Circuit Court for Prince George's County
Case No. CT190986X

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 2248

September Term, 2022

MARCO MOSELEY

V.

STATE OF MARYLAND

Berger,
Ripken,
Raker, Irma S.
(Senior Judge, Specially Assigned),

Opinion by Raker, J.

Filed: June 27, 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).

Appellant, Marco Moseley, was convicted in the Circuit Court for Prince George's County of one count of transporting a handgun on the public roads and one count of transporting a loaded handgun on the public roads. Appellant presents the following questions for our review:

> 1. "Whether the fruits recovered from the search of Mr. Moseley's vehicle are admissible where the basis of the search was the smell of marijuana and a legal amount of cannabis when that is no longer a permissible basis for a search and evidence recovered from such a search is no longer admissible in any trial, hearing, or other judicial proceeding?
>
> 2. Whether the circuit court erred in denying the motion to suppress the evidence found during a stop and search of Mr. Moseley's vehicle where the basis of the justification of that stop was a *de minimis* traffic violation?"

Finding no error, we shall affirm.

I.

Appellant was indicted by the Grand Jury for Prince George's County of one count of a felon in possession of a firearm (Count 1), one count of illegal possession ammunition (Count 2), one count of transporting a handgun on the public roads (Count 3), and one count of transporting a loaded handgun on the public roads (Count 4). He proceeded to trial before a jury. The State entered a *nolle prosequi* as to Count 1, and the trial judge entered a judgment of acquittal on Count 2. The jury found appellant guilty of the two remaining charges. The trial court merged Counts 3 and 4 for sentencing purposes and sentenced appellant to a term of incarceration of three years on Count 3.

Appellant was driving on Marlboro Pike in Prince George's County on July 9, 2019. Two officers were driving behind him in an unmarked police car. Suddenly, appellant made a left-hand turn onto Lorring Drive without using his turn signal. The officers testified that they were following behind appellant and that they had no idea when or whether he was about to turn left. Multiple times, the officers described his turn as "sudden." He made the turn "quickly."

The officers pulled appellant over for failure to use his turn signal. When they approached appellant's vehicle, the officers smelled an odor they believed to be marijuana and PCP. They asked him if there was anything in the vehicle, and he told them that there was a little bit of "weed" in the car. The officers instructed appellant to exit the vehicle, and one of the officers searched the car. During the search, the officer located a firearm. The officers arrested Mr. Mosely.

Prior to trial, appellant moved to suppress the fruits of the stop and the search, arguing that the stop lacked probable cause and was unlawful because he did not violate the traffic laws. In the alternative, appellant argued that the traffic violation was *de minimis* and insufficient to support a stop. Even assuming the initial stop was valid, appellant argues that the smell of PCP was insufficient to support a search because the smell of PCP could indicate ether in the car rather than PCP, and that the smell of marijuana was insufficient to support the search because the police officers had no basis to believe that the amount of marijuana emanating from the car was illegal.

The trial court found the testimony of the officers credible and found that the officers had been following appellant when he made a left turn without using his turn signal, thereby

violating the traffic laws. The court found that the officers had probable cause for the traffic stop. The court found that the officers had smelled marijuana and that the smell, in combination with appellant's statements, gave the officers probable cause to search the vehicle. The court stated:

> "Okay, I've heard the testimony of officer—Detectives Ali and Rubolotta. I find their testimony to be credible. Based on that testimony, I find that when the Officers were following the Defendant in his vehicle, they observed him to turn left without using a left-turn signal. That gave them reasonable basis for conducting a traffic stop. Upon arriving or upon approaching the vehicle, they smelled the odor of at least marijuana and PCP. And then the Defendant, when asked for his license or registration, said that he didn't have a driver's license and that he had some weed or marijuana in the car. I find that both the smell and his statement that there was weed in the car gave probable cause to the Officers to search."

The court denied appellant's suppression motion.

The jury found appellant guilty of one count of transporting a handgun on the public roads and one count of transporting a loaded handgun on the public roads. He was sentenced as described above. This timely appeal followed.

II.

Appellant addresses first the initial stop of appellant's vehicle. Appellant argues that the court erred in finding that the officers had probable cause for the initial stop. Appellant argues that the State did not meet its burden of demonstrating that appellant violated Md. Code Ann. Transp. § 21-604(c) (West 1977), which provides that "A person may not, if any other vehicle might be affected by the movement, turn a vehicle until he

gives an appropriate signal in the matter required by this subtitle." Appellant argues that, while the officers testified that appellant turned left without signaling, the State did not establish whether any other cars were present and, if so, what their positioning was relative to appellant. In appellant's view, the State failed to establish that the officers had probable cause to believe that "any other vehicle might be affected" in anything more than a *de minimis* manner by appellant's failure to signal. Appellant argues that the statute requires a showing that appellant affected other drivers in some material way.

In the alternative, appellant argues that, even if appellant turned without using a turn signal, and even if he did so in a way that had the potential to affect other vehicles, the violation was *de minimis*. Appellant argues that *de minimis* violations of the traffic code do not provide sufficient probable cause to stop a car.

Once again in the alternative, and not argued below, appellant asks this Court to reject *Whren v. United States*, 517 U.S. 806 (1996) and to hold that pretextual stops violate Article 26 of the Maryland Declaration of Rights.[1] He argues that even if the officers had probable cause to believe appellant had committed a traffic violation, the stop was pretextual, illegal under Article 26, and should be suppressed on those grounds. Appellant acknowledges that the Supreme Court of the United States held in *Whren*, 517 U.S. 806 (1996) that an officer may stop a vehicle for a traffic violation even if the stop is pretextual. Such stops do not violate the Fourth Amendment to the United States Constitution. However, appellant argues that a pretextual stop must satisfy, not only the Fourth

[1] Interestingly, appellant does not ask this Court to create an exclusionary rule under Article 26.

Amendment to the United States Constitution, but also Article 26 of the Maryland Declaration of Rights. He asks us to hold that pretextual stops are not permissible in the State of Maryland.

The State argues that the evidence demonstrated that there were two officers driving behind appellant when he made his left-hand turn suddenly without signaling. These officers were surprised by appellant's decision to turn. Therefore, there was another vehicle that might be affected by the unsignalled left-hand turn. The State argues that there was sufficient evidence for the trial judge to find that the State met its burden of proving that appellant violated Section 21-604(c). The State notes that we have not adopted any sort of *de minimis* exception to the rule that officers may stop vehicles for traffic infractions and should not do so.

As to the *Whren* issue, the State raises, first, preservation. The State argues that we should decline to adopt an independent reading of the Maryland Declaration of Rights which diverges from *Whren*, because appellant failed to raise this argument in the trial court, and, therefore, the issue is not preserved for our review. Furthermore, such a holding would conflict with the Maryland Supreme Court's holding in *Scott v. State*, 366 Md. 121, 139 (2001), that Article 26 of the Maryland Declaration of Rights is coextensive with the Fourth Amendment to the United States Constitution.

Appellant next addresses the officers' decision to search his car after he had been stopped without probable cause to search. Appellant argues that, since his arrest, the State Legislature passed Md. Code. Ann. Crim. Proc. Section 1-211 (West 2023), which prohibits officers from searching a vehicle based solely on the odor of marijuana. Section

1-211(c) requires that evidence obtained in violation of Section 1-211 should be suppressed. Appellant argues that Section 1-211 should be applied retroactively and that, because the officers had no valid basis for the search of his vehicle other than the smell of marijuana, the evidence they seized from his vehicle must be suppressed.

The State maintains that this argument is not preserved. Appellant raised no arguments based on Section 1-211 in the trial court. He never raised the substantive argument that the smell of marijuana alone is insufficient to give rise to probable cause to search. Even if the argument is preserved, the State argues that Section 1-211 should not be given retroactive effect because it is neither remedial nor procedural, and the text, history, and purpose of the statute indicate that it was not intended to have retroactive effect. Finally, the State argues that Section 1-211 does not apply because the officers searched appellant's car based on both the smell of marijuana and the smell of PCP, rather than "based solely on the odor of marijuana."

III.

We begin with appellant's arguments that the initial stop of his vehicle was unconstitutional. As a threshold matter, we must determine whether his arguments are preserved. Md. Rule 8-131(a) provides that an appellate court will not decide an issue unless it "plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 4-242 further provides that a motion to suppress evidence based on an unlawful search or seizure must state the grounds for that motion. Failure to appropriately raise a theory of suppression results in the waiver of that theory of suppression. *Id.* We have

construed these rules in combination to prevent an appellant from raising a suppression theory on appeal that was not argued in the circuit court. *Savoy v. State*, 218 Md. App. 130, 141-42 (2014).

Here, appellant argued in the circuit court that no traffic violation occurred and that, even if a traffic violation occurred, the violation was *de minimis*. Appellant did not argue, however, that the stop was pretextual and that this Court should fashion a new precedent under Article 26 of the Maryland Declaration of Rights prohibiting pretextual stops. Neither party developed a record regarding pretext. The Article 26 and *Whren* issue was not raised in the trial court and is not preserved for our review. We shall consider only appellant's first two arguments and not appellant's argument that Article 26 of the Maryland Declaration of Rights prohibits pretextual stops.

We review a trial court's legal determinations *de novo* and make our own independent constitutional evaluation of whether the actions of law enforcement were lawful. *Sizer v. State*, 456 Md. 350, 362 (2017). We accept all the trial court's factual findings unless those findings are clearly erroneous, viewing the evidence in the light most favorable to the prevailing party below. *Funes v. State*, 469 Md. 438, 462 (2020).

We turn first to appellant's argument that no traffic violation occurred. Section 21-604(c) of the Transportation Article, provides "[a] person may not, if any other vehicle might be affected by the movement, turn a vehicle until he gives an appropriate signal in the matter required by this subtitle." Appellant does not contest that he made a left-hand turn without using his turn signal. Rather, he contests that he did so at a time when "any other vehicle might be affected by the movement."

Appellant urges us to adopt a novel interpretation of Section 21-604(c) that would require the effect on another vehicle in the vicinity to be more than *de minimis*. Appellant relies on *Rowe v. State*, 363 Md. 424, 441 (2001), where the Maryland Supreme Court held that "momentary crossing of the edge line of the roadway and later touching of that line did not amount to an unsafe lane change or unsafe entry onto the roadway" and did not justify a stop. From *Rowe*, appellant reasons that *de minimis* momentary conduct cannot violate a standard designed to protect other vehicles.

The language of the statute at issue in *Rowe* is distinct from the language of Section 21-604(c). The statute at issue in *Rowe* required that "[a] vehicle shall be driven *as nearly as practicable* entirely within a single lane and may not be moved from that lane or moved from a shoulder or bikeway into a lane until the driver has determined that it is safe to do so." *Rowe*, 363 Md. at 433-34 (emphasis added). The Court in *Rowe* explicitly considered what behavior was so unsafe or outside the norm as to take a driver outside the "practicable lane" and concluded that the defendant's conduct did not reach that standard. *Id.* at 438. The statute explicitly allowed for imperfect driving, including some degree of violation of lane markings, and required the courts to determine whether the defendant's conduct sufficiently deviated from the norm as to be illegal. *Id.* at 434. Section 21-604(c) anticipates no such minor deviations.

Our decision in *Best v. State*, 79 Md. App. 241, 247-48 (1989) is instructive. There, the defendant argued that "unless the State has affirmatively proved that another vehicle is actually following the turning vehicle and following closely enough to be adversely affected by the absence of the signal, the State has failed to prove the condition precedent

for the requirement that the warning be given." *Id.* at 247. We rejected that argument, holding that the purpose of the traffic law is to "alert other vehicles in the vicinity coming in from all points of the compass." *Id.* In that case, the State demonstrated that a police car was driving behind the defendant's vehicle and was in the area of the defendant's vehicle when the defendant made a right-hand turn without signaling. *Id.* We held that the officer was justified in stopping the defendant's vehicle. *Id.*

Nearly the same facts are present in the instant case. The trial court found the officers' testimony credible. The officers were driving behind appellant. They were in the vicinity when he made a "sudden" unsignalled turn. Appellant failed to alert the officers to his intention to turn while they were in his vicinity. The only difference in this fact pattern is that appellant turned left, whereas Best turned right. The statute does not differentiate between left-hand and right-hand turns. Further, in this case, the State presented additional evidence that the turn was "sudden" and "quick" and that the officers driving behind appellant did not expect him to turn because he was not using his turn signal. Under the standards set out in *Best*, appellant violated Section 21-604(c).

We next turn to appellant's argument that, even if appellant violated Section 21-604(c), the violation was a *de minimis* traffic violation, insufficient to provide probable cause for a stop. Once again, appellant's support for this proposition is *Rowe*. Appellant argues that "[i]n *Rowe*, the Supreme Court of Maryland made clear that trivial violations of the traffic code cannot be relied upon to support a . . . stop." Once again, appellant misconstrues *Rowe*. In *Rowe*, the issue before the court was whether the defendant's conduct was severe enough to amount to a violation of the pertinent statute. The Court

held that it was not. Because there was no violation of the statute, there was no probable cause for the stop. Nowhere did the Court conclude that conduct severe enough to constitute a violation of a traffic law could be so *de minimis* as to deprive the police of probable cause.

Maryland courts have held consistently that a stop based on a violation of the traffic law is objectively reasonable and constitutional under the Fourth Amendment to the United States Constitution. *See, e.g.*, *State v. Williams*, 401 Md. 676, 689-90 (2007); *Carter v. State*, 236 Md. App. 456, 467-68 (2018). We have not established a *de minimis* exception. We decline to do so today.

The trial court did not err in finding that the traffic stop was supported by probable cause.

IV.

We next address appellant's claim that we should apply Md. Code. Ann. Crim. Proc. §1-211 (West 2023) retroactively to suppress the fruits of a search based on the odor of marijuana. We decline to address appellant's retroactivity argument, but not based upon preservation.[2] The search here was based upon the smell of PCP as well as marijuana.

[2] We do not fault counsel for failing to raise a rule that did not exist at the time. *Lucado v. State*, 40 Md. App. 25, 32 n.5 (1978) ("We cannot evade this responsibility by interposing Maryland Rule 1085 upon the premise that the point was not raised or decided below. Obviously, counsel cannot be held to the task of objecting upon a ground that, at the time, did not exist."). It's difficult, if not impossible, to raise retroactivity of a statute prior to the enactment of that statute.

Even if we were to hold that the statute had retroactive effect, which we do not, the police would have had probable cause to search the vehicle based upon the smell of PCP.

Appellant argued below that *Bailey v. State*, 412 Md. 349 (2010) prevented the officers from finding probable cause based on the odor of PCP. In that case, the Court found that the smell of ether, the smell commonly associated with PCP, is not a sufficient basis for probable cause because ether is a lawful substance on its own. *Id.* at 383. This case, however, is distinguishable from *Bailey*. In *Bailey*, the Court noted that, while the smell of ether was not, alone, sufficient to form the basis for probable cause, it could contribute to probable cause as part of a totality of the circumstances analysis. *Id.* at 382. Indeed, the Court noted that a link between the suspect and drug activity along with the odor of PCP might be enough to produce probable cause. *Id.* at 384.

Here, the police did not base their search solely on the presence of marijuana as prohibited by Section 1-211, nor did the police base their search solely on the smell of ether as prohibited by *Bailey*. Rather, the police based their search on the combination of the two smells. Section 1-211 does not prohibit police officers from considering the odor of marijuana as a factor in their probable cause analysis (provided that it is not the only factor). In this case, the odor of marijuana provided a link between appellant and drug activity. The combination of strong information about appellant's probable drug use and the odor of PCP was sufficient to establish probable cause. *Bailey*, 412 Md. at 383.

The trial court did not err in denying appellant's motion to suppress the evidence seized pursuant to the police officers' search of appellant's vehicle.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.