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ARKANSAS COURT OF APPEALS

DIVISION III
No. CR-23-35

MICHAEL PRESTON WHITING APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** March 13, 2024 APPEAL FROM THE ARKANSAS COUNTY CIRCUIT COURT, SOUTHERN DISTRICT [No. 01DCR-19-105] HONORABLE DONNA GALLOWAY, JUDGE AFFIRMED

BRANDON J. HARRISON, Chief Judge

Michael Preston Whiting appeals his conviction on a conditional guilty plea that reserved the right to challenge the denial of his motion to suppress evidence of drugs and firearms police recovered in a warrantless search of his pickup truck. He argues the State did not establish probable cause for the search, which followed a roadside alert by Bond, a drug dog. Bond died of cancer within weeks of the search, and the records of his hits and misses in the field were lost before the suppression hearing in a claimed computer crash. On de novo review, we affirm the circuit court's denial of the motion to suppress.

On 12 September 2019, Whiting was pulled over near the intersection of Highways 152 and 276 near DeWitt for speeding. Officer Bradley Wilson of the Arkansas County Sheriff's Office turned on his siren after he clocked Whiting driving 76 miles an hour in a 55-mile-an-hour zone on Highway 165 South. Whiting signaled a left, but missed the turn,

and made a sudden turn across the highway and into the ditch on the other side. Whiting backed up, began traveling north, recrossed the highway, and pulled over where he had started. Based on the erratic driving, Officer Wilson initially believed Whiting might be intoxicated. When the officer finally contacted Whiting, he didn't smell alcohol or hear Whiting slur his words; however, he did smell a faint odor of marijuana coming from inside the truck.[1]

Whiting said he did not have his driver's license or proof of insurance with him when Wilson asked for them, but he did provide the registration for his truck. The information came back from ACIC as valid. While Wilson was checking it, Officer Alex Hargrove arrived—with Bond—as backup, though Wilson hadn't asked for any. Wilson told Hargrove about the smell of marijuana inside the truck, and Hargrove said he would run Bond around the outside.

Before the search, Officer Wilson had asked Whiting whether there were weapons in the truck. Whiting said no. But like Whiting's statement that he didn't have his driver's license, this turned out not to be true. When Officer Wilson told Whiting he was going to search the truck, Whiting admitted there were two firearms inside, but "nothing illegal." Bond alerted three different times to the driver's-side door. Officer Wilson then searched the truck, which revealed a black bag under the driver's seat containing a bag of methamphetamine, a bag of marijuana, a bag of unknown pills, a glass pipe, cigarillo bags, and a digital scale. He also found a .22-caliber rifle and a 12-gauge shotgun behind the

[1]Officer Bradley admitted that he did not include this observation about the smell of marijuana in a contemporaneous probable-cause affidavit. He explained that he searched the truck because Bond alerted to it, not because he had smelled marijuana.

driver's seat. Whiting was charged with—and subject to our review of the circuit court's ruling denying his motion to suppress, convicted of—possession of methamphetamine with purpose to deliver, possession of drug paraphernalia with purpose to manufacture, possession of a firearm by certain persons, simultaneous possession of drugs and a firearm, possession of drug paraphernalia, and possession of marijuana. He was sentenced to an aggregate term of twelve years' imprisonment.

I.

With permission from both the circuit court and the State, a defendant may enter a conditional plea of guilty and reserve the right to appeal a limited number of issues, including the denial of a motion to suppress evidence. Ark. R. Crim. P. 24.3(b)(i). In reviewing the denial of a motion to suppress, we "conduct a de novo review based on the totality of the circumstances, reviewing findings of historical facts for clear error and determining whether those facts give rise to reasonable suspicion or probable cause"—whichever test governs review of the officer's action—"giving due weight to inferences drawn by the circuit court and proper deference to the circuit court's findings." *Jackson v. State*, 2013 Ark. 201, at 5, 427 S.W.3d 607, 611. A finding is clearly erroneous, even if there is some evidence to support it, if our review of all the evidence leaves us with "the definite and firm conviction that a mistake has been made." *Id.* at 5–6, 427 S.W.3d at 611. In that review, we give appropriate deference to the circuit court's opportunity to evaluate the credibility of witnesses who testified at the suppression hearing. *Id.* at 6, 427 S.W.3d at 611. The circuit court's suppression ruling will be reversed only if it is clearly against the preponderance of the evidence. *E.g.*, *id.* at 6, 427 S.W.3d at 611–12.

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures by requiring a search warrant based on probable cause; however, an exception allows for the warrantless search of a vehicle based on probable cause. *E.g.*, *id.* at 8, 427 S.W.3d at 613. Thus, Ark. R. Crim. P. 14.1(a)(i) allows an officer who has "reasonable cause to believe that a moving or readily movable vehicle is or contains things subject to seizure" to "stop, detain, and search the vehicle and . . . seize [those things] discovered in the course of the search where the vehicle is . . . on a public way[.]"[2] Probable cause to search a vehicle is based on the collective knowledge of police, not just what the officer making the traffic stop knows. *E.g.*, *Christopher v. State*, 2017 Ark. App. 237, at 4, 520 S.W.3d 291, 293.

The odor of marijuana coming from a vehicle can provide sufficient probable cause to search it. *E.g.*, *McDaniel v. State*, 337 Ark. 431, 437, 990 S.W.2d 515, 518–19 (1999). So can a positive alert from a dog trained to detect the odor of illegal drugs. *E.g.*, *Jackson*, 2013 Ark. 201, at 11, 427 S.W.3d at 614. And when probable cause is based on a dog's alert, the United States Supreme Court has emphasized that probable cause is determined by whether "all the facts surrounding [a dog's] alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime," not whether the search complies with "rigid rules, bright-line tests, and mechanistic inquires" under state law. *Florida v. Harris*, 568 U.S. 237, 244, 248 (2013).

[2]Our supreme court has held there is no substantive difference between reasonable cause and probable cause. *E.g.*, *Yancey v. State*, 345 Ark. 103, 110, 44 S.W.3d 315, 319 (2001).

When the reliability of an alert is challenged, the trial court is simply required to "weigh the competing evidence" to determine whether probable cause existed. *Id.* at 248.

Applying *Harris*, our supreme court has held that there are not "any specific evidentiary items that will demonstrate, or necessarily refute, a drug dog's reliability." *Jackson*, 2013 Ark. 201, at 11, 427 S.W.3d at 614. Moreover, in determining whether to suppress evidence, the trial court is "the ultimate arbiter of credibility." *Id.* Thus, the court held in *Jackson* that the circuit court did not clearly err in determining the dog was reliable based on its handler's testimony and the dog's training records, despite some evidence of false alerts. *Id.* at 11–12, 427 S.W.3d at 614. In *Harris*, the Supreme Court rejected an argument that probable cause was necessarily absent because the dog's handler had not logged field alerts that did not lead to arrests. 568 U.S. at 242. In other words, he had not kept records of the dog's "misses" in the field, only the hits. The Court noted that field-performance records have relatively little probative value: false negatives go unrecorded, because without an alert the officer might not initiate a search; false positives might reflect a quantity of a substance too small or well hidden to locate, or the residual odor of drugs that had recently been in the car or on the driver. *Id.* at 245–46.

In this appeal, the probable-cause issue is bound up with the eventual discovery that Bond's field-performance records had been lost in a computer crash in late 2019 or early 2020. Whiting argues we should draw an adverse inference like the spoliation doctrine in civil cases. We are not convinced it should apply here.

A few courts have held since *Harris* that a drug dog's field-performance records are relevant to the probable-cause determination and discoverable when requested by a

defendant. *E.g.*, *United States v. Foreste*, 780 F.3d 518, 528 (2d Cir. 2015). Others, including the U.S. Court of Appeals for the Eighth Circuit, have noted *Harris*'s conclusion that "evidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert" and held the field-performance records need not be produced at all. *United States v. Salgado*, 761 F.3d 861, 867 (8th Cir. 2014) (quoting *Harris*, 568 U.S. at 246). We're not aware of any court that has held field-performance records are in a category of material the prosecution must routinely disclose without a specific request.

As a general matter, we agree with Whiting that law enforcement's loss of relevant evidence after the defense has specifically requested it should merit serious consideration of sanctions under Ark. R. Crim. P. 19.7. The prosecution must "use diligent, good faith efforts to obtain [discoverable] material in the possession of other governmental personnel" upon the timely request and designation of material by defense counsel. Ark. R. Crim. P. 17.3(a). But the record does not demonstrate that Bond's field-performance records had been requested before they were lost. Whiting filed a broad motion for discovery in November 2019 that itemized requests for some specific types of evidence (for example, video from dashcams, MVRs, or bodycams from any officer who responded to the scene), as well as categories of discoverable material, such as other evidence "which tends to negate the guilt of the defendant as to the offense charged (including anything which tends to impeach a state's witness) or would tend to reduce the punishment for the offense." It does not specifically request evidence related to a drug dog, dog sniff, dog certification, or similar

issue. It does not categorically request evidence relevant to whether there was probable cause to search, either.[3]

On 9 January 2020, Whiting moved to suppress the evidence recovered from his vehicle. The motion raises some issues related to the dog sniff—but not Bond's reliability. Whiting argued that (1) there was no cause for the officer who pulled him over to call for a drug dog; (2) doing so prolonged the stop; and (3) there was no video of the dog sniff. Whiting contended the missing video would show "the dog did not alert," so there was no probable cause.[4]

The suppression hearing was reset many times to accommodate new requests for information from law enforcement. The first indication that Whiting had requested Bond's field-performance records is in a May 12 motion to continue. Whiting asserted that Bond might not have been certified to conduct an area search and had died shortly after the search of ailments Whiting contended "may have affected the dog's olfactory receptors." In light of those issues, Whiting was "requesting [Bond's] hit or miss records, including but not limited to training and real world air sniffs that did hit, but drugs were not present," or

[3]The closest might be a request to "[d]isclose and permit inspection, copying, or photocopying of documents of any material or computer or computer-like memory, disks, or hard drives concerning any searches and seizures of the defendant or his or her property or statements that he or she allegedly made, including GPS tracking orders, pinging cell phones, CSLI (cell site location information) data, or sneak-and-peak warrants." We can't say the prosecution should have interpreted Bond's field-performance records (or the veterinary records it disclosed) as records "concerning" a search of Whiting or his property.

[4]Officer Hargrove testified at the suppression hearing that when the search took place, the Arkansas County Sheriff's Office did not use body cameras, and there were no cameras in the vehicle.

didn't hit, though drugs were present. He indicated they had not been turned over "because counsel are just now asking for them."

Eventually, the circuit court heard testimony at a suppression hearing. In addition to Officer Wilson's testimony setting out the facts of the arrest we recited above, the court heard from Officer Hargrove.

He testified that he took over as Bond's handler in summer 2018. He kept records of Bond's field performance on his personal laptop, intending to make paper copies to keep at the sheriff's department. According to Hargrove, the sheriff's office didn't tell him to keep those records on a personal computer. But they didn't tell him not to do that either. By the time Hargrove learned Whiting had filed a suppression motion involving the search, the laptop had already crashed. (The nature of the malfunction is not clear from the record.) Hargrove turned the laptop over to Whiting's forensic expert, but the data could not be recovered. The lost records included Bond's training and obedience records, hit and miss logs, and records of Hargrove's own training hours.

Hargrove testified that Bond was certified for narcotics when the search occurred on September 12 and was recertified just weeks later on September 25. Hargrove himself led Bond through the recertification test course at the Conway Police Department. Bond was led through a sally port, a few offices, and their locker room to detect narcotics and five vehicles to search in the parking lot, with two finds. Hargrove observed Bond find all the drugs that were set out to be found.

Officer Hargrove testified that he had been a K-9 officer for about a year. Although neither party introduced Bond's certification record, defense counsel handed it to Hargrove

and cross-examined him abouts its content. Officer Hargrove explained that it was dated 20 September 2018, which was when the dog initially went through K-9 school. He said that the P on the certification stands for "pass."

Officer Hargrove also explained how the dog sniff occurred. When Officer Wilson informed him there was a smell of marijuana coming from Whiting's vehicle, he brought Bond up to the truck after Whiting got out. Bond gave a tug and went directly to the driver's side of the pickup, sat, and put his nose hard against the driver's-side door, a form of alert. Officer Hargrove pulled Bond off the vehicle and commenced his usual dog-sniff procedure, starting at the passenger-side taillight and going around the vehicle. Bond gave a "headshot"—a head turn and change in breathing that, in training, indicates the dog has hit a scent cone. Bond alerted hard on the driver's-side door. Hargrove took him back off, ran the vehicle again, and Bond alerted on the same spot a third time, the same way. He told Officer Wilson where Bond had alerted, and that's where Officer Wilson found the drugs.

Whiting argues, as he did below, that Bond's alert was not proved to be a reliable indication that drugs were present. We acknowledge that the evidence of Bond's training and certification was little more than a statement that he was trained and certified to detect narcotics and successfully completed a recertification course weeks later. But the Supreme Court held in *Harris* that a court can presume a dog's alert provides probable cause to search, "*even in the absence of formal certification*, if the dog has recently and successfully completed a training program that evaluated his proficiency in locating drugs." 568 U.S. at 247 (emphasis added). Bond had. The weight to give the loss of other evidence and Officer

Hargrove's explanation for it was an issue of credibility the circuit court was in the superior position to make. *See, e.g.*, *Jackson*, 2013 Ark. 201, at 6, 427 S.W.3d at 611. The court knew the documents were unavailable and was able to take that into account when ruling on the motion to suppress.

Further, we determine probable cause from all the evidence, and Bond's alert was not the only fact that contributed. Officer Wilson saw Whiting drive in an erratic fashion after attempting to stop him and smelled marijuana inside the truck, which can be enough to provide probable cause for a vehicle search on its own. *See, e.g.*, *McDaniel*, 337 Ark. at 437, 990 S.W.2d at 518–19. Officer Wilson explained his failure to mention that odor in his probable-cause affidavit; the circuit court was in a better position to assess his credibility on those points.

The remaining issues Whiting identifies don't change our determination that probable cause existed to search Whiting's truck. First, Whiting complains that Officer Hargrove's testimony that the dog was certified is hearsay. However, the officer could testify to matters that were based on his own personal knowledge and observations. *See, e.g.*, *Finley v. State*, 2019 Ark. 336, at 7, 587 S.W.3d 223, 228. Second, Whiting urges us to account, in our review of the totality of the circumstances, for the fact that when the search occurred, Bond had the same medical issues that caused him to die a couple of months later. But as he appropriately acknowledges, we can give little weight to that fact without evidence it would have affected Bond's sense of smell. We don't have that evidence. The circuit court's decision denying Whiting's motion to suppress was not clearly against the preponderance of the evidence we have before us.

Affirmed.

WOOD and MURPHY, JJ., agree.

Eugene Clifford, for appellant.

Tim Griffin, Att'y Gen., by: *Christopher R. Warthen*, Ass't Att'y Gen., for appellee.