Circuit Court for Montgomery County
Case No. 137953C

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 1361

September Term, 2021

GERMAN KARL PENARANDA

v.

STATE OF MARYLAND

Nazarian,
Friedman,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: June 7, 2023

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. MD. R. 1-104.

** At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

FACTS

On December 4, 2019, police in Montgomery County saw German Penaranda filling his car at a gas station in Rockville, Maryland. They followed him up I-95 to Linthicum, Maryland. They watched him buy something at a store. They watched him pick up a woman at a motel, spend 10 minutes with her, and then drop her back off at the motel. They watched him smoke cigarettes in a parking lot. Then they watched him drive back to Rockville. On the way back, he varied his speeds and took odd routes. All told, eight Montgomery County police officers trailed Penaranda for more than three hours.

At the end of the trip, police pulled Penaranda over for speeding on Rockville Pike. The police testified that they immediately smelled the odor of marijuana coming from Penaranda's car and asked Penaranda, the car's sole occupant, to step out of the car. When he didn't immediately comply, the police pulled him out, walked him to the rear of the car, and observed that he was still giving off a strong odor of marijuana. Police began to search him and found a small baggie of a white substance in his pants pocket, which they believed to be cocaine. They then placed Penaranda in handcuffs. The police continued to search Penaranda's person (finding a veritable pharmacopeia of illegal drugs, but which did not include marijuana) and then conducted a search of his car (finding a small amount of marijuana).[1]

[1] Police issued Penaranda a civil citation for possession of less than 10 grams of marijuana.

Penaranda was indicted for possession of cocaine, heroin, fentanyl, and a combination of heroin and fentanyl, with intent to distribute. He moved to suppress the drugs as the product of an illegal search. The motions court denied his motion to suppress. Penaranda was convicted, sentenced,[2] and now appeals, arguing that the motions court erred in denying his motion to suppress. For the reasons that follow, we reverse.

ANALYSIS

I. ODOR OF MARIJUANA

We begin by observing that Penaranda does not contest the reasonableness of the initial stop, that is, the police officers pulling him over to the side of Rockville Pike for speeding.[3] Rather, his disagreement begins shortly thereafter, when the police smelled the odor of marijuana. As a result, the primary question in this case is what was the legal

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[2] Penaranda was convicted of four separate crimes, possession with intent to distribute cocaine, heroin, fentanyl, and a combination of heroin and fentanyl. On each, he was sentenced to five years incarceration, suspending all but the 581 days, which he was detained pre-trial, concurrent, with 3 years of probation. As a result, to the best of our knowledge, he is not currently incarcerated.

[3] Nor could he under prevailing law. *Whren v. United States*, 517 U.S. 806 (1996). We have little doubt, however, given the expenditure of time, officers, cars, and gasoline, that the police intended to use Penaranda's speeding as a pretext to allow them to search. Judge Friedman reiterates, and this panel agrees, that the Supreme Court of Maryland should abandon the failed federal constitutional doctrine established in *Whren*. *Snyder v. State*, No. 1127, Sept. Term 2021, slip op. (unreported opinion) (filed Feb. 3, 2023) (Friedman, J., concurring). Were the Supreme Court of Maryland to abandon *Whren*, it would be required to adopt a different test under Article 26 of the Maryland Declaration of Rights. Under such a test, the police would likely have to prove the reasonability of such a stop in the context in which it occurred, a more difficult, but certainly not insurmountable hurdle. For an examination of other tests employed by our sister states to replace *Whren*, *see Snyder* at n.7 (Friedman, J., concurring). Here, however, Penaranda has not made a record to challenge the constitutionality of the initial stop.

significance of the odor of marijuana on December 4, 2019, the day on which Penaranda was searched.

Rapid changes in the law governing possession of marijuana have caused rapid changes in the legal significance of the odor of marijuana in the determination of probable cause. *Pacheco v. State*, 465 Md. 311, 317 (2019) (discussing rapidly changing environment concerning marijuana). We think it is helpful, therefore, to recite the entire history:

Chronology

October 1, 2014	Maryland General Assembly reclassifies the use and possession of marijuana from a criminal offense to a civil offense. Acts of 2014, ch. 158.
January 20, 2017	Supreme Court of Maryland (at the time named the Court of Appeals of Maryland)[4] holds that odor of marijuana coming from car alone gives probable cause to search the car. *Robinson v. State*, 451 Md. 94 (2017).
March 27, 2017	Supreme Court of Maryland reaffirms holding from *Robinson*, that odor of marijuana coming from a car alone gives probable cause to search the car but that the odor does not give rise to reasonable articulable suspicion that occupants of the car are armed and dangerous and, therefore, subject to being frisked. *Norman v. State*, 452 Md. 373 (2017).
June 28, 2018	Appellate Court of Maryland, in a deeply divided decision, discussed below, holds that odor of marijuana coming from a particular person in a store gives probable cause to arrest and

[4] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See also*, Md. R.1-101.1(a) ("From and after December 14, 2022, any reference in these Rules or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland….").

	search the person for marijuana-related crimes. *Lewis v. State*, 237 Md. App. 661 (2018) (*Lewis I*).
August 12, 2019	Supreme Court of Maryland holds that odor of marijuana and sight of a burnt marijuana roach does not give probable cause for a search incident to a lawful arrest. *Pacheco v. State*, 465 Md. 311 (2019). This case is discussed more fully, below.

December 4, 2019 PENARANDA SEARCH

July 27, 2020	Supreme Court of Maryland reverses *Lewis I* and holds that odor of marijuana coming from a particular person in a store does not give rise to probable cause to search. *Lewis v. State*, 470 Md. 1 (2020) (*Lewis II*).
June 21, 2022	Supreme Court of Maryland holds that odor of marijuana gives rise to reasonable articulable suspicion to frisk a juvenile for weapons. *In re D.D.*, 479 Md. 206 (2022).
November 8, 2022	Maryland voters approve constitutional amendment legalizing use and possession of cannabis.[5] Acts of 2022, ch. 45 (ratified Nov. 8, 2022).
July 1, 2023	Effective date of constitutional amendment and enabling legislation making cannabis legal in Maryland. MD. CONST. art. XX; Acts of 2023, chs. 254, 255.
July 1, 2023	Effective date of statute eliminating the odor of cannabis as a basis for searches in Maryland. Acts of 2023, ch. 802.

With this chronology in mind, we must determine the legal significance of the odor of marijuana from the person and from the car on December 4, 2019, the day on which Penaranda was searched. The motions court found that *Lewis I* was still governing law at

[5] Upon legalization, the term "cannabis" replaced all references to "marijuana" in the Maryland Annotated Code. Acts of 2022, ch. 26, §§ 13, 19. Because we discuss events prior to legalization, we use the former name.

the time of the search and that it, not *Pacheco*, should govern the analysis of this search. We review that decision as a matter of law, without deference to the motions court.

It is a little difficult to reconstruct the holding in *Lewis I*. Judge Kathryn G. Graeff's lead opinion found that the odor of marijuana, if localized to a particular person, provides probable cause to arrest that person for the crime of possession of marijuana." *Lewis I* at 683. We understand Judge Graeff's opinion as stating that the odor of marijuana—if sufficiently particularized to an individual—could provide probable cause for a search incident to a lawful arrest. Judge Graeff's view, however, failed to command a majority of the panel. The second vote in favor of affirming Lewis's conviction was supplied by Judge Kevin F. Arthur. But, we know that Judge Arthur did not agree with Judge Graeff's view that the odor of marijuana supplied probable cause for a search incident to a lawful arrest. Rather, Judge Arthur viewed an affirmance in *Lewis I* to be compelled solely by the *stare decisis* effect of the binding decision in *Robinson*. *Lewis I* at 684-85 (Arthur, J., concurring). Judge Douglas R.M. Nazarian (also a member of this panel) dissented. Judge Nazarian wrote that the law concerning car searches discussed in *Robinson* shouldn't be applied in the context of a search in a store and concluded that the search was unconstitutional. *Lewis I* at 693-705 (Nazarian, J., dissenting). Thus, after *Lewis I*, we knew that Lewis's conviction had been affirmed, but we knew very little about the justification for that affirmance. [6]

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[6] The standard for extracting a rule from plurality opinions of Maryland appellate courts is set forth in Justice Watts's opinion for the Supreme Court of Maryland in *State v. Falcon*, 451 Md. 138, 161-62 (2017); Shane M.K. Doyle, *The Unsoundness of Silence:*

In *Pacheco*, the only evidence that supported an unwarranted search of his person was the odor of marijuana and the sight of a burnt marijuana roach weighing far less than 10 grams. *Pacheco*, 465 Md. at 318. Our Supreme Court carefully distinguished between the more flexible standards for the search of an automobile, *Pacheco*, 465 Md. at 321-22 (discussing *Carroll* doctrine (the automobile search doctrine)), and the more rigorous standards for the search of a person incident to a lawful arrest. *Id*. at 322-23. The *Pacheco* Court didn't overrule *Robinson*, which had held that odor of marijuana alone was sufficient for an automobile search, *id*. at 329-30 (discussing *Robinson*), but held that the odor of marijuana, alone was insufficient to establish probable cause for a search incident to a lawful arrest. *Id*. at 333-34.

The effect of *Pacheco* on *Lewis I* was complete. As to Judge Graeff's theory—that the odor of marijuana gave probable cause for a search incident to a lawful arrest—*Pacheco* clearly rejected her theory. As to Judge Arthur's theory—that *Robinson* should be read broadly to find that the odor of marijuana provides probable cause for a search incident to a lawful arrest—*Pacheco* rejected that theory too. Thus there was, by the time that *Pacheco* was decided on August 12, 2019, nothing left of this Court's decision in *Lewis I.* We, therefore, hold that the motions court erred by applying *Lewis I*. And, under *Pacheco*, the

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Silent Concurrences and Their Use in Maryland, 79 MD. L. REV. ONLINE 129, 139-48 (2020). Given, however, that *Lewis I* was overturned by the Supreme Court of Maryland, as we discuss below, we no longer need to engage in this analysis.

circuit court erred by not finding that the odor of marijuana was insufficient to create probable cause for a search incident to a lawful arrest. *Pacheco*, Md. 465 at 333-34.[7]

Interestingly, the Supreme Court in *Pacheco* pointed out that the constitutionality of the search in *Pacheco* turned entirely on timing. Had the police searched Pacheco's car first, found drugs, and then searched his person, the search could have been constitutional. *Pacheco*, 465 Md. at 331-32. Because they searched Pacheco's person first and then his car, however, it was unconstitutional. *Id*. The same is true for Penaranda. The odor of marijuana would have given police probable cause to search Penaranda's car under *Robinson* and the automobile exception and the drugs in the car would have given them probable cause to arrest Penaranda and conduct a search of his person incident to a lawful arrest. Because, however, they searched his person first, the odor of marijuana did not give them probable cause to search his person incident to a lawful arrest. Because the police conducted the searches in the wrong order, they were both unconstitutional under *Pacheco*.

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[7] The parties also argued below and elaborately briefed in this Court an alternative argument regarding whether the trial court should have nevertheless granted Penaranda's motion to suppress the evidence of the search even if *Lewis I* was still the governing law. Because, we have determined that the motions court erred in applying *Lewis I* to Penaranda's case, we need not and do not reach this alternative argument. Nevertheless, we thank counsel for this interesting discussion.

II. TOTALITY OF CIRCUMSTANCES

Perhaps understanding that we were likely to find that *Pacheco*, not *Lewis I*, was the relevant legal precedent governing the search in this case,[8] the State focused its attention instead on factually distinguishing Penaranda's case from *Pacheco* based on the totality of the circumstances. Before we evaluate the totality of the circumstances, however, Penaranda asserts three reasons why we shouldn't reach the question at all. We summarize these arguments:

- Penaranda, *first,* points out that the police testified that the only factor that they considered—the only thing they were investigating—in deciding to search Penaranda and his car was the odor of marijuana. Penaranda suggests that this testimony operates as a waiver of the State's ability to now rely on other factors to support the existence probable cause. The State replies that there is precedent from the U.S. Supreme Court that suggests that the police's stated basis doesn't limit the court's subsequent consideration of the totality of the circumstances that lead to probable cause.
- Penaranda *next* argues that the motions court made a finding that the other factors on which the State wishes to rely were rejected by the motions court, which said about those other factors, "I've seen a million of these cases [and] I don't think that has anything to do with probable cause." Moreover, Penaranda argues that the motions court's rejection of these other factors was a factual finding that is binding on this Court and prevents us from considering the totality of the circumstances.
- And, *third*, Penaranda argues that the State never made a totality of the circumstances argument at the motions court and thus failed to preserve it for appellate review. The State, while admitting that it didn't use the phrase "totality of the circumstances," nevertheless argues that it made the same argument below that it is making here and that the argument is therefore preserved.

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[8] It is not clear to us whether and to what extent the State's brief intended to defend the motions court's determination that *Pacheco* did not overrule *Lewis I* (stating that *Lewis I* remained a viable precedent after *Pacheco* but making no legal argument in support of that assertion). As described above, however, we think that conclusion is clear.

We hold, as to the third of these arguments, that the State's argument, that the courts should consider the totality of the circumstances, was sufficiently preserved that this Court can exercise review. Moreover, as to the first two of these arguments, we hold that neither the police's stated basis nor the motions court's evaluation of the relative merits of these factors, preclude us from our obligation to conduct our own independent constitutional appraisal of whether the totality of the circumstances presented gave rise to probable cause for a search incident to Penaranda's arrest. *See Pacheco*, 465 Md. at 319. And so, it is to that question we next turn.

The State offers four factors that it says together create a totality of the circumstances supporting probable cause to arrest and, therefore, search Penaranda's person incident to that arrest. Those four factors are: (1) that Penaranda's person and car smelled of marijuana; (2) that the police knew Penaranda had previously been arrested for drug-related crimes; (3) that, while in Linthicum, Penaranda had a liaison with a woman who appeared to be working as a prostitute; and (4) that Penaranda drove home as if to spot and evade pursuit.

In evaluating these four factors and whether they together demonstrate a totality of the circumstances favoring the existence of probable cause to arrest, we are limited to the evidence and testimony presented at the suppression hearing. *Nathan v. State*, 370 Md. 648, 659 (2002); *Ferris v. State*, 355 Md. 356, 368 (1999). We give deference to the motions judge's first-level findings of fact—who did what and when—unless those findings appear to be clearly erroneous. *Holt v. State*, 435 Md. 443, 458 (2013); *Charity v. State*, 132 Md. App. 598, 606 (2000); *Ferris*, 355 Md. at 368. Where the motions judge did

not make explicit findings of fact, we consider the evidence presented in the light most favorable to the prevailing party. *Charity*, 132 Md. App. at 606. We do not, however, defer to the motions court's legal conclusions regarding whether a search was valid. *Ferris*, 355 Md. at 368. Rather, it is our responsibility to apply the law to the specific facts of the case and make our own independent constitutional appraisal. *Holt*, 435 Md. at 458; *Nathan*, 370 Md. at 659; *Charity*, 132 Md. App. at 607.

A. Penaranda's car and person smelled of marijuana

As noted above, the police testified that they smelled the odor of marijuana coming from Penaranda's person and from his car. The motions court found that testimony to be true and we accept that first-level fact finding. That is, for our purposes, Penaranda's car and person smelled of marijuana.

The *Pacheco* Court did not instruct us as to what weight to accord to the odor of marijuana, except that alone it was insufficient to generate probable cause but that, "[i]n a different case, additional facts or testimony beyond what we have here may well have compelled a different result." *Pacheco*, 465 Md. at 333.

We also know that the odor of marijuana does not give rise to general probable cause that the person may have any kind of contraband or weapons. *Pacheco*, 465 Md. at 329 (discussing *Norman*). Rather, if the odor of marijuana has any weight at all in the probable cause analysis it is only with respect to the three marijuana crimes that existed at the time: possession of 10 or more grams; possession with intent to distribute; and driving under the influence. *Id.* at 328 (discussing *Robinson*). On the whole, we think that the odor of marijuana at the time of Penaranda's search had some minor weight that the police were

entitled to consider in making their probable cause determination. Yet we see little reason to infer that the smell was related to either a felony or a misdemeanor committed in the presence of police that would justify an arrest and then a search incident to a lawful arrest. We, therefore, give this odor of marijuana relatively little weight in our analysis.[9]

It is worth noting that our conclusion here is, as we write, already obsolete. As noted in our chronology above, after the search in Penaranda's case on December 4, 2019, the law governing marijuana and the odor of marijuana has continued to change and develop. As a result, our analysis here does not apply (or does not necessarily apply) to any searches conducted after that date.

B. Penaranda had been previously arrested for drug-related offenses

At the motions hearing, the police testified that they saw Penaranda's car at a gas station in Rockville and ran his license plates. From that they discovered that he had been arrested for drugs three years earlier. The State, at the motions hearing and on appeal, argued that this fact should count as part of the totality of the circumstances leading to probable cause to arrest and search. The motions court judge was not particularly impressed by this fact and neither are we.

We accept the first-level fact-finding that Penaranda had prior drug-related arrests. We also accept that prior arrests can be considered as part of a probable cause analysis.

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[9] Although it does not matter to our analysis, it is worth noting that the police's reliance on the odor of marijuana here did not accurately predict that Penaranda would possess an amount of marijuana that would constitute a crime in the State of Maryland at the time.

State v. Amerman, 84 Md. App. 461, 484 (1990). Nevertheless, we give Penaranda's prior arrests very limited weight in the probable cause evaluation because there is no evidence that those drug-related arrests resulted in convictions. It is not a minor thing that, in our system, people are innocent until proven guilty. Moreover, we know that prior arrests, or even prior convictions, alone cannot satisfy the probable cause requirement. Were it otherwise, somebody who was once arrested would forever be fair game for warrantless searches. That is not and cannot be the law.

Yet still, we understand that as one of many factors that make up the totality of circumstances, the fact of his prior drug-related arrests must count for something. In our independent constitutional appraisal, we count it as a minor factor that might, if it appears in concert with other factors, make up probable cause.

C. Penaranda had a liaison with a woman who appeared to be working as a prostitute

Police testified that Penaranda picked up a woman at a motel in Linthicum, spent 10 minutes in the car with her, and then he returned her to the motel. Police witnesses then made several inferential leaps: that the woman was working as a prostitute; that sometimes people working as prostitutes exchange sex for drugs; and that drug dealing goes "hand-in-hand" with prostitution. Thus, the police witnesses suggested that Penaranda's liaison with this woman added to their probable cause calculus. The motions court made no findings of fact with regard to this factor. And while we are willing to accept the police's first-level description of these facts, we are unwilling to accept, without more, the inferences that the police witnesses urged: that the woman was working as a prostitute, that

Penaranda paid her for sex in drugs, or that their interaction made it any more likely that Penaranda possessed or intended to sell drugs. In our independent constitutional appraisal, this fact adds nothing to the probable cause analysis.

D. Penaranda drove home as if to spot and evade pursuit

Police testified that Penaranda drove at an irregular rate of speed, alternating between driving too fast and too slow. He took an odd route, driving through, for example, a commuter "kiss-and-ride" parking lot and then back out on to the highway. The police witnesses testified that they interpreted Penaranda's odd driving as a tactic for spotting and evading pursuit. The motions court made no findings of fact with regard to this factor. We credit the police's first-level testimony that Penaranda engaged in erratic and evasive driving. In our independent constitutional appraisal, we think that the inference drawn by the police—based on their experience and training—that Penaranda was trying to spot and evade pursuit adds to the totality of the circumstances in favor of the existence of probable cause.

E. Conclusion

After applying the appropriate standards of review to the law, facts, and conclusions below, we have conducted our own independent constitutional appraisal of the totality of the circumstances that included Penaranda's prior drug-related arrests, his liaison with a woman who appeared to be working as a prostitute, his evasive driving, and the odor of marijuana. Given the governing law at the time, we find that the police lacked probable cause to believe that Penaranda had committed a felony or a misdemeanor in their presence that would entitle them to arrest him and to search him incident to that arrest.

JUDGMENT OF THE CIRCUIT COURT OF MONTGOMERY COUNTY REVERSED. CASE REMANDED WITH INSTRUCTIONS TO REVERSE THE JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AND REMAND TO THAT COURT WITH INSTRUCTIONS TO GRANT THE MOTION TO SUPPRESS. COSTS TO BE PAID BY MONTGOMERY COUNTY.