stopped writing and briefed the K-9 handler, telling him that both men were "real nervous" and lit cigarettes as soon as the Detective pulled them over and that the passenger was "like, foreign." Dispatch then gave the Detective the "All Clear" on the two occupants' licenses and warrant checks. After the briefing, the Detective and the K-9 handler walked toward the sedan to execute the K-9 scan. Following SPD Policy, the officers removed both men from the car before conducting the K-9 scan.

Detective Ross removed the passenger, and the K-9 handler removed Mr. Rosa. The Detective patted down the passenger and identified a knife, which the Detective removed.

The Detective then began questioning the passenger about his origins and occupation.[2] The passenger replied that he was from Puerto Rico and had lived in Salisbury for four years. The K-9 handler asked Mr. Rosa if there were items in the car or on Mr. Rosa's person worth police notice. Mr. Rosa responded that there was a gun in the sedan, and the K-9 handler signaled Detective Ross.

The officers then detained Mr. Rosa and his passenger. Although it is unclear whether the K-9 scan occurred before or after the officers searched the sedan, the dog scanned the sedan and alerted. The officers didn't find any drugs in the car[3] but did locate the firearm Mr. Rosa had mentioned. Mr. Rosa was arrested and charged with illegal possession of a firearm with a felony conviction, illegal possession of a regulated firearm, transporting a loaded handgun in a vehicle, wearing, carrying, and transporting a handgun in a vehicle on public roads, and illegal possession of ammunition.

Before trial, Mr. Rosa moved to suppress the handgun. Only Detective Ross testified at the motion hearing about his encounter with Mr. Rosa. The Detective testified that he didn't delay when investigating the traffic stop and that the stop took no longer than routine traffic stops. Even so, the Detective couldn't recall whether he issued the warning to Mr. Rosa. After this testimony, the parties agreed to submit their respective arguments to the

[2] Detective Ross also asked the passenger why his "accent was so heavy and why he didn't really have an understanding of English."

[3] The officers found some empty jars containing what they characterized as marijuana residue, but don't appear to have found any illegal drugs, and no drug charges were brought. Indeed, the passenger was allowed to go home from the scene.

suppression court in writing.

Mr. Rosa argued that Detective Ross had detained him twice—once for the traffic stop and once for the K-9 scan—and that the second detention was not supported by reasonable suspicion. He contended that his presence at Booth Street was unremarkable and that any nerves he displayed were typical of anyone subjected to a traffic stop. He argued that Detective Ross should have completed the stop by issuing him the warning once the Detective received the "All Clear" from the dispatcher. The State responded that this case was factually like *Carter v. State*, 236 Md. App. 456 (2018), and that the arguments the defendant raised in *Carter*—and that this Court rejected—were the same arguments Mr. Rosa raised here. When the K-9 handler arrived, the State said, Detective Ross remained engaged in his traffic stop duties and any brief interlude to update the K-9 handler did not mean that the Detective abandoned those duties or initiated a new stop. And to the extent the stop had been prolonged, the State argued, reasonable suspicion supported it.

The suppression court denied Mr. Rosa's motion on the record on October 19, 2022, then memorialized its ruling and rationale in a written order and opinion on January 9, 2023. The court concluded that Detective Ross had not delayed the traffic stop unreasonably, had been diligent in carrying out the initial stop, and did not abandon his duties when he stopped writing the warning to brief the K-9 handler. The court determined that even if it were to find an unreasonable delay and, therefore, a second stop, reasonable suspicion supported that second stop because Mr. Rosa was driving a vehicle with a

temporary Delaware registration in a high-crime area, and he and his passenger appeared nervous. The court also saw a contradiction between Detective Ross's initial observation of Mr. Rosa exiting the apartment complex and Mr. Rosa's statement to Detective Ross that he was "coming from work at Mountaire (a poultry farm/company)." Finally, the court found Detective Ross's raised suspicions to be reasonable because Mr. Rosa "oddly injected facts" into his explanation for being in the area, such as "the death of his friend." Given the totality of these facts, the court found Detective Ross had reasonable articulable suspicion to prolong the detention, and the stop "lasted no longer than was necessary to effectuate the purpose of the stop."

Mr. Rosa later entered a conditional guilty plea to possessing a regulated firearm and transporting a loaded handgun in a vehicle and reserved the right to appeal the denial of the suppression motion.

II. DISCUSSION

Mr. Rosa raises a single issue on appeal: whether the circuit court erred in denying his motion to suppress the handgun found in his vehicle.[4] He concedes that the initial traffic stop was proper. He argues, however, that his continued detention for purposes of the K-9 scan exceeded the original traffic stop's scope and wasn't grounded in reasonable articulable suspicion. The State responds that Detective Ross didn't abandon the original stop's purpose by stopping to assist the K-9 handler and that, in the alternative, reasonable

[4] Mr. Rosa phrased the Question Presented as: "Did the circuit court err in denying Mr. Rosa's motion to suppress?" The State framed it similarly: "Did the motions court correctly deny the motion to suppress a firearm found in a vehicle during a car stop?"

suspicion supported any alleged second stop. The State contends as well that if the officers did frisk Mr. Rosa (and his argument that the frisk was impermissible is preserved), that frisk was inconsequential to the handgun's admissibility.

On appellate review, we consider the evidence presented at the suppression hearing, construed in the light most favorable to the prevailing party, here, the State. *Sellman v. State*, 449 Md. 526, 538 (2016). We "accept the trial court's factual findings absent clear error." *State v. McDonnell*, 484 Md. 56, 78 (2023). "However, when assessing the constitutionality of a search or seizure, we conduct 'an independent constitutional evaluation . . . applying the law to the facts found in each particular case.' We review *de novo* any legal conclusions about the constitutionality of a search or seizure." *Id.* (citation omitted). The Fourth Amendment to the United States Constitution, which applies through the Fourteenth Amendment, shields citizens "against unreasonable searches and seizures." U.S. Const. amend. IV.; *Mapp v. Ohio*, 367 U.S. 643, 655–56 (1961). Here, we're looking at whether the seizure violated the Fourth Amendment, so we assess whether that seizure was reasonable; that is, we examine the reasonableness of the government's actions in executing the stop. *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977).

A. The Circuit Court Did Not Err In Denying The Motion To Suppress.

Although they aren't grounded in reasonable suspicion or probable cause, "[s]o-called *Whren* stops—valid but pretextual traffic stops undertaken for the primary purpose of investigating other illegal activity"—are an effective law enforcement weapon. *Carter v. State*, 236 Md. App. 456, 468 (2018). But the stop here, by itself, didn't give the officers

a basis to search the car—Mr. Rosa's statement that there was a gun in the car and the K-9 scan's positive alert did. So the issue here is whether the K-9 scan was initiated properly within the context of the original stop or after that stop had been completed. If it was part of the first stop, the search survives; if it wasn't, the search would need to be supported by a new and independent source of reasonable suspicion or probable cause.

Stated generally, traffic stops "'must be temporary and last no longer than is necessary to effectuate the purpose of the stop.'" *Ferris v. State*, 355 Md. 356, 369 (1999) (quoting *Florida v. Royer*, 460 U.S. 491, 500 (1983)). But we "will not simply determine that a stop was unreasonable due to the length of time over which it occurred." *Byndloss v. State*, 391 Md. 462, 485 (2006). Instead, we analyze the length of the stop in context, looking at the entire encounter. *Id.* The "tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop and attend to related safety concerns." *Rodriguez v. United States*, 575 U.S. 348, 354 (2015) (citation omitted). So although a stop may be lawful in itself, the officer's authority to detain or seize occupants of the vehicle extends only until the task tied to the stop is completed or should reasonably be completed. *Id.* Without a new source of reasonable suspicion or probable cause, the mission flowing from a typical traffic violation entails (and thus authorizes) "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id.* at 355. If the stop is "'prolonged beyond the time reasonably required to complete the mission of issuing a warning ticket,'" the stop can

become unlawful. *Id.* at 354–55.

That said, the stop-effecting officer "may pursue investigations into both the traffic violation and another crime 'simultaneously, with each pursuit necessarily slowing down the other to some modest extent.'" *Carter*, 236 Md. App. at 468 (quoting *Charity v. State*, 132 Md. App. 598, 614 (2000)). This authority includes a request for a K-9 unit to scan a vehicle. *State v. Ofori*, 170 Md. App. 211, 235 (2006). But because the officer does not need reasonable suspicion or probable cause to call for or implement a K-9 scan and because "a scan by a drug-sniffing dog serves no traffic-related purpose, traffic stops cannot be prolonged while waiting for a dog to arrive." *Carter*, 236 Md. App. at 469. A K-9 scan is a "perfectly legitimate utilization of a free investigative bonus as long as the traffic stop is still genuinely in progress. The emphasis in that statement is on the word 'genuinely.'" *Ofori*, 170 Md. at 235. The purpose behind the initial traffic stop cannot "be conveniently or cynically forgotten and not taken up again until after an intervening narcotics investigation has been completed or has run a substantial course." *Charity*, 132 Md. App. at 615.

Whether a stop has been prolonged improperly or a second stop has been initiated turns on the particular facts and circumstances of each stop and requires an individualized constitutional analysis. The facts of this case mirror two reported opinions of this Court. The first is *Munafo v. State*, 105 Md. App. 662 (1995), where a sheriff's deputy validly stopped a driver for speeding and reckless driving. *Id.* at 673. The deputy called dispatch

to examine Mr. Munafo's driver's license and rental agreement[5] and radioed another officer for assistance. *Id.* at 667. The dispatcher reported back that the license and rental agreement had "checked out." *Id.* The deputy wrote Mr. Munafo a warning but didn't issue it immediately. *Id*. The other officer arrived, the two conferred, and then both approached the vehicle. *Id*. at 667–68. The arriving officer shone a flashlight in through the passenger window and saw a bag of suspected marijuana. *Id.* at 668. We held that the deputy "was required to end the stop promptly and send [the driver] on his way" once he learned that the driver's license and rental agreement had checked out. *Id.* at 673. And at that point, the continued detention initiated a second Fourth Amendment stop that required reasonable, articulable suspicion. *Id.*; *see Snow v. State*, 84 Md. App. 243, 264–65 (1990) (recognizing that once primary purpose of stop is satisfied, continued detention constitutes second stop under Fourth Amendment and thereby requires reasonable articulable suspicion).

The second case is *Carter v. State*, in which an officer also witnessed a traffic violation and effected a traffic stop. 236 Md. App. at 464. The officer obtained the driver's license and registration and, while doing so, thought the driver to be "extremely nervous." *Id.* The officer then called a K-9 unit and conducted a records search that checked out. *Id.* While the officer was writing the driver a warning, the K-9 handler arrived. *Id.* 464–65. The stopping officer paused to brief the K-9 handler, then ordered the driver to step out of the vehicle. *Id*. at 465. The K-9 handler scanned the vehicle and the dog alerted to the

[5] The rental agreement was produced in lieu of Mr. Munafo's registration. 105 Md. App. at 666.

presence of drugs. *Id.* We held that the officer had not extended the initial traffic stop impermissibly because the K-9 scan's alert occurred within the time that tasks related to the traffic infraction reasonably take. *Id.* at 472. And given that officers can pursue other investigations simultaneously with the traffic infraction investigation, *Charity*, 132 Md. App. at 614, we held that the officers hadn't abandoned the stop's original purpose. *Carter*, 236 Md. App. at 472.

Again, "[w]hether [Mr. Rosa] was effectively stopped twice for constitutional purposes is not a question of fact, but one of constitutional analysis." *Munafo*, 105 Md. App. at 672. Like *Munafo* and *Carter*, Detective Ross received an "All Clear" from dispatch after inquiring into Mr. Rosa and his passenger's identifications and the vehicle's registration. Unlike *Munafo*, though, the K-9 unit arrived while Detective Ross was still writing the warning to Mr. Rosa, which mirrors *Carter*. In this case, and as in *Carter*, Detective Ross stopped writing the warning, briefed the K-9 handler, then helped his colleague prepare to conduct the K-9 scan. The dog's alert in *Carter* was almost instantaneous, 236 Md. App. at 465, so the scan fell within the initial traffic stop. *Id*. at 472.

What matters here is whether briefing the K-9 handler and questioning Mr. Rosa were sufficiently analogous temporally to the K-9 scan in *Carter* or, said differently, whether those actions "occurred within the time that 'tasks tied to the traffic infraction are—or reasonably should have been—completed.'" *Carter*, 236 Md. App. at 472 (citation omitted). They did. Had Detective Ross finished writing the warning before the K-9

handler arrived, this case would track *Munafo*. At that point, the Detective would have completed the task authorized by the stop, and to hold Mr. Rosa and his passenger any longer would have prolonged the stop improperly. But as in *Carter*, Detective Ross hadn't yet completed the warning when the K-9 handler arrived—he had received the "All Clear" signal from the dispatcher but was in the process of writing the warning. This record affords us no basis to conclude that Detective Ross slow-rolled the stop or lollygagged the warning—the encounter spanned about seven minutes from the stop until the K-9 scan and the circuit court found, in the course of denying Mr. Rosa's motion to suppress, that the Detective acted with appropriate diligence.

As a result, the critical events—Mr. Rosa's acknowledgment that there was a gun in the car—occurred in connection with the initial stop. Detective Ross was, under *Carter*, allowed to stop the process of generating the warning to brief and assist the K-9 handler. The officers were allowed to remove Mr. Rosa and his passenger from the car in connection with the K-9 scan. And because, in response to the K-9 handler's officer safety question, Mr. Rosa revealed that there was a gun in the car, the officers ended up with the authority to search the car, which the positive K-9 alert would have provided as well. Ultimately, then, it doesn't matter whether the dog alerted before Mr. Rosa acknowledged the gun or after. Either scenario authorized the officers to search the car and to find the gun underlying Mr. Rosa's charges in this case.

The circuit court did not err in denying Mr. Rosa's motion to suppress.

JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. APPELLANT TO PAY COSTS.

Circuit Court for Wicomico County
Case No. C-22-CR-22-000247

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1333

September Term, 2023

YARIEL J. ROSA

v.

STATE OF MARYLAND

Graeff,
Nazarian,
Shaw,

JJ.

Concurring Opinion by Nazarian, J.

Filed:

Having just concluded that we must affirm the decision denying Mr. Rosa's motion to suppress the firearm anchoring his convictions in this case, I write separately to explain how, in my view, the law operated here in a manner inconsistent with core constitutional search and seizure principles. This case reveals how the combination of (1) *Whren v. United States*, 517 U.S. 806 (1996), (2) officers' authority to remove people from cars during traffic stops, and (3) the fact that K-9 scans aren't searches allows officers to seize and question people without having to establish reasonable articulable suspicion or probable cause, all in the hope of generating it. And although these techniques are, in theory, available for officers to use against anyone, officers have enormous discretion over when and against whom to use them.

And the decision about when and against whom officers deploy these techniques raises the other important aspect of this case: this stop, search, and ensuing convictions appear, at least to this observer of the record, to have resulted from race-influenced profiling. The Detective who effected the stop seemed to acknowledge as much himself. As Detective Ross briefed the K-9 handler he called—based on his assumption that the two (brown) men in a car in a "high-crime area" were there to buy drugs—he made a point of adding that Mr. Rosa's passenger was "like, foreign[,]" and later he wondered aloud why the passenger's "accent was so heavy and why he didn't really have an understanding of English."

This stop and search and seizure and arrest and charges and conviction and affirmance would never have happened unless an officer decided to follow *these* men and

wait for *them* to commit some sort of traffic violation. We can't know with certainty what was in the Detective's heart when he decided to target Mr. Rosa and his vehicle. But we know that the Detective noticed and focused in the investigation on how they looked and whom he assumed (incorrectly) they were when he stopped Mr. Rosa and his passenger for the most minor of traffic infractions, and when he called for a K-9 unit.[1]

We know that the Detective carried out the stop, briefed the K-9 handler on the passenger's race when he arrived, took the men out of the car, carried out a K-9 scan that resulted in a positive alert, then asked questions that, once answered, ended up supporting a search that yielded a gun. At the very least, then, the record raises questions about why the Detective targeted *these* men and conveys the appearance that the Detective chose to exercise this discretion based at least in some measure on the men's appearance. Racial profiling isn't a defense to the charges Mr. Rosa faces here, so he (understandably) didn't focus on proving it in the circuit court. But it's hard not to see the profiling here and to wonder whether race influenced the decision to deploy this set of powerful discretionary law enforcement tools.

I.

When this all started, Detective Ross—who was on a "proactive patrol"—knew nothing beyond the fact that there were two brown men in a car in a "high-crime area." Why did he pick this car? Search and seizure law doesn't interrogate motivation. It appears

[1] Again, the Detective's body camera footage revealed that Mr. Rosa's sedan did not have tinted windows and that the traffic stop took place in daylight.

from the record, though, that the Detective's decision to stop Mr. Rosa arose at least in some measure from the appearance of the men in the car, and that he called immediately for a K-9 scan based on assumptions about who and where the men were and why they were there.

As it turns out, the core assumptions underlying the officers' deployment of these techniques in this case were wrong. Although they have brown skin and spoke Spanish, neither man was "foreign;" one was from Salisbury and the other from Puerto Rico, meaning that both men are Americans. Although Detective Ross testified at the suppression hearing that they found some empty jars with what he characterized as marijuana residue, neither man possessed illegal drugs in a quantity illegal to use or to sell, and the searches revealed no evidence that they were in the process of committing any drug crimes or headed anywhere to commit any—nor, by the way, were any drug crimes charged. The dog alerted, but not to anything that justified charges, nor has the State argued here that the car contained any illegal contraband. But as the officers framed their questions in terms of the officers' safety (questions that arose only because the officers decided to effect a pretextual traffic stop in the first place), Mr. Rosa's cooperation opened the door, as it were, to the search of his vehicle. And so—as they hoped all along—the officers got into the car and found something, in this case Mr. Rosa's gun.

II.

In my view, we need to reckon with the way that these doctrines interact to allow hunches that can be grounded in bias (or nothing) to authorize law enforcement to stop

people, engage them at considerable length, and generate support for searches that wouldn't pass constitutional muster otherwise.

The Fourth Amendment to the Constitution of the United States and Article 26 of the Maryland Declaration of Rights protect Marylanders from unreasonable searches and seizures. In common understanding, that reasonableness threshold requires officers to have some basis to search or seize us. It's true that officers are always free to approach and attempt to engage people for any reason or none at all. But unless we have given an officer a basis to form *reasonable* articulable suspicion or *probable* cause, we are, generally speaking, free to go about our business and not to reveal to officers where we are (or aren't) going, what we are (or aren't) doing, and what we have (or don't) in our possession. And the extent of an officer's authority to search or seize us depends on the extent of what the officer knows or can see. The law has evolved, however, to allow techniques that can open doors and cars and pockets that the Constitution otherwise closes, and this case reveals how these can be used in sequence and keep the encounter and the pressure alive.

Let's start at the beginning. Detective Ross wasn't on traffic patrol—he was on a "proactive" patrol in a "high-crime area." And yet he followed a car that had done nothing until it "failed to stop at the stop line[] and . . . didn't use the turn signal until after [it] had begun [to] turn," then pulled the car over after the driver discarded a cigarette a quarter-mile later. Why was he bothering with bare minimum (if that) traffic infractions? Because he had a hunch that these men in this car must be up to something criminal. And under *Whren*, officers can effect traffic stops for purely pretextual reasons so long as some straight-face

traffic violation actually occurs. 517 U.S. at 813. By that standard, of course, law enforcement likely can stop anyone reading this opinion on just about any trip. Usually, a *Whren* stop involves a rolled stop sign or a failure to signal, but in this case, Mr. Rosa, in fact, stopped and, by the Detective's reckoning, used his signal. But this stop was never about nitpicky technique failures. This stop was about starting an encounter that could justify more penetrating scrutiny. And Mr. Rosa doesn't challenge the stop because he can't—this is all permissible, at the officer's discretion.[2]

Having effected a traffic stop, the Detective created an opportunity to engage Mr. Rosa and his passenger and, importantly, to make observations about who they were, what they were doing, and what he thought about them. This may not have opened the door of the car literally (although, as we'll discuss below, it could have). But it did open the window of the car and expanded the Detective's engagement with these men and,

[2] On at least two other occasions, members of this Court have suggested that the absence of any reasonableness check on *Whren* stops warrants renewed consideration of whether Maryland should adopt a different test under Article 26 of the Maryland Declaration of Rights. These cases pre-date July 1, 2023, if barely, so I can't cite them here. Md. Rule 1-104(a)(2)(B). But for what it's worth, several of our sister state courts have rejected *Whren* and developed new, better doctrine under their respective state constitutions. *State v. Gonzales*, 257 P.3d 894, 896 (N.M. 2011) (holding that a pretextual traffic stop violates the New Mexico Constitution unless there is probable cause or reasonable suspicion for the real purpose behind the stop); *State v. Ladson*, 979 P.2d 833, 837–38 (Wash. 1999) (rejecting pretextual stops as violating Washington State Constitution); *State v. Ochoa*, 206 P.3d 143, 148 (N.M. Ct. App. 2008) (finding the "federal analysis [under *Whren*] unpersuasive and incompatible with [New Mexico]'s distinctively protective standards for searches and seizures of automobiles"); *see also* Margaret M. Lawton, *State Responses to the Whren Decision*, 66 CASE W. RESRV. L. REV. 1039 (2016); Michael Sievers, Note, *State v. Ochoa: The End of Pretextual Stops in New Mexico*?, 42 N.M. L. REV. 595 (2012).

importantly, the range of opportunities to find, or generate, reasonable suspicion and probable cause.

Reasonable suspicion is "nothing more than 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'" *Sizer v. State*, 456 Md. 350, 364 (2017) (citations omitted). It is a "'common sense, nontechnical conception that considers factual and practical aspects of daily life and how reasonable and prudent people act.'" *Bost v. State*, 406 Md. 341, 356 (2008) (quoting *Stokes v. State*, 362 Md. 407, 415–16 (2001)). And we measure this from the officer's perspective, not the defendant's. *See id.* ("The test is 'the totality of the circumstances,' viewed through the eyes of a reasonable, prudent, police officer."). The officer gets to decide, in their view and under the circumstances, what indicates criminal activity. *Sizer*, 456 Md. at 365. And Detective Ross's subjective perception, viewed through his lenses and potential biases, was the only perspective offered at the suppression hearing. A "stop may be upheld based on 'a series of acts which could appear naturally innocent if viewed separately' but that 'collectively warrant further investigation.'" *Trott v. State*, 473 Md. 245, 257 (2021) (cleaned up) (citations omitted). That "does not allow the law enforcement official to simply assert that apparently innocent conduct was suspicious to him or her; rather the officer must offer 'the factual basis upon which he or she bases the conclusion.'" *Ferris*, 355 Md. at 391–92 (quoting *Derricott v. State*, 327 Md. 582, 591 (1992)). But an officer's perspective gets a great deal of deference, and when it's the only perspective offered, it comes across as unopposed.

In the majority opinion, we never had to reach, and never reached, whether these officers had reasonable suspicion or probable cause that could justify searching Mr. Rosa (the State briefed and argued the question in the event we had held that the Detective had prolonged the stop wrongfully). The State claims that they did have reasonable suspicion and probable cause; my view is they didn't. For the purposes of this concurring opinion, though, what matters is how artificial and pretextual the supposed bases for suspicion and probable cause are:

- The suppression court based its ruling in part on Mr. Rosa's supposedly conflicting statements to Detective Ross. That court found that Detective Ross observed "Mr. Rosa driving out of an apartment complex," yet Mr. Rosa told the Detective that he "was coming from work at Mountaire (a poultry farm/company), not an apartment complex." According to the suppression court, Mr. Rosa's "statements to the officer about where he was coming from were contradicted by the Detective's own observations." But the Detective testified that "[he] believe[d Mr. Rosa] said he was coming from work, but he had just picked up . . . the passenger in that apartment complex." The record from the suppression hearing refuted the court's findings, making them clearly erroneous. *State v. Brooks*, 148 Md. App. 374, 398 (2002). Regardless, Detective Ross created confusion here out of nothing: he initiated a stop based on a pretext, he questioned Mr. Rosa, and then he measured Mr. Rosa's answers against his own assumptions about what people should or shouldn't be doing and where. The

Detective was never required to prove anything—he could create suspicion out of confusion grounded in untested assumptions, and that's what happened here.

- In Detective Ross's own words, three factors indicated to him that criminal activity was afoot: (1) Mr. Rosa's explanation for being in the area; (2) Mr. Rosa's presence in a high-crime area; and (3) Mr. Rosa's nervousness. *First*, Mr. Rosa explained to Detective Ross that Mr. Rosa had left his job at Mountaire and driven to the apartment complex to pick up a friend—the passenger, who lived in Salisbury—because his friend had recently lost a family member. The Detective found this explanation suspicious, given that Mr. Rosa lived in Crisfield, and the suppression court agreed. But I fail to see how, based on the facts presented to Detective Ross, he deduced that criminality was afoot. After all, he saw Mr. Rosa exit the apartment complex, as Mr. Rosa stated. He also saw the passenger in the vehicle with Mr. Rosa, as Mr. Rosa explained his reasons for being at the apartment complex and having the passenger with him. The records check on Mr. Rosa and his passenger did not raise any red flags. Indeed, there were no inconsistencies. Nor were there contradictions. Given such circumstances, reasonable suspicion needed more.
- *Second*, the Detective claimed that Mr. Rosa and his passenger were in a high-crime area. But to qualify, a high-crime area requires particularized facts about the geographic area at issue, the criminal activity known to happen in the area, and the temporal proximity of the criminality known in that area to the time

of the stop. *Washington v. State*, 482 Md. 395, 443 (2022). The record here reveals nothing of the sort. We know that the Detective first observed Mr. Rosa when Mr. Rosa was leaving the apartment complex. The Detective testified that Mr. Rosa was in a high-crime area and that the Detective saw Mr. Rosa exit that area—the apartment complex. And yet, that same Detective testified that he was unfamiliar with the apartment complex:

> [MR. ROSA'S COUNSEL:] What do you know, if anything, about the complex -- that apartment complex there? What's the demograph there? Where you first observed --
>
> [DETECTIVE ROSS:] That apartment complex is in the county. I'm not -- I don't really know what the demograph -- I don't know if it's Hispanic, black, white. I really don't know who exactly – it's in the county, it's not our jurisdiction, so I don't go there very often.
>
> West Road is in our jurisdiction, and Route 50 is in our jurisdiction.
>
> [MR. ROSA'S COUNSEL:] Okay.
>
> So you don't know whether or not that apartment comp-- you don't know much about it?
>
> [DETECTIVE ROSS:] I don't. I may have been there once.

Neither he nor anyone else attempted to explain how they knew the area was a high-crime area. Although the Detective stated that he was aware of potential drug transactions from Crisfield residents acquiring drugs in Salisbury, he didn't articulate why he believed Mr. Rosa or his passenger were connected to those crimes. *See Sellman*, 449 Md. at 547–48 (highlighting how officer did not explain why information missing from Mr. Sellman's record in police

database contributed to officer's suspicion that he was involved in crimes reported in the area).

The other high-crime area factors were absent too. While conceding that he lacked familiarity with the area, Detective Ross also couldn't, and didn't, articulate when a drug transaction last had occurred. And without more, the Detective's conclusion could be grounded only in hunches and, in this instance, the Detective's apparent views that the men were "foreign." *See Washington*, 482 Md. at 437 ("[T]he description of an area as a high-crime area must be based on objective and specific facts, like any factor in the totality of the circumstances analysis.").

- *Third*, the Detective relied heavily on the men's nervousness. This is another area that warrants significant caution and carries potential for misuse. Appellate courts have recognized repeatedly that the "innocent and the guilty may both frequently react with analogous trepidation when approached by a uniformed police officer." *Ferris*, 355 Md. at 388 (citation omitted); *Whitehead*, 116 Md. App. 497, 505 (1997) ("There is no earthly way that a police officer can distinguish the nervousness of an ordinary citizen . . . from the nervousness of a criminal who traffics in narcotics."). Detective Ross gathered that Mr. Rosa and his passenger were nervous because Mr. Rosa spoke with a shaking voice, shook as he handed over his documents, and discarded and lit a cigarette as Detective Ross approached Mr. Rosa's vehicle. The suppression court credited these

findings fully, and although we defer to that court's first-level fact-finding, this shouldn't be entitled to much—or any—weight in an independent constitutional analysis. The deference should extend to a recognition of the Detective's stated reasons, not a finding that they generated reasonable suspicion or probable cause.

Indeed, the nervousness indicators here were unexceptional in light of Mr. Rosa and his passenger's compliance with all of the officers' instructions. Although Mr. Rosa and his passenger may have been shaking, the Detective agreed that Mr. Rosa pulled over in a reasonable time once the Detective turned on his vehicle's police lights. Mr. Rosa was not evasive, and he and his passenger answered the Detective's questions—ultimately to Mr. Rosa's peril. Mr. Rosa also explained to the Detective where he was coming from and why Mr. Rosa and his passenger were together. Finally, Mr. Rosa and his passenger followed the Detective's instructions to exit the vehicle. *See Sellman*, 449 Md. at 554–55 (holding Mr. Sellman's nervousness unexceptional given lack of other suspicious factors, his compliance in answering officer's questions, and the fact that he exited vehicle when told to).

I fail as well to see how discarding and lighting a cigarette displayed nervousness. The final act before the traffic stop was that someone in the car discarded a cigarette, so one or both obviously had been smoking beforehand. If lighting a cigarette was a sign of nervousness, there was nothing new about it if

they were smoking before. And yet, by his own words, nothing aroused Detective Ross's suspicions when Mr. Rosa exited the apartment complex. The suppression record also lacks any explanation as to why lighting or smoking any of those cigarettes indicated nervousness, let alone that criminal activity was afoot.[3] And more to the point, the fact and extent of another's nervousness is a highly subjective observation, one that's not testable and is impossible to rebut or disprove later. *Ferris*, 355 Md. at 389 (recognizing that characterizing someone as "unusually nervous is an extremely subjective evaluation") (citation omitted). Moreover, given Detective Ross's reliance on the men's appearance in his decision to follow and stop them in the first place, it would be hard to blame these two brown-skinned men for being nervous from the inception of an unprovoked police encounter regardless of how it went.

Adding all of this up, then, leaves this encounter short of establishing reasonable articulable suspicion to search the car or the men.

But the officers didn't need to stop there, and they didn't. Indeed, officers can call a K-9 for any reason or none at all, and if one arrives in time, a K-9 scan isn't a search. *Ofori*, 170 Md. App. at 235. Out of the box, of course, this case raises the question of why Detective Ross called for a K-9 scan. He gets credit for making that call quickly, but at the time he made that call, what did he know that created reasonable suspicion? Nothing. Sure,

[3] Although the court below noted that "cigarettes can mask other odors in a vehicle," Detective Ross never testified that he believed or even thought the cigarettes were meant to mask other odors in the vehicle.

officers can't prolong a stop artificially, *compare Munafo*, and didn't here. 105 Md. App. 662. But we know that Detective Ross made a point of telling the K-9 handler in the initial briefing that Mr. Rosa's passenger was "like, foreign," which is a pretty good subliminal look at what contributed to the Detective's unsupported suspicions. And in any event, a K-9 scan is a free shot. If they can get the dog there before completing the ticket (with some wiggle room to brief the K-9 handler and the like, *see Carter*, 236 Md. App. 456), they have nothing to lose and everything to gain. Here, the dog alerted to what seemed at most to be some marijuana residue in some empty jars in the car—not enough to establish a drug crime, but enough to support a search of the car. *See In Montrail M.*, 87 Md. App. 420, 437 (1991), *aff'd*, 325 Md. 527 (1992) (vehicle search permissible where K-9 arrived and alerted positively to presence of drugs while stop-effecting officer was still awaiting results from license and registration checks).

But they still weren't done. Before the K-9 scan even happened, the officers were allowed to pull the men out of the car, without reasonable suspicion, and question them for "officer safety." *Mimms*, 434 U.S. at 111. Again, no suspicion was necessary. Indeed, no K-9 scan was necessary either—officers can pull occupants out of the car without reasonable suspicion or probable cause in connection with any traffic stop. *Id.* This doesn't justify a full-blown search of the car or their person without reasonable suspicion or probable cause. *Knowles v. Iowa*, 525 U.S. 113, 117–18 (1998) (noting while officers can order vehicle occupants to exit vehicle during traffic stop, traffic stop itself does not justify full search of those individuals and officers may only frisk those individuals if officers

have *reasonable articulable suspicion* that occupants are armed and dangerous); *see Sellman*, 449 Md. at 558–59 (emphasizing that while it may be reasonable for officers to ask vehicle occupants to exit a vehicle for officer safety during traffic stop, frisking those occupants requires reasonable suspicion that those occupants are armed and dangerous). But that process accomplished exactly what the officers had hoped: it escalated the encounter, generated a basis for the officers to question the men (ostensibly for the officers' safety), and allowed the officers to obtain further information or observations that could expand the opportunity to justify a search. So to recap: without ever having reasonable suspicion or probable cause, these officers generated a basis to search Mr. Rosa's car based on a (pretextual) *Whren* stop and a (pretextual) K-9 scan.

When Mr. Rosa answered at that point, truthfully, that there was a gun in the car, he literally opened the door for them, and that answer compelled us to affirm the denial of his motion to suppress the gun. But again, we need to put this in perspective. Without generating reasonable suspicion or probable cause, the officers expanded and prolonged their encounters with Mr. Rosa and his passenger until they spawned two separate bases to get into the car. Mr. Rosa's revelation of the gun followed the pretextual traffic stop, the pretextual decision to call the K-9 unit, and the decision to take the men out of the car to carry out the scan. There never was any independent basis for reasonable suspicion or probable cause. And yet, as we have concluded above, no reasonable suspicion or probable cause was required.

III.

The Fourth Amendment of the Constitution of the United States and Article 26 of the Maryland Declaration of Rights protect people from unreasonable searches and seizures. Under current law, what happened here is considered reasonable. I don't think it is, but as an intermediate appellate court, it's not our role to flout precedent.

It is our place, however, to identify cases where the precedent leads to unreasonable results. And in this instance, the intersection of three bodies of law—the *Whren* stop, the treatment of K-9 scans as non-searches that can be requested and conducted for no reason at all, and the authority of officers to remove people from cars without suspicion—operated to allow these officers to subject these two men to penetrating police scrutiny without reasonable suspicion or probable cause. And it certainly looks from this record, not least from Detective Ross's own mouth, that he selected these particular men for this treatment based on a race- and (incorrect) origin-inflected "hunch." I acknowledge that not all traffic stops are *Whren* stops, not all stops are a function of racial profiling, and some K-9 scans reveal chargeable offenses. But not all ends justify the means, and in this case the collective impact of these doctrines allowed the officers to dodge their constitutional burdens.

It's not the officers' fault that the law has given them these tools, and our decision to affirm the denial of Mr. Rosa's motion to suppress acknowledges as much. It is wrong, though, for law enforcement to use these tools to pursue "hunches" grounded in mistaken and race-based assumptions. Had the search of the car come up empty for contraband, Mr. Rosa and his passenger would have had no recourse. They would have endured the stress

and humiliation of a stop and search, one that appeared to be motivated in some measure by their race, to satisfy the Detective's hunch. When a search comes up dry, the officer gets on with their day, but the person who was stopped and searched is left to pick up the pieces. It's no wonder that people stopped by police might well be nervous, then, especially people of color. Nor does it seem surprising that people, especially people of color, might wonder how often they're stopped based on how they look to the officers authorized to enforce the Constitution and laws of this State. And the circumstances of this case ought to give us pause about how these doctrines operate in the context of real-life policing and whether they, and the strong deference to law enforcement's stated justifications for using them, ought to be conditioned on some affirmative notion of reasonableness, as the United States and Maryland Constitutions contemplate.

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/1333s23cn.pdf