Cite as 2018 Ark. App. 80

ARKANSAS COURT OF APPEALS

DIVISION II AND III

No. CR-17-265

JAKE EARL SMALL APPELLANT V. STATE OF ARKANSAS APPELLEE	Opinion Delivered: February 7, 2018 APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, FORT SMITH DISTRICT [NO. 66FCR-16-192] HONORABLE JAMES O. COX, JUDGE AFFIRMED IN PART; REVERSED AND REMANDED IN PART

RITA W. GRUBER, Chief Judge

Jake Earl Small was charged in the Sebastian County Circuit Court with furnishing a prohibited article, a Class B felony; possessing hydrocodone, a Class C felony; and two counts of possession of drug paraphernalia, Class D felonies. Some of the contraband was found in the car he was driving when Fort Smith police officer Eric Hoegh stopped it for lack of insurance. Prohibited items were also found on Small's person when he was booked and searched at the Sebastian County jail.

Small filed pretrial motions to suppress evidence from his car, which included seven hydrocodone pills in a small baggie, and his statement to Officer Hoegh that the pills were from a friend and that Small took them for his arthritis. After conducting a suppression hearing, the trial court denied the motions by a written order on December 5, 2016.

On December 6, 2016, the State filed an amended criminal information that added the offense "Proximity to certain facilities," based on an allegation that Small possessed a controlled substance, Class C felony or greater, within 1000 feet of the real property of a church. On December 15, 2016, Small filed a pretrial motion to dismiss the "count" of enhanced sentencing or, alternatively, to continue the trial—based in part on a lack of allegation regarding his mental state. The motion was argued on the morning of trial, December 19, 2016, and was denied.

Claire Desrochers, the forensic chemist at the Arkansas State Crime Laboratory who tested seven pills that were found during the search of Small's vehicle, testified at trial that the pills contained 3.6763 grams of hydrocodone and that hydrocodone is a Schedule II drug. Officer Greg Napier of the Ft. Smith Police Department's narcotics unit gave the following testimony. He testified that he reviewed the videotape from the traffic stop, learned its location, and flew his drone to take the photograph introduced as State's exhibit no. 7. He walked along the side of the road past the church property line and up into the church driveway, measuring a total distance of 846 feet. He also measured the straight-line distance as 738.6 feet from the side of the church. The jury found Small guilty of all charges.

Small raises four points on appeal. First, he contends that the trial court erred in denying his motions to suppress. Second and third, he contends that the trial court erred in denying his motion to dismiss the sentencing enhancement of Arkansas Code Annotated section 5-64-411 for possessing the hydrocodone near a church and erred in refusing to give his proffered jury instructions regarding the statute. Fourth, he contends that there was insufficient evidence to support the conviction of violating Arkansas Code Annotated

section 5-64-411. We affirm the trial court's decision to deny his motions to suppress and reverse the trial court's conviction for violating Arkansas Code Annotated section 5-64-411; the other two points become moot.

I. *Whether there Was Sufficient Evidence to Support a Violation of Ark. Code Ann. § 5-64-411*[1]

Due to double-jeopardy considerations, we consider a challenge to the sufficiency of the evidence before we address alleged trial errors. *Coger v. State*, 2017 Ark. App. 466, at 2, 529 S.W.3d 640. In assessing the sufficiency of the evidence supporting criminal convictions, we consider only the proof that supports the verdict. *Id.* We view that evidence and all reasonable inferences deducible therefrom in the light most favorable to the State, and we will affirm if the finding of guilt is supported by substantial evidence. *Id.* Evidence is substantial if it is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other without requiring resort to speculation or conjecture. *Id.*

A person is subject to enhanced sentencing of an additional 10-year term of imprisonment if the person "[p]ossesses a controlled substance in violation of § 5-64-419 and the offense is a Class C felony or greater" and "[t]he offense is committed on or within" 1000 feet of the real property of a church. Ark. Code Ann. § 5-64-411(a)(1) & (2)(H) (Repl. 2016). The possession of two grams or more of a Schedule II controlled substance is a Class C felony. *See* Ark. Code Ann. § 5-64-419. Small repeats on appeal the argument he made in his motion for a directed verdict—that this statute requires proof of a culpable

[1]Small has not argued insufficiency of the evidence regarding the other charges.

mental state, and the State failed to present evidence that he knowingly or purposely possessed drugs within 1000 feet of a church.

Small also argues that our legislature "never intended that this code provision be applicable to traffic stop cases since the police could manipulate the situation by initiating the traffic stop near one of the listed establishments." We do not address his latter argument because he did not make it to the trial court. A party is bound by the nature and scope of the objections and arguments made at trial and may not enlarge or change those grounds on appeal. *Ronk v. State*, 2016 Ark. App. 126, at 8. We now address the sufficiency of the evidence pursuant to Small's directed-verdict motion.

Small notes the provision of Arkansas Code Annotated section 5-2-203(b) (Repl. 2013) that, with certain exceptions, "if the statute defining *an offense* does not prescribe a culpable mental state, a culpable mental state is nonetheless required and is established only if a person acts purposely, knowingly, or recklessly." (Emphasis added.) He argues that the State failed to address his culpable mental state, a key element of the crime, and that there was no evidence that he was aware of the church's location. He points to State's exhibit no. 7, an aerial photograph taken by drone, showing Trinity Baptist Church "down the street and around the corner of where [he] was stopped." He concludes that because the State did not present evidence that he acted purposely or knowingly, it failed to meet its burden of proof. Small notes the holding of *Leeka v. State*, 2015 Ark. 183, 461 S.W.3d 331, that because our DWI statute did not contain an express requirement of a culpable mental

state, one nonetheless was imputed to the offense through Ark. Code Ann. § 5-2-203. *Leeka*, 2015 Ark. 183, at 6–8, 461 S.W.3d at 335–36.[2]

The State responds that section 5-2-203 is inapplicable because section 5-64-411, unlike the DWI Act at issue in *Leeka*, is a sentencing enhancement rather than a statute defining an offense. The State relies on *Baumgarten v. State*, a case concerning when the State may amend a charge:

> It is well settled that an information may be amended up to a point after a jury has been sworn if it does not change the nature of a crime, or create unfair surprise. We have held that an amendment which adds an allegation of habitual offender does not change the nature or degree of the crime. Such an amendment simply authorizes a more severe punishment, not by creating an additional offense or an independent crime, but by affording evidence to increase the final punishment in the event the defendant is convicted.

316 Ark. 373, 379, 872 S.W.2d 380, 384 (1994) (internal citations omitted).

We find a clear distinction between *Baumgarten* and the present case. Adding a habitual-offender status does not change the elements or nature of the charges or the proscribed conduct. Arkansas Code Annotated section 5-64-411, however, adds an enhanced sentence for a person found guilty of certain offenses, including that for which appellant was convicted, only if an additional requirement is met. That additional requirement is the location where the act is committed. Accordingly, we hold that the

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[2]In 2015, in response to the April 2015 *Leeka* opinion, our legislature explicitly stated its intention to make DWI a strict-liability offense, not requiring proof of a culpable mental state. *Tackett v. State*, 2017 Ark. App. 271, at 4, 523 S.W.3d 360, 362. The legislature stated in Act 6 that it "intended and still intends to keep driving while intoxicated a strict liability offense." Act 299 added subsection (c) to Ark. Code Ann. § 5-65-103, which provides that "[a]n alcohol-related offense under this section is a strict liability offense."

circuit court erred in concluding that section 5-64-411 did not require a culpable mental state, and we reverse and remand on this point.

II. *Whether the Trial Court Erred in Denying Small's Motions to Suppress*

Small contends that Officer Hoegh did not have probable cause to initiate the traffic stop of his vehicle. Hoegh testified that he made the stop on the evening of February 12, 2016, when he was on patrol in the city of Fort Smith:

> I came behind Mr. Small's vehicle at the railroad tracks. We were stopped there for a brief moment. I ran the defendant's tag. The vehicle insurance came back to be cancelled. Once . . . we started back in motion, I then initiated my blue lights and made a traffic stop on Mr. Small. The traffic stop was about 6:50 p.m. This is a copy of the NCIC return which I got on Mr. Small's vehicle. It shows that the insurance shows cancelled.
>
> I then retrieved his name and date of birth and information. He at the time did not have insurance available. He did not have anything but the policy number. I then returned to my vehicle. I then, just like I do with everyone else, I [ran] his name through the database to get a return on him to know who I'm speaking with. Upon the NCIC return, I got a return and an active warrant out of Little Rock. It was for contempt of court. It also showed that his license was suspended.

While Hoegh was running the computerized NCIC search in his service vehicle, Small located his insurance papers and gave them to an assisting officer who had arrived at the scene.

During cross-examination, Hoegh testified that he had never before seen a printout such as State's exhibit no. 1—entitled "Hoegh ACIC Verification"—and that his computer screen "does not have the initial page." He acknowledged that people whom he had stopped for no insurance sometimes did have insurance and that sometimes he had called within working hours to verify insurance information, but he said that he did not call to

verify Small's insurance information due to the active warrant and suspended driver's license. Hoegh explained,

> If I pulled you over and you can't find your insurance and you give me your driver's license, I am going to run your driver's license regardless whether or not you find it within a few seconds later based upon my computer telling me you don't have insurance. I'll retrieve the driver's license or the person's name and date of birth, run their information and then if they are able to find their insurance verification, I will tell them to hold it outside the window and I will be up there to get it in a second. Or I will let them call their insurance company and try to get a policy number for their vehicle. Even if you give me your insurance card and driver's license, I still would run the driver's license. I would still investigate the stop with the person I'm coming into contact with, as well as their vehicle insurance information. We still investigate the stop to verify the insurance is valid, and also that their driver's license is valid even though the purpose of the stopping them has been satisfied.

Small complains that Hoegh's computerized search returned unreliable information that Small's insurance was canceled and that Hoegh discovered Small's active warrant for contempt of court by running information through NCIC without giving him sufficient time to produce proof of insurance. He points to the following statement in State's exhibit no. 1, the printout showing that his insurance had been canceled: "The insurance information is provided by the Department of Finance and Administration. Valid insurance policies may exist that are not included in the database at this time." He also argues that even if the stop was legal, Hoegh exceeded the scope of the initial stop before discovering drugs in the car.

In order for a police officer to make a traffic stop, he or she must have probable cause to believe that a traffic violation has occurred. *Yarbrough v. State*, 370 Ark. 31, 38, 257 S.W.3d 50, 56 (2007). When reviewing the denial of a motion to suppress evidence, we conduct a de novo review based on the totality of the circumstances, recognizing the trial court's superior opportunity to determine witnesses' credibility and reversing the findings

of historical fact only when they are clearly erroneous. *Tankersley v. State*, 2015 Ark. App. 37, at 1–2, 453 S.W.3d 699, 700–01. Probable cause is defined as facts or circumstances within a police officer's knowledge that are sufficient to permit a person of reasonable caution to believe that an offense has been committed by the person suspected. *Lockhart v. State*, 2017 Ark. 13, at 5, 508 S.W.3d 869, 873. In assessing the existence of probable cause, the appellate review is liberal rather than strict. *Id.*

Furthermore, whether a police officer has probable cause to make a traffic stop does not depend on whether the driver was guilty of the violation that the officer believed to have occurred. *Travis v. State*, 331 Ark. 7, 10, 959 S.W.2d 32, 34 (1998). In *Travis*, the deputy stopped a truck with a Texas license plate because he mistakenly believed the truck was being operated in violation of the law. Our supreme court affirmed the trial court's denial of the motion to suppress evidence that was subsequently discovered in the truck:

> Although the deputy was erroneous, the question of whether an officer has probable cause to make a traffic stop does not depend upon whether the defendant is actually guilty of the violation that was the basis for the stop. As we said in [*Burris v. State*, 330 Ark. at 73, 954 S.W.2d at 213, citing *Whren v. United States*, 517 U.S. 806 (1996); *State v. Jones*, 310 Ark. 585, 839 S.W.2d 184 (1992)], "all that is required is that the officer had probable cause to believe that a traffic violation had occurred. Whether the defendant is actually guilty of the traffic violation is for a jury or a court to decide, and not an officer on the scene."
>
> The facts of this case are unlike those found in *Delaware v. Prouse*, 440 U.S. 648 (1979), which formed the foundation of the Court of Appeals decision in this case. There was no issue of reasonable or probable cause in the *Prouse* decision because that case involved a "random" traffic stop. We cannot say that Deputy Smith lacked reasonable cause to stop Mr. Travis's truck simply because the truck ultimately was found to have been operated in compliance with Texas law. At the time of the stop, Deputy Smith reasonably, albeit erroneously, believed the license plate was required to display expiration stickers. That the license plate was later found to have been in compliance with Texas law does not mean that the deputy lacked probable cause to make the stop.

331 Ark. at 10–11, 959 S.W.2d at 34–35 (citations omitted).

As part of a valid traffic stop, a police officer may detain a traffic offender while the officer completes certain routine tasks, such as computerized checks of the vehicle's registration and the driver's license and criminal history, and the writing up of a citation or warning. *Sims v. State*, 356 Ark. 507, 514, 157 S.W.3d 530, 535 (2004). During this process, the officer may ask the motorist routine questions such as his or her destination, the purpose of the trip, or whether the officer may search the vehicle, and the officer may act on whatever information is volunteered. *Id.*

Here, Officer Hoegh believed that Small's car was being operated in violation of our law requiring insurance coverage. We note the following provision of Arkansas Code Annotated section 27-22-104:

> Failure to present proof of insurance coverage at the time of a traffic stop or arrest or *a failure of the Vehicle Insurance Database* or proof of an insurance card issued under § 23-89-213 *to show current insurance coverage at the time of the traffic stop creates a rebuttable presumption that the motor vehicle or the person's operation of the motor vehicle is uninsured*.

Ark. Code Ann. § 27-22-104(2)(A) (Repl. 2013) (emphasis added).

We agree with the State that Small's reliability argument is belied by the statutory language that "a failure of the Vehicle Insurance Database . . . to show current insurance coverage at the time of the traffic stop creates a rebuttable presumption that the motor vehicle or the person's operation of the motor vehicle is uninsured." *Id.* The lack of insurance information in the database was sufficient to provide Officer Hoegh with probable cause to believe that a traffic violation had occurred. Hoegh was entitled to rely on the information in his possession at the time of the initial stop, *see Travis*, *supra*, and it is irrelevant that Small may have subsequently produced documents showing that he had insurance.

We also agree with the State that the search of Small's vehicle did not exceed the scope of the valid traffic stop. After initiating the stop, Officer Hoegh took Small's driver's license back to his car to run a routine computerized check. Hoegh testified that it is his standard practice to run a computerized NCIC check in a routine traffic stop and that he performed the check while waiting for Small to find his insurance information. Thus, Hoegh's action of running Small's license and criminal history were within the scope of a valid traffic stop. *See Sims*, *supra*. The information Hoegh obtained from the NCIC search, that Small had a suspended driver's license and an active warrant for his arrest, provided reasonable suspicion to continue the detention. We affirm the denial of the motion to suppress.

III. *Whether the Circuit Court Erred in Denying Small's Motion to Dismiss the Sentencing Enhancement*

IV. *Whether the Circuit Court Abused its Discretion by Rejecting Small's Proposed Jury Instructions*

Both of these points relate to Arkansas Code Annotated section 5-64-411. They are rendered moot by our decision in Part I.

Affirmed in part; reversed and remanded in part.

VIRDEN, KLAPPENBACH, and WHITEAKER, JJ., agree.

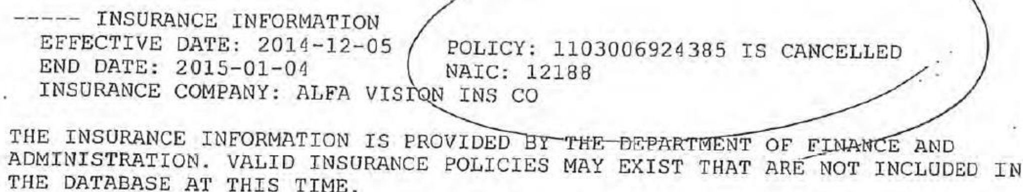
HARRISON and VAUGHT, JJ., dissent.

BRANDON J. HARRISON, Judge, dissenting. I respectfully dissent from the majority's decision to affirm the denial of the motion to suppress. The initial traffic stop was unlawful given this case's facts, so the circuit court should have granted the motion.

Given my disagreement with the majority on the lawfulness of the traffic stop and the suppression question, I do not need to decide the sentencing-enhancement challenge.

I.

State's exhibit A—the ACIC verification from Officer Hoegh's investigation into Small's lawfully displayed and registered license plate—shows that "PLATE/018TJG" was searched the evening of 12 February 2016. The report lists Small as the vehicle owner and a Fort Smith resident. The second page has a section titled "INSURANCE INFORMATION." Here is what it looks like:


----- INSURANCE INFORMATION
EFFECTIVE DATE: 2014-12-05 POLICY: 1103006924385 IS CANCELLED
END DATE: 2015-01-04 NAIC: 12188
INSURANCE COMPANY: ALFA VISION INS CO

THE INSURANCE INFORMATION IS PROVIDED BY THE DEPARTMENT OF FINANCE AND ADMINISTRATION. VALID INSURANCE POLICIES MAY EXIST THAT ARE NOT INCLUDED IN THE DATABASE AT THIS TIME.

As one can see, the information the officer obtained when he stopped Small was more than one year out of date. The "END DATE" of the policy, as reported by the database, was 4 January 2015. Small was detained in mid-February 2016, on the suspicion of driving uninsured, though he was in fact insured. The report does state that a certain insurance policy was cancelled; yet it also warns, "VALID INSURANCE POLICIES MAY EXIST THAT ARE NOT INCLUDED IN THE DATABASE AT THIS TIME." As this case exemplifies, the blanket disclaimer is wholly justified.

During the suppression hearing the officer said that he did not know about the disclaimer. But he also acknowledged, "[I]t has happened before that I stopped someone

for no insurance and they had insurance." The police department "typically look[s] at the information they provide with the expiration date, the effective date and the expiration date, who it's with." And the officer said at times he has called an insurance company to validate someone's policy. The State offered no additional proof on the database's operation or accuracy.

Now is as good a time as any to note that the State's position on appeal does not appear to be what it was in the circuit court. Nowhere in the State's circuit-court papers does it cite any of the statutes on which the State's appellate brief and the majority opinion rely. Nor did the State expressly argue this case as one where the officer had "probable cause" to detain Small based on an unobserved traffic-law violation. In circuit court, the State argued that the stop was valid under Arkansas Rules of Criminal Procedure 2.2 and 3.1. The court ruled, "Officer Hoegh ran the Defendant's plate and showed to have canceled insurance, which provided reasonable suspicion for a stop of the vehicle." Rule 3.1 states:

> A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct.

The State does not now contend that a report from the insurance-coverage database provides reasonable suspicion that a felony or a misdemeanor involving danger of forcible injury to a person or a theft or that some property damage occurred. It changed tack on appeal, moving the case from Rule 3.1's "reasonable suspicion" and "felony and

misdemeanor" concepts to "probable cause" and "traffic violation" concepts. The majority has accepted the State's new argument that an officer's discretionary decision to search the shaky database—having no observable and articulable reason to do so in the first place—supplied the officer with (1) probable cause that a (2) traffic violation had occurred under Ark. Code Ann. § 27-22-104. So I too will address this issue of first impression.

II.

Section 27-14-414 of the Arkansas Code, titled "Vehicle Insurance Database," charged the Department of Finance and Administration to "develop, establish, and maintain a database of information to verify compliance with the motor vehicle liability insurance laws of Arkansas[.]" Ark. Code Ann. § 27-14-414(a) (Repl. 2014). The statute plainly recites that "state and local law enforcement agencies can access the [database] to check the current insurance coverage on motor vehicles in Arkansas required to maintain current liability insurance as required by law." Ark. Code Ann. § 27-14-414(b)(2); *see also* Ark. Code Ann. § 27-14-414(e)(1)(C). But the way law-enforcement officers can employ the Vehicle Insurance Database is partly constrained by the United States Constitution.

The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The Supreme Court of the United States has held that temporarily detaining a person during a traffic stop is a "seizure" of "persons" within the meaning of the Fourth Amendment. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). A police officer's decision to stop a person while traveling in a motor vehicle is

therefore subject to the "constitutional imperative" that the stop not be "unreasonable" under the circumstances. *Whren v. United States*, 517 U.S. 806, 809–10 (1996).

Was the officer's decision to pull Small over and detain him reasonable given the circumstances? Generally, the answer turns on whether the officer had probable cause to believe that a traffic violation has occurred. *See Prouse*, 440 U.S. at 659. Though it cannot be defined as definitively as $E=mc^2$, identifying some parameters on the core concept of probable cause is worth the time in this Fourth Amendment case. Here is the Supreme Court on probable cause:

> Articulating precisely what "reasonable suspicion" and "probable cause" mean is not possible. They are commonsense, nontechnical conceptions that deal with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. As such, the standards are not readily, or even usefully, reduced to a neat set of legal rules. We have described reasonable suspicion simply as a particularized and objective basis for suspecting the person stopped of criminal activity, and probable cause to search as existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found. We have cautioned that these two legal principles are not finely-tuned standards, comparable to the standards of proof beyond a reasonable doubt or of proof by a preponderance of the evidence. They are instead fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed.
>
> The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause. The first part of the analysis involves only a determination of historical facts, but the second is a mixed question of law and fact: The historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.

Ornelas v. United States, 517 U.S. 690, 695–97 (1996) (internal quotations and citations omitted).

And it is important to realize that police/citizen encounters, even if brief in duration and for the purpose of ensuring compliance with motor-vehicle laws, are significant events. Here is the Supreme Court making this point:

> We cannot assume that the physical and psychological intrusion visited upon the occupants of a vehicle by a random stop to check documents is of any less moment than that occasioned by a stop by border agents on roving patrol. Both of these stops generally entail law enforcement officers signaling a moving automobile to pull over to the side of the roadway, by means of a possibly unsettling show of authority. Both interfere with freedom of movement, are inconvenient, and consume time. Both may create substantial anxiety. For Fourth Amendment purposes, we also see insufficient resemblance between sporadic and random stops of individual vehicles making their way through city traffic and those stops occasioned by roadblocks where all vehicles are brought to a halt or to a near halt, and all are subjected to a show of the police power of the community. At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion.

Prouse, 440 U.S. at 657 (internal quotations and citations omitted).

The State of Arkansas has not identified any behavior by Small, that the officer himself observed or heard, which supplied the probable cause required to initiate a traffic stop. There is no contention that Small was not wearing his seat belt, that he failed to use a turn signal, that he was speeding, driving carelessly, or committing any number of additional potential violations that could justify a stop. Under Arkansas law, a properly registered vehicle presumes a sufficiently insured vehicle. *See* Ark. Code Ann. § 27-13-102(a) (Repl. 2014) (motor-vehicle license plate or registration shall not be issued, renewed, or changed unless proof of liability insurance is given). By all accounts Small's license plate

had no obvious defect; it was present, visible, and the registration stickers were current. Small should have been presumed compliant with Arkansas law. So why run an insurance check under circumstances that did not "warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found"? *Ornelas*, 517 U.S. at 696.

The officer had to, when we get right down to it, guess on the result the insurance investigation would return. One could argue, "Your license plate is public and therefore you have no expectation of privacy in it." But a driver's mere presence on the road is even more obvious, and that fact alone does not authorize a police officer to stop a motorist and demand that he or she produce a license and proof of registration, for example. The Supreme Court of the United States so held in *Prouse*, *supra*. In this case, nothing observable to the officer's trained eye provided probable cause or reasonable suspicion for the seizure of Small's person.

As for the database, the State has offered no statistical evidence on its accuracy. Is the database 98% accurate? Or 98% *in*accurate? No one knows anything, really, about its overall accuracy, and that uncertainty is a rub of constitutional magnitude. As previously mentioned, the officer testified during the suppression hearing that he has pulled people over when the database reported that a driver's insurance was expired or revoked and it was not. His testimony bolsters what the database itself expressly declares: it is an unreliable source of insurance-coverage information.

The accuracy of a primary source of information on which police officers might base an unknown number of probable-cause decisions to detain the traveling public on the suspicion of driving without insurance is a critical concern. It must be. Constitutional

rights hang in the balance. The Supreme Court has stated that the likelihood of discovering a violation during a discretionary stop is an important variable in the constitutional calculus.

> In terms of actually discovering unlicensed drivers or deterring them from driving, the spot check does not appear sufficiently productive to qualify as a reasonable law enforcement practice under the Fourth Amendment.
>
> Much the same can be said about the safety aspects of automobiles as distinguished from drivers. Many violations of minimum vehicle-safety requirements are observable, and something can be done about them by the observing officer, directly and immediately. Furthermore, in Delaware, as elsewhere, vehicles must carry and display current license plates, which themselves evidence that the vehicle is properly registered; and, under Delaware law, to qualify for annual registration a vehicle must pass the annual safety inspection and be properly insured. It does not appear, therefore, that a stop of a Delaware-registered vehicle is necessary in order to ascertain compliance with the State's registration requirements[.]

Prouse, 440 U.S. at 660.

The State's omnipresent interest in promoting public safety on Arkansas's roads by enforcing compulsory insurance laws must be weighed against Arkansans' right to remain free from police officers' unbridled discretion. Checkpoints are potentially lawful means to enforce insurance-coverage concerns, when proper procedures are in place. But even organized checkpoints have some restrictions. In *Whalen v. State*, for example, our supreme court held that evidence obtained during a checkpoint stop had to be suppressed because the checkpoint procedure did not sufficiently constrain officer discretion on whom to detain: "A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasion solely at the unfettered discretion of officers in the field." 2016 Ark. 343, at 6, 500 S.W.3d 710, 713 (internal citations omitted). This case did not involve a checkpoint, but the principle at work is the same: well-intentioned though he may have

been, the officer in this case made an unfettered discretionary decision to stop a citizen who had done nothing obviously unlawful in his conduct and whose vehicle was observably compliant with the motor-vehicle laws.

As hard as I have tried to do so, I cannot bring my mind to conclude that a database used for law-enforcement purposes—whose accuracy (or inaccuracy) is wholly unknown to any number of officers at any given point in time—provides a fact "sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found" when all the other observable facts right in front of an officer speak the contrary. *Ornelas*, 517 U.S. at 695–96.

The Supreme Court of the United States deserves the final word on the reasonable expectation of privacy that all Americans enjoy while operating or traveling in an automobile:

> An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed. As *Terry v. Ohio*, [392 U.S. 1 (1968)], recognized, people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles.

Prouse, 440 U.S. at 662–63.

III.

The State infringed on the reasonable expectation of privacy that Jake Earl Small was entitled to receive under the Fourth Amendment to the United States Constitution while driving his car on 12 February 2016. I therefore respectfully dissent from this court's decision to affirm the denial of the motion to suppress evidence obtained during the illegal traffic stop.

VAUGHT, J., joins.

Ryan C. Allen, for appellant.

Leslie Rutledge, Att'y Gen., by: *Kathryn Henry*, Ass't Att'y Gen., for appellee.