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# Recent Developments: *Ray v. State*: Under Maryland Rule 4-252, Failure to Raise a Claim of Unlawful Arrest in a Fourth Amendment Motion to Suppress Hearing Constitutes a Waiver of the Claim and Precludes Appellate Review, Absent a Finding of Plain Error

Nicholas B. Hawkins

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## RECENT DEVELOPMENT

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**RAY V. STATE: UNDER MARYLAND RULE 4-252, FAILURE TO RAISE A CLAIM OF UNLAWFUL ARREST IN A FOURTH AMENDMENT MOTION TO SUPPRESS HEARING CONSTITUTES A WAIVER OF THE CLAIM AND PRECLUDES APPELLATE REVIEW, ABSENT A FINDING OF PLAIN ERROR.**

**By: Nicholas B. Hawkins**

The Court of Appeals of Maryland held that the failure to raise a claim of unlawful arrest in a motion to suppress hearing, in accordance with Maryland Rule 4-252, barred that claim from appellate review. *Ray v. State*, 435 Md. 1, 76 A.3d 1143 (2013). The court found that a claim for the suppression of evidence based on an unlawful arrest must be both “advanced and litigated” at the trial level to avoid waiver of the issue on appeal. *Id.* at 18, 76 A.3d at 1152. The court further held that, under Maryland Rule 8-131(a), addressing the merits of the unpreserved claim at the appellate level could unfairly prejudice a party, and therefore, the court declined to exercise its discretion. *Id.* at 23-24, 76 A.3d at 1155-56.

On October 5, 2010, Sergeant Mark White initiated a traffic stop on Interstate 270 on a Ford Expedition after noticing various traffic violations. Sergeant White then issued three traffic citations to the driver, Antoine Norris, upon learning that Norris was driving with a suspended license. While Sergeant White was speaking to Norris, Officer Robert Sheehan and two other officers arrived at the scene. Officer Sheehan asked the three remaining passengers, including Bashawn Montgomery Ray (“Mr. Ray”), to exit the vehicle. Another passenger, Mashea Ray (“Ms. Ray”), gave Officer Sheehan consent to search her wallet for identification. When Officer Sheehan opened the wallet, he found a stack of credit cards that appeared fake and Ms. Ray could not identify the names on the cards. All vehicle occupants were then arrested, including Mr. Ray, who was charged with conspiracy to commit theft and other offenses.

Prior to trial, defense counsel for Mr. Ray filed an omnibus motion in the Circuit Court for Montgomery County requesting the suppression of all evidence obtained from the alleged illegal search and seizure in violation of his constitutional rights. Defense counsel then filed a more detailed supplemental motion that specifically requested the suppression of all evidence obtained as a result of the illegal traffic stop and detention on October 5, 2010. However, neither motion set forth the specific evidence that Mr. Ray sought to suppress.

The circuit court denied Mr. Ray’s motion to suppress after finding that Officer Sheehan had the authority to order the passengers out of the car and that the legal discovery of the contraband was due to the consent search of

Ms. Ray's wallet. During trial, the court found Mr. Ray guilty of conspiracy to commit theft of property and making a false statement while under arrest.

Mr. Ray appealed to the Court of Special Appeals of Maryland, which found that Mr. Ray's theory of unlawful arrest was effectively preserved for appeal, but the police nonetheless had probable cause to arrest Mr. Ray under the theory of "common enterprise." The Court of Appeals of Maryland then granted Mr. Ray's petition for a writ of certiorari to consider whether the intermediate appellate court erred in finding that probable cause existed to arrest him under "common enterprise" theory. The court also granted the State's cross-petition to consider whether it was appropriate for the intermediate appellate court to address Mr. Ray's probable cause claim when it had not been challenged at the motions hearing. The court ultimately concluded that it could not decide the merits of Mr. Ray's claim because it was not properly preserved for review.

The Court of Appeals of Maryland began by reviewing Maryland Rule 4-252, which requires that certain matters be raised by a pretrial motion that states the grounds on which the claim is made. *Ray*, 435 Md. at 14, 76 A.3d at 1150. Failure to properly raise any matter listed under Maryland Rule 4-252, including the Fourth Amendment protection against unlawful searches and seizures, constitutes a waiver of that claim. *Id.* Maryland Rule 4-252 was intended to achieve two goals: to informing the court of the issues and to alert the state of the claim(s) so that it may defend against them. *Id.* (citing *Denicolis v. State*, 378 Md. 646, 660, 837 A.2d 944 (2003)). The court found that defense counsel's omnibus motion did not satisfy Maryland Rule 4-252(e) because it failed to sufficiently state grounds that would support the suppression of the evidence. *Ray*, 435 Md. at 15, 76 A.3d at 1150-51. However, the supplement to the omnibus motion did satisfy Maryland Rule 4-252(e) because it contained detailed information relating to the officer's lack of probable cause. *Id.* at 16, 76 A.3d at 1151. Nevertheless, the supplemental motion failed because it did not state that the unlawful arrest was a reason for requesting the suppression of the evidence. *Id.* The court also noted that the defense never raised the unlawful arrest claim in any form during the motions hearing. *Id.*

The court then considered whether the Fourth Amendment claim of unlawful arrest was preserved for appeal based on oral statements made during the motions hearing. *Ray*, 435 Md. at 17, 76 A.3d at 1152. In reviewing this question, the court found that neither Mr. Ray nor the prosecutor raised the probable cause argument. *Id.* at 17, 76 A.3d at 1152. The court stated that Mr. Ray's arguments supporting his motion to suppress revolved around the legality of the stop rather than the specific reasons why the officers lacked probable cause to arrest him. *Id.* at 19, 76 A.3d at 1153. The court, therefore, held that Mr. Ray waived his probable cause claim because it was not "advanced and litigated" at the trial level. *Ray*, 435 Md. at 18, 76 A.3d at 1152.

The court then found that the prosecutor's statements during the hearing did not raise the issue to the standard necessary for appellate review under

Maryland Rule 8-131(a). *Ray*, 435 Md. at 20-21, 76 A.3d at 1153-54. Maryland Rule 8-131(a) states that the appellate court may consider an issue if it plainly appears by the record to have been raised in and decided by the trial court. *Id.* Mr. Ray asserted that, regardless of his silence on the issue, the prosecutor raised the probable cause argument at the hearing when he stated, “just as if drugs had been discovered, they’ve got probable cause to arrest everybody.” *Id.* (quoting *Ray v. State*, 206 Md. App. 309, 337 n. 13, 47 A.3d 1113, 1128 n. 13 (2012)). The court, however, looked at the literal meaning of the term “raise” and found that the prosecutor’s comment at the hearing did not sufficiently introduce the probable cause argument for consideration by the parties. *Ray*, 435 Md. at 14, 76 A.3d at 1150 (citing BLACK’S LAW DICTIONARY 1373 (9th ed. 2009)). Further, the court found that the prosecutor’s comment did not raise an issue that created a matter of dispute between the parties because defense counsel never contested the argument that the police had probable cause to arrest Mr. Ray. *Ray*, 435 Md. at 20, 76 A.3d at 1154. The prosecutor’s statements were not enough to raise the probable cause argument at the trial level and therefore the argument was not available for Mr. Ray on appeal. *Id.* at 20-21, 76 A.3d at 1153-54.

The Court of Appeals of Maryland ultimately determined that it would be an abuse of its discretion to address the merits of Mr. Ray’s claim based on the record before it. *Ray*, 435 Md. at 22, 76 A.3d at 1155. The court explained that under Maryland Rule 8-131(a) it would only review an unpreserved issue if neither party would be unfairly prejudiced. *Id.* (citing *Jones v. State*, 379 Md. 704, 714, 843 A.2d 778, 784 (2004)). The court stated that because the probable cause argument was not preserved at the trial level, deciding the matter would unfairly prejudice the State by precluding it from introducing evidence in opposition to Mr. Ray’s argument. *Ray*, 435 Md. at 23, 76 A.3d at 1155. The court also found the trial record inadequate and lacking information concerning Mr. Ray’s arrest. *Id.* at 23-24, 76 A.3d at 1155-56. The court could not overlook the unpreserved probable cause argument because the record was insufficient to support the court’s exercise of its discretion to consider the claim. *Id.* at 24, 76 A.3d at 1156.

In *Ray v. State*, the Court of Appeals of Maryland read Maryland Rules 4-252 and 8-131(a) as procedural safeguards designed to promote justice and the orderly administration of law. If a defendant waives a matter at trial pursuant to Rule 4-252, such as a Fourth Amendment claim of unlawful arrest, a reviewing appellate court may not consider it. Doing so could be an abuse of the court’s discretion and deprive the opposing party the opportunity to adequately defend their case. Defense attorneys must ensure that issues specifically relating to the motion to suppress are properly raised in the motion and at the hearing in order to preserve the matter for appeal. Claims adequately raised in a motion to suppress provide for a properly preserved record for the appellate court’s review.