Circuit Court for Garrett County
Case No. 11-K-16-005315

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 604

September Term, 2017

JOHNNIE RAY BOWLING

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Graeff,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: August 28, 2018

*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. Rule 1-104.

Appellant, Johnnie Ray Bowling, was convicted, based on an agreed statement of facts, of one count of sexual offense in the second degree. The court sentenced appellant to twenty years' incarceration.

On appeal, appellant presents the following question for our review:

> Did the trial court err in denying appellant's motion to suppress the fruits of an unlawful wiretap?

For the reasons that follow, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND[1]

On June 27, 2017, Lieutenant Robert Zimmerman, a member of the Garrett County Sheriff's Office, began an investigation regarding sexual abuse allegations involving ten-year-old, R.J., the daughter of appellant's wife, Tammy Bowling. As part of that investigation, R.J. was interviewed by Dawna Day, an employee of the Department of Social Services, while Lieutenant Zimmerman listened to the interview from a separate room. After hearing R.J. allege that appellant engaged in forced sexual activity with her, Lieutenant Zimmerman met with Ms. Bowling, who agreed to allow the lieutenant to monitor a phone call between her and appellant.

On June 29, 2016, Ms. Bowling met Lieutenant Zimmerman at the Garrett County Sheriff's Office, where she signed a consensual monitoring form. At approxiamtely 11:56 a.m., Ms. Bowling used her cell phone to call appellant's cell phone. Appellant told her

[1] Because the sole issue involves the court's denial of appellant's motion to suppress, we set forth only what occurred at the suppression hearing.

that he would call her back during lunch, and he returned the call at approximately 12:06 p.m. The content of that call was recorded by the Sheriff's Office and admitted into evidence at both the motions hearing and the trial.

Appellant was arrested the next day. The police obtained a warrant to search appellant's cell phone, and they found a call log showing the call that had been received.

On cross-examination, Lieutenant Zimmerman provided further details about the recorded phone call. Ms. Bowling was located in an interview room at the Garrett County Sheriff's Office during the call. Another officer, Corporal Plaff, was operating the digital recording device during the phone call, while Lieutenant Zimmerman monitored the phone call from an adjacent room.[2] Lieutenant Zimmerman could not hear the conversation between Ms. Bowling and appellant as it occurred in real time.

When defense counsel asked Lieutenant Zimmerman what he knew about appellant's whereabouts during the phone call, Lieutenant Zimmerman acknowledged that he did not ask where appellant was located during the call. He testified that it did not make any difference if the other person was in West Virginia or any other state.

On redirect examination, Lieutenant Zimmerman clarified that the phone call that was recorded was the one made by appellant when he returned Ms. Bowling's phone call. He agreed that that phone call originated from appellant's cellphone.

Defense counsel then argued that evidence obtained as a result of the recording of the call should be suppressed for two reasons. First, he argued that there was no probable

[2] Corporal Plaff's first name is not included in the record.

cause to support the recording of the phone call between Ms. Bowling and appellant. Second, he argued:

> [T]he actual call that was then recorded was not initiated from this state but was initiated from a foreign state. I believe that the rule of law that would apply would be West Virginia. There's no – and the Lieutenant was forthright and said that they've never worried about that. They wouldn't care if this person was in California. There was no contact with any law enforcement in the other state to work hand in hand to do things the legal and prudent way, the constitutional way, and for that, we would ask Your Honor to dismiss that. If Your Honor would, obviously, suppress that issue, I think it brings into question the reliability as far as fruits of the poisonous tree as subsequent search warrant as far as being valid with that information not being present for the search of the phone, and I'll submit, basically, on the remainder of my brief – argument, Your Honor at that point.

The court asked if defense counsel had any authority to support his argument. Counsel replied that it was a "conflicts of law issue," and he was "just made aware of the situation that my client was out of state for this."

The court ultimately denied the motion to suppress. It found that the Maryland wiretap statute did not require a finding of probable cause, but even if it did, there was probable cause to support the recording. The court further found that Ms. Bowling's consent to have that phone call recorded resulted in the recording being valid under Maryland's wiretap statute. The motions court did not explicitly address appellant's argument that the recorded call should be suppressed because it originated from another state.

DISCUSSION

Appellant contends that the suppression court erred in denying his "motion to suppress the fruits of an unlawful wiretap." He asserts that the Maryland wiretap statute does not specifically allow for the interception of calls originating from outside Maryland.

The State responds in two ways. First, it argues that this Court should decline to consider appellant's contention for "lack of substantive argument." Second, it contends that, even if this Court were to find that the issue is adequately argued, the argument is meritless because nothing "support[s] [appellant's] foundational premise that the consent monitoring provision of the Maryland statute can be violated, even in theory, by virtue of the intercepted call originating out-of-state." Indeed, the State asserts that appellant's argument is foreclosed by the Court of Appeals' decision in *Davis v. State*, 426 Md. 211 (2012).

In reviewing a circuit court's denial of a motion to suppress evidence, we apply the following standard of review:

> "[W]e view the evidence presented at the [suppression] hearing, along with any reasonable inferences drawable therefrom, in a light most favorable to the prevailing party." *Davis v. State*, 426 Md. 211, 219, 43 A.3d 1044, 1048 (2012). We accord deference to the fact-finding of the trial court unless the findings are clearly erroneous. *Bailey v. State*, 412 Md. 349, 362, 987 A.2d 72, 80 (2010). We give no deference, however, to the question of whether, based on the facts, the trial court's decision was in accordance with the law. *Crosby v. State*, 408 Md. 490, 505, 970 A.2d 894, 902 (2009).

Seal v. State, 447 Md. 64, 70 (2016).

The Maryland Wiretapping and Electronic Surveillance Act ("Maryland Wiretap Act" or "Act") makes it unlawful to willfully (1) "intercept"; (2) disclose; or (3) use "any

wire, oral, or electronic communication." Md. Code (2017 Supp.), § 10-402(a) of the Courts and Judicial Proceedings Article ("CJP"). The consequences of "unlawfully intercept[ing] such a communication" is that it becomes "inadmissible in any court proceeding." *Holmes v. State*, 236 Md. App. 636, 650 (quoting *Seal*, 447 Md. at 71), *cert. denied*, __Md.__ (2018).

Unlike its federal counterpart, the Maryland Wiretap Act generally requires two-party consent. *Seal*, 447 Md. at 72-73 (comparing CJP § 10-402(c)(3) with 18 U.S.C.A. §§ 2510 *et seq*.). There are, however, several exceptions to this general rule. For example, as pertinent to this appeal, law enforcement officers may intercept phone calls with the consent of only one of the parties when the wiretap is used to provide evidence of the commission of one of multiple enumerated offenses, including a sexual offense in the second degree. *See* CJP § 10-402(c)(2)(ii)(1). *Accord Hill v. State*, 418 Md. 62, 68 n.2 (2011).

There is no dispute in this case that Ms. Bowling consented to the monitoring of the phone call and that appellant was charged with an enumerated offense. Rather, appellant's sole claim is that his phone call was improperly intercepted under the Act because he initiated it from West Virginia. This contention fails for multiple reasons.

Initially, although defense counsel asked Lieutenant Zimmerman if his investigation would be affected if the call was made while appellant was in West Virginia, there was no evidence presented regarding appellant's location at the time he returned Ms. Bowling's phone call. At most, there was a proffer by defense counsel that appellant was "out of state

for this," followed by argument that "the rule of law that would apply would be West Virginia." From an evidentiary standpoint, even if appellant were correct in his analysis of the Maryland Wiretap Act, i.e., that it does not permit the interception of communications originating from out-of-state, there was no evidence presented to establish the factual predicate for this argument.

Moreover, appellant cites no legal authority to support his argument that the call was improperly intercepted because it was initiated out-of-state. A failure in this regard has resulted, in other cases, in declining to consider the argument. *See Assateague Coastkeeper v. Md. Dep't of the Env't*, 200 Md. App. 665, 670 n. 4 (2011) (declining to address an issue where appellant failed to adequately brief it), *cert. denied*, 424 Md. 291 (2012); *Conrad v. Gamble*, 183 Md. App. 539, 569 (2008) (declining to address issue because argument was "completely devoid of legal authority."); *Anderson v. Litzenberg*, 115 Md. App. 549, 578 (1996) (failure to provide legal authority to support contention waived contention).

Finally, even assuming appellant was able to overcome the first two hurdles, the argument is without merit. In *Davis v. State*, 426 Md. 211, 218 (2012), the Court of Appeals addressed the proper jurisdiction for an ex parte order regarding a phone call that originated in, and was received in, Virginia, but was intercepted in Maryland. The Court held that, under the Maryland wiretap statute, interception occurs at the "listening post," or the location at which "law enforcement officers capture or redirect first the contents of the communication overheard by the wiretap and where they heard originally the

communication." *Id.* As long as the "listening post" is in Maryland, "neither the physical location of the mobile phone at the time the call was placed and during the communication or the recipient of the call are material." *Id.* at 218.

Here, because the "listening post" was in Maryland, i.e., at the Garrett County Sheriff's Office when appellant called Ms. Bowling back, the call was intercepted in Maryland. There is no jurisdictional problem, and the circuit court properly denied the motion to suppress.

JUDGMENT OF THE CIRCUIT COURT FOR GARRETT COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.