UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1389

September Term, 2014

RONALD LINWOOD CLARK

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Reed,

JJ.

Opinion by Reed, J.
Dissenting Opinion by Graeff, J.

Filed: March 8, 2016

*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.

In January 2012, the Baltimore County Police Department began investigating Kristopher Dybas, for his suspected involvement in a cocaine distribution scheme. Approximately six months later, the police obtained Orders Authorizing the Interception of Wire Communications for telephone numbers belonging to appellant and his known supplier, Nicholas Hapsis, Jr. As a result, they intercepted numerous communications between Mr. Hapsis and appellant, which resulted in evidence linking appellant to the cocaine distribution scheme.

Appellant subsequently was charged in the Circuit Court for Baltimore County with conspiracy to possess cocaine with the intent to distribute. He joined in a Motion to Suppress Electronic Surveillance filed by one of his co-defendants, but it was denied. Thereafter, he entered into a conditional guilty plea, and the court sentenced appellant to ten years imprisonment, without the possibility of parole.[1]

On appeal,[2] he presents one question for our review, which we have rephrased as follows:

> Did the circuit court improperly deny appellant's Motion to Suppress Electronic Surveillance because the police failed to exhaust conventional investigative techniques before seeking a wiretap order?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

---

[1] The court granted an appellate bond.

[2] Appellant filed an appeal pursuant to Md. Code (2011 Supp.) § 12-302(e)(3) of the Courts & Judicial Proceedings Article ("CJP"), which provides: "An appeal from a final judgment entered following a conditional plea of guilty may be taken in accordance with the Maryland Rules."

FACTUAL AND PROCEDURAL BACKGROUND

In January 2012, a Confidential Informant ("Informant") advised Detectives Joseph Rickabaugh and Scott Griffin of the Baltimore County Police Department that Mr. Dybas was involved in the sale of cocaine. The Informant's basis of knowledge was that he had purchased various quantities of cocaine from Mr. Dybas during the past year.

Detectives Rickabaugh and Griffin then performed a search in the National Crime Information Center (NCIC) and Maryland Interagency Law Enforcement System (MILES) databases, which revealed that Mr. Dybas had been arrested four times for drug-related crimes, including selling cocaine to an undercover detective in 2002, and being found in a park, after hours, in the possession of cocaine in 2011.

In March 2012, the detectives conducted multiple controlled buys from Mr. Dybas, using the Informant as the solicitor and buyer. During the last week of March, the Informant contacted Mr. Dybas about purchasing cocaine, and he went to the meet-up location with Detective Griffin, who was acting in an undercover capacity. After the Informant and Mr. Dybas completed their transaction, but before the three parted ways, Detective Griffin asked whether Mr. Dybas would be willing to sell cocaine directly to him at a later time. Mr. Dybas indicated in the affirmative.

During the second week of April 2012, Detective Griffin purchased cocaine directly from Mr. Dybas. He contacted Mr. Dybas by telephone to initiate the transaction, and they established that their meet-up location would be a business parking lot. After arriving at the parking lot, but before approaching Detective Griffin, Mr. Dybas was observed entering

the front passenger seat of two different vehicles, both of which were occupied. This led detectives to believe that Mr. Dybas had arranged for multiple drug transactions at the same time and location. Eventually, Mr. Dybas approached Detective Griffin. Surveilling detectives observed them enter a vehicle and drive away. They drove to a nearby recreation area, where Mr. Dybas received payment from Detective Griffin, exited the vehicle by himself, and then walked to meet with Nicholas Hapsis, Jr., who had parked his vehicle at the recreation area prior to their arrival.[3] Detective Griffin observed Mr. Hapsis retrieve an item from his trunk and hand it to Mr. Dybas. Mr. Dybas returned to the vehicle in which Detective Griffin was waiting and handed him a plastic bag of cocaine. They drove back to the parking lot that served as the original meet-up location, and they parted ways.

Four more direct buys were conducted in the months of April and May 2012. In mid-April, Detective Griffin contacted Mr. Dybas a second time about purchasing cocaine. This time, Detective Griffin brought Detective Hoerr, his colleague at the Baltimore County Police Department, to the meet-up location and introduced him to Mr. Dybas. After receiving payment from the detectives, Mr. Dybas drove to a nearby shopping center. He walked inside one of the businesses, had a brief meeting with Mr. Hapsis, and then drove back to the meet-up location, where he handed the detectives the cocaine they had requested.

Detective Griffin contacted Mr. Dybas again in late April, this time to arrange a meeting between Mr. Dybas, Detective Hoerr, and another of his colleagues, Detective

[3] The Informant had advised the detectives that Mr. Dybas' supplier was Mr. Hapsis.

Sutton. At the time specified for the transaction, Mr. Dybas met Detectives Hoerr and Sutton at the meet-up location. Again, he left the scene after accepting payment in order to procure the drugs. He was surveilled to a parking lot, where, consistent with previous occasions, he met with Mr. Hapsis. After Mr. Hapsis handed Mr. Dybas an unknown item, the latter returned to where he had left Detectives Hoerr and Sutton to complete the sale.

In early May, Detective Griffin arranged a meeting between Mr. Dybas and Detective Sutton. This time, after taking money from Detective Sutton at the meet-up location, Mr. Dybas drove to Mr. Hapsis' residence, where he retrieved the cocaine from the driver's side of Mr. Hapsis' unlocked vehicle without meeting with anyone. In mid-May, Detective Griffin arranged a final meeting with Mr. Dybas for the purpose of purchasing cocaine. Both Mr. Dybas and Mr. Hapsis were surveilled, but the two did not meet before or after the transaction. Instead, Mr. Dybas simply arrived at the meet-up location with the amount of cocaine Detective Griffin requested.

In addition to the surveillance and controlled buys detailed above, Detectives Rickabaugh and Griffin had a Dialed Number Recorder (DNR) installed on Mr. Dybas' cell phone and performed an investigation into his finances. The DNR revealed that Mr. Dybas maintained contact with fifteen individuals who had prior charges or arrests relating to the possession and distribution of controlled dangerous substances. Furthermore, the financial investigation disclosed that, consistent with the profile of an individual who is engaged in the distribution of controlled dangerous substances, Mr. Dybas had no reported earnings in the State of Maryland. Detectives Rickabaugh and

Griffin detailed these findings, along with the information obtained from the Informant, the controlled buys, and the physical surveillance, in an affidavit in support of their application to obtain a wiretap Order.

In June 2012, the Honorable Robert J. Cahill, Jr. signed Orders Authorizing the Interception of Wire Communications over telephone lines belonging to Mr. Dybas and Mr. Hapsis. Thereafter, the police intercepted several calls and texts between Mr. Hapsis and appellant. During these communications, appellant asked Mr. Hapsis to supply several ounces of cocaine, consistent with redistribution and not personal use. The State proffered that Mr. Hapsis was prepared to testify against appellant if the case went to trial. As indicated, appellant was convicted, based on a conditional guilty plea, of conspiracy to possess cocaine with the intent to distribute.

DISCUSSION

Appellant contends that the circuit court erred in denying the Motion to Suppress Electronic Surveillance. He asserts that the affidavit prepared by Detectives Rickabaugh and Griffin did not demonstrate, as the Maryland wiretapping statute requires, that a wiretap was warranted because "other investigative procedures have been tried and failed or . . . reasonably appear to be unlikely to succeed if tried." Md. Code (2011 Supp.) § 10-408(a)(1)(iii) of the Courts & Judicial Proceedings Article ("CJP"). Specifically, appellant argues that "the police did not utilize effective techniques, such as confidential informants, three undercover officers, and physical surveillance, to their fullest extent." Moreover, he asserts that other investigative techniques, such as "trash rips" and ordinary search

warrants, were not attempted at all. He claims that the affidavit does not contain a full and complete statement as to why the techniques that were utilized failed, or why the ones that were not utilized were unlikely to succeed.

The State argues that the court properly denied the motion to suppress based on its finding that the detectives properly exhausted investigative techniques, as required by the statute. It asserts that the "exhaustion requirement simply ensures that wiretapping is not used as the initial step in an investigation." Here, the State contends, the police "exhausted a wide range of investigative techniques before seeking a warrant to conduct wiretap surveillance," including physical surveillance, controlled buys, use of a confidential informant, public records checks, use of a DNR, and a financial investigation, but these efforts were "inadequate for the purpose of dismantling [Mr.] Dybas's entire cocaine-trafficking organization." It notes that, to obtain a wiretapping order, "[t]he State . . . need not exhaust every conceivable investigative possibility before seeking a wiretap order," (citing *Salzman v. State*, 49 Md. App. 25, 33, *cert. denied*, 291 Md. 781 (1981)), and that this Court should "give 'considerable deference' to the [trial] court's determination that 'exhaustion' has been shown." (citing *Cantine v. State*, 160 Md. App. 391, 401-02 (2004) (quoting *U.S. v. Oriakhi*, 57 F.3d 1290, 1298 (4th Cir. 1995)), *cert. denied*, 386 Md. 181 (2005).

CJP § 10-408 addresses an application for an ex parte order authorizing the interception of wire communications. It sets forth the requirements for the application, and, as relevant to this appeal, it requires that the police provide: "A full and complete

statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." CJP § 10-408(a)(1)(iii). This statutory requirement is known as the "exhaustion" requirement for wiretapping and electronic surveillance. The failure to satisfy the exhaustion requirement "dictates the suppression of all derivative evidence." *Cantine*, 160 Md. App. at 391, 402.[4]

The underlying principle of the exhaustion requirement "is to guard against the use of electronic surveillance as an initial investigative tool." *Id.* at 402 (quoting *Vandegrift v. State*, 82 Md. App. 617, 627 (1990)). We have explained that, "if the application demonstrates to the issuing judge that normal investigative measures have been tried and failed, it is sufficient." *Allen v. State*, 89 Md. App. 25, 35 (1991), *cert. denied*, 325 Md. 396 (1992). In seeking a wiretap, "[t]he State 'need not exhaust every conceivable investigative possibility before seeking a wiretap order.'" *Id.* (quoting *Salzman*, 49 Md. App. at 33). Rather, the exhaustion required must be viewed in a "practical and common sense fashion," i.e., "to assure that wiretapping is not resorted to where traditional investigative techniques would suffice." *Salzman*, 49 Md. App. at 33 (citations and quotations omitted).

[4] The State argues that, even if the affidavit did not satisfy the exhaustion requirement, the good faith exception to the exclusionary rule applies and is a sufficient basis to uphold the circuit court's ruling. We disagree. This Court previously has indicated that the statutory exclusionary rule, unlike that involved for a Fourth Amendment violation, is not subject to the "good faith" exception. *See Chan v. State*, 78 Md. App. 287, 306 (1989). Thus, we confine our analysis to whether the affidavit met the exhaustion requirement.

In reviewing an order allowing a wiretap, "we must determine whether 'the application and supporting affidavits . . . [were] sufficient to demonstrate the need for electronic surveillance.'" *Cantine*, 160 Md. App. at 401 (quoting *Vandegrift*, 82 Md. App. at 627). "We give 'considerable deference' to the [issuing] court's determination that 'exhaustion' has been shown." *Cantine*, 160 Md. App. at 401-02 (quoting *Oriakhi*, 57 F.3d at 1298).

In denying the Motion to Suppress Electronic Surveillance, the circuit court held:

> In sum, the Court finds that the Affidavits in the case clearly illustrate that the affiants did not seek a wiretap as an initial investigative tool. The Affidavits describe numerous techniques that were utilized, and also the techniques that were not utilized due to the likelihood that they would be unsuccessful in achieving the objectives of the investigation. Based on the described techniques, the affiants were able to obtain a decent amount of information about Defendant Dybas, they learned that Defendant Hapsis was a source of supply, and they also identified some associates. However, the techniques were unsuccessful in identifying additional sources of supply, the location of stash houses, or the identity of other co-conspirators and their roles therein. Based on the fact that the Affidavits clearly show that normal investigative procedures were attempted but failed, or they are unlikely to be successful, the Court finds that conventional investigative techniques were exhausted before seeking a wiretap.

We agree. As explained below, we conclude that there was no abuse of discretion in ordering the wiretap.

In the affidavit seeking a wiretap, Detectives Rickabaugh and Griffin stated that their objective was to "identify [Mr. Dybas'] co-conspirators, assets, financiers and sources of supply, which would aid in effectively dismantling the entire organization."[5] The

[5] These are valid objectives. *See Salzman v. State*, 49 Md. App. 25, 34 n.5 (1981) (because "[t]he police had probable cause to believe that unknown sources (continued . . .)

59-page affidavit detailed the various investigative techniques the detectives employed over the course of several months before they sought a wiretap order. They utilized a confidential informant, who helped them conduct multiple controlled buys, introduced them to Mr. Dybas, and informed them that Mr. Hapsis was Mr. Dybas' source of supply. On multiple occasions, the police went undercover to purchase cocaine directly from Mr. Dybas. They checked numerous databases for information on Mr. Hapsis and Mr. Dybas, including Mr. Dybas' criminal record, which revealed four prior arrests on drug charges. They obtained Mr. Dybas' toll records and had a DNR installed on his phone, which indicated that fifteen individuals with whom he was communicating had prior arrests or charges for possession and distribution of controlled dangerous substances. They investigated Mr. Dybas' finances, and discovered that he had no reported income. The affidavit makes clear that all of these investigative techniques were utilized fully and effectively.

The affidavit then states that the investigation had shown that Mr. Dybas was "a mid to upper level cocaine distributor actively operating in the Baltimore County area, utilizing cellular telephone [] to further his drug organization." It continued:

> Although Detective Rickabaugh and Griffin have identified some co-conspirators of [Mr. Dybas'] cocaine distribution organization from the DNR data, billing records, surveillance and through the use of a confidential informant, Detectives Rickabaugh and Griffin know that there are sources of supply, stash houses, assets and other con-conspirators that have yet to be identified.

(. . . continued) of supply, co-conspirators, and 'higher-ups' in fact existed[,] [t]he objectives of the wiretap were therefore valid").

> Detectives Rickabaugh and Griffin have utilized many traditional techniques of investigation but have not been able to meet all of the goals that have been set forth in this Affidavit. This is due to the sophistication of this drug organization, as well as the volume of cocaine that is being distributed throughout the vast network of co-conspirators. [Mr. Dybas] and members of this organization are security conscious, and continue to seek new methods of hampering any investigations by Law Enforcement. Based on the facts and circumstances outlined in this Affidavit, Detectives Rickabaugh and Griffin aver that [Mr. Dybas] is familiar with the methods of narcotics investigations utilized by Law Enforcement.
>
> Detectives Rickabaugh and Griffin contacted several local and federal law enforcement agencies in the region to ascertain if [Mr. Dybas] has been a target of any previous court ordered wiretap investigations. None of the agencies contacted had any knowledge of any prior wiretap investigations involving [Mr. Dybas]. However, many of the people that [Mr. Dybas] is interacting with via cellular phone [] as outlined in this Affidavit, have previously been targets of other prior narcotics related investigations.

The affidavit stated that "the only way to effectively target and dismantle [Mr. Dybas'] cocaine distribution organization" was an order for a wiretap.

Appellant asserts that the detectives failed to employ certain investigative techniques, including the execution of search warrants and "trash rips." We are not persuaded.

The affidavit presented a detailed and specific discussion regarding why certain techniques were unlikely to target and dismantle Mr. Dybas' cocaine distribution organization. With respect to the use of search warrants, it stated that this method of investigation would not be helpful because major drug dealers typically do not keep drugs at their residences, and therefore, a search of the residence could result in no seizure of contraband, but it "would alert co-conspirators [to] the existence of this investigation." Executing search warrants would not satisfy the goals of the investigation, which were to

identify Mr. Dybas' "cocaine sources of supply, dismantle the entire cocaine distribution organization and to locate and seize all of their assets and/or proceeds of sales from distributing cocaine." Under the circumstances, it was reasonable for the court to conclude that this method of investigation was not likely to further the goal of the investigation. *See Allen*, 89 Md. App. at 35-36 (search warrant would not satisfy the "objective of the investigation to identify all confederates, stash houses and sources of supply").

With respect to the decision of the police not to perform "trash rips" during the course of their investigation, the affidavit explains that people "involved in the distribution of narcotics often times will not set their trash out for regular collection in an effort to thwart Police from retrieving the trash and search[ing] through it, looking for evidence." With respect to Mr. Dybas, moreover, the affidavit stated:

> During the majority of this investigation, Kristopher Dybas was residing in a row home community which utilizes community trash locations where numerous residents of the community discard their trash on set trash days. Your Affiants believed there was more of a chance of getting caught attempting to find a trash bag belonging to Kristopher Dybas than there was a chance of actually finding a trash bag belonging to Kristopher Dybas while pulling bags of trash from the pile placed at the roadside. The consequences associated with this could have compromised the investigation.

The detectives further explained that, even if the investigation tool was successful, and the State obtained abandoned trash by Mr. Dybas, it "would only have [led] to the probable cause needed to execute a search warrant at his particular residence," but it "would not provide the evidence needed to fulfill all the goals of this investigation, which are to fully identify and dismantle [Mr. Dybas'] cocaine distribution organization." Again, giving

deference to the circuit court's decision here, we cannot conclude that it abused its discretion in determining that this investigation technique was unlikely to be successful.

With respect to the investigative technique of physical surveillance, appellant argues that this "most basic technique . . . was barely used- and certainly not demonstrated to be ineffective." On this point, the affidavit provided the following statement:

> During the course of this investigation, your Affiants have conducted surveillance on Kristopher Dybas and his residence at 11 Bellfalls Way[,] Nottingham, Maryland 21236. As described in the affidavit, through surveillance, your Affiants have observed Kristopher Dybas leave his residence and go to a predetermined location in the Parkville area of Baltimore County. Kristopher Dybas would meet undercover Detectives and obtain buy money from the Baltimore County investigative funds. Kristopher Dybas was then observed meeting Nicholas Hapsis, obtaining the amount of cocaine from him. Kristopher Dybas would then return to the predetermined location and give the cocaine to the undercover Detective. As a result of the surveillances conducted during this investigation, your Affiants have not been able to identify any of the stash houses or verify all cocaine sources of supply for Kristopher Dybas. Without being combined with the use of telephone conversations, this investigative technique appears unlikely to succeed in achieving the ultimate goals of the investigation. While surveillance is an investigative tool that is, and has been, used to confirm meetings between alleged conspirators, it often leaves the investigators to speculate as to the identities of those attending the meetings and the purpose of the meetings. When physical surveillance is used in conjunction with electronic surveillance, the identity of all the participants may become known and . . . the purpose of the meeting may take on a new significance. During this investigation, physical surveillance has not been able to ascertain the identity of all the sources of supply for controlled dangerous substances which the targets are utilizing, nor the identity of all the co-conspirators. Your Affiants believe that electronic surveillance, combined with physical surveillance and other investigative techniques will give your Affiants this knowledge.

To be sure, the detectives here could have conducted more physical surveillance. As indicated, however, the State "need not exhaust every conceivable investigative

possibility before seeking a wiretap order." *Salzman*, 49 Md. App. at 33. The affidavit explained that further physical surveillance was unlikely to achieve the goal of the investigation, i.e., to target and dismantle the cocaine distribution organization. *See Id.* at 34 (surveillance of drug dealer's home over a five-week period "predictably failed to reveal identities of any 'higher-ups,' sources of supply, or coconspirators.").

Accordingly, applying a "practical and common sense" approach, we conclude that the application of the detectives satisfied the exhaustion requirement of CJP § 10-408. The circuit court did not abuse its discretion in denying appellant's motion to suppress.

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

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1389

September Term, 2014

RONALD LINWOOD CLARK

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Reed,

JJ.

Dissenting Opinion by Graeff, J.

Filed: March 8, 2016

I write separately in dissent because, in my opinion, the affidavit prepared by the detectives in the case *sub judice* did not demonstrate to the issuing judge that the exhaustion requirement of Md. Code (2011 Supp.), § 10-408(a)(1)(iii) of the Courts & Judicial Proceedings Article ("CJP"), had been satisfied. Specifically, I do not believe the affidavit contained a "full and complete" statement as to whether the "normal" investigative technique of surveillance "had been tried and failed or . . . [was] reasonably . . . unlikely to succeed if tried or . . . too dangerous." *Id.* at § 10-408(a)(1)(iii).

The majority is correct in that "the exhaustion requirement's basic purpose is to assure that wiretapping is 'not . . . routinely employed as the initial step in criminal investigation.'" *Salzman*, 49 Md. App. at 32 (quoting *United States v. Giordano*, 416 U.S. 505, 515 (1974)). However, in order to achieve this "basic purpose," the General Assembly enacted CJP § 10-408(a)(1)(iii), which requires that

> [e]ach application for an order authorizing the interception of wire, oral, or electronic communication shall be made in writing upon oath or affirmation . . . [and] *shall include . . . [a] full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.*

Id. (emphasis added). I certainly recognize that, in the present case, wiretapping was not employed as the initial investigative step. But, nevertheless, I do not believe the affidavit in support of the wiretap application contained the "full and complete" statement required by the above statute as well as existing Maryland caselaw interpreting the same.

We have had multiple occasions in the past to interpret the exhaustion requirement. In *Allen v. State*, 89 Md. App. 25 (1991), *cert. denied*, 325 Md. 396 (1992), we declared that "if the application demonstrates to the issuing judge that normal investigative measures have been tried and failed, it is sufficient." *Id.* at 35 (internal citations and quotations omitted). We have also asserted that "[t]he State 'need not exhaust every conceivable investigative possibility before seeking a wiretap order.'" *Id.* (quoting *Salzman v.* State, 49 Md. App. 25, 33, *cert. denied*, 291 Md. 781 (1981)). However, on the other hand, we have held that "'where traditional techniques could have led to . . . success [ ],' . . . a wiretap order will not be granted." *Allen*, 89 Md. App. at 34-35 (quoting *United States v. Simpson*, 813 F.2d 1462, 1472-73 (9th Cir. 1987), *cert. denied*, 484 U.S. 898 (1987)).

Furthermore, we have recognized that the affiant's stated objectives, which, in the present case, were to "identify [Dybas'] co-conspirators, assets, financiers and sources of supply . . . in [order to] effectively dismantl[e] the entire organization,"[1] are relevant to the exhaustion analysis. *See Vandegrift v. State*, 82 Md. App. 617, 627 (1990). Therefore, while giving "considerable deference to the [circuit] court's determination that exhaustion has been shown," *Cantine v. State*, 160 Md. App. 391, 401-02 (2004), *cert. denied*, 386 Md. 181 (2005) (internal citations and quotations omitted), the appellate court must determine whether, "in light of the objectives of the investigation, it appears that normal investigative techniques have been unsuccessful and, if continued, would be unlikely to yield the evidence sought." *Vandegrift*, 82 Md. App. at 627.

[1] These, as the majority accurately indicates, are valid objectives. *See* Majority Slip Op. at n.5 (citing *Salzman*, 49 Md. App. at 34 n.5).

In denying the Motion to Suppress Electronic Surveillance, the circuit court found that

> the Affidavits in the case clearly illustrate that the affiants did not seek a wiretap as an initial investigative tool. The Affidavits describe numerous techniques that were utilized, and also the techniques that were not utilized due to the likelihood that they would be unsuccessful in achieving the objectives of the investigation. Based on the described techniques, the affiants were able to obtain a decent amount of information about Defendant Dybas, they learned that Defendant Hapsis was a source of supply, and they also identified some associates. However, the techniques were unsuccessful in identifying additional sources of supply, the location of stash houses, or the identity of other co-conspirators and their roles therein. Based on the fact that the Affidavits clearly show that normal investigative procedures were attempted but failed, or they are unlikely to be successful, the Court finds that conventional investigative techniques were exhausted before seeking a wiretap.

Of these findings, I agree that the affidavit "illustrates that the affiants did not seek a wiretap as an initial investigative tool" and "describes numerous techniques that [had already been] utilized." However, unlike the majority, I do not agree with the circuit court's ultimate conclusion that the exhaustion requirement was satisfied because, while the affidavit contains a detailed description of every stage of the investigation, it fails to adequately demonstrate that normal investigative procedures–particularly those of mobile and stationary surveillance–were reasonably unlikely to result in success.

In *Calhoun v. State*, 34 Md. App. 365 (1997), we turned to the legislative history of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), 18 U.S.C. §§ 2510-2520 (1970), which served as the blueprint for the Maryland wiretap

statute, to determine what constitute "normal" investigative procedures. We noted that Title III defines "normal investigative procedure" as including "*standard visual or aural surveillance* techniques by law enforcement officers, general questioning or interrogation under an immunity grant, use of regular search warrants, and the infiltration of conspirational groups by undercover agents or informants." *Calhoun*, 34 Md. App. at 374 (emphasis added) (internal quotation and citation omitted). Nevertheless, we also noted in *Calhoun* that the intent of Title III was for "the showing [to] be tested in a practical and common sense fashion," because, after all, the fact that "a normal investigative technique is theoretically possible . . . does not [necessarily indicate] that it is likely." 34 Md. App. at 374 (quoting (1968) U.S. Code Cong. & Admin. News at 2190). Therefore, applying such a "practical and common sense" approach, I do not believe the normal (a.k.a. "traditional") investigative techniques of mobile and stationary surveillance were reasonably unlikely to achieve the objectives of the investigation.

As the majority and I have already indicated, the 59-page affidavit explains in detail the various investigative techniques the detectives employed before seeking a wiretap order. But, unlike in every other case in which we have applied the exhaustion requirement, the affidavit does not demonstrate that the most basic investigative techniques of mobile and stationary surveillance were "tried and failed or . . . reasonably . . . unlikely to succeed if tried or . . . too dangerous." CJP § 10-408(a)(1)(iii).

We have heard a number of cases involving narcotics investigations similar to the one here where surveillance was "tried and failed or . . . reasonably appear[ed] to be

unlikely to succeed if tried." CJP § 10–408(a)(1)(iii). In *Allen*, as in the present case, the police "aspired to learn the full scope of the conspiracy under investigation." 89 Md. App. at 35. However, "stationery surveillance was soon spotted and mobile surveillance quickly evaded" by the defendants, who were sophisticated drug dealers. *Id.* Therefore, we found that the technique of surveillance had been exhausted. *Id.* In *Salzman*, the suspects were family members who only sold to "long-time associates." 49 Md. App. at 35. We found that the police had exhausted traditional investigative techniques because the affidavit contained the following explanation as to why surveillance, although untried, was unlikely to succeed: "[B]ecause the [appellants'] house was in an isolated area of Baltimore County, long-term stationary surveillance would likely be detected." *Id.* In *Vandegrift*, "surveillance was terminated once [it] began to arouse the suspicion of the suspects." 82 Md. App. at 628. In *Cantine*, like in *Allen*, the suspects were sophisticated. They only dealt with old friends and associates, and kept changing their telephone numbers to evade police investigations. *Cantine*, 160 Md. App. at 402-03. Nonetheless, the affiants described how they "had been conducting surveillance over several years, more intensively, for several months prior to the submitted affidavit." *Id.* at 402. In *Haina v. State*, the police conducted both mobile and stationary surveillance on the suspect prior to seeking a wiretap order. 30 Md. App. 295, 309-311 (1976). However, the affiants stated in their affidavit that mobile surveillance was unsuccessful because the suspect "drove in a very erratic manner as to elude anyone that might be following him," *id*. at 310, and that stationary surveillance at the suspect's residence was terminated because it "had begun to attract [the] attention of

some of the other residences in the neighborhood." *Id.* at 310. Finally, in *Nye v. State*, we found that the police had exhausted normal investigative techniques due, in part, to the fact that they had performed mobile surveillance on the suspect and stationary surveillance at two addresses, but were nonetheless unable to determine the identities of "higher-ups." 49 Md. App. 111, 121 (1981).

Each of the aforementioned cases involved a narcotics investigation with similar objectives to those of the investigation in the case at bar. However, unlike the present case, the affidavits in *Allen*, *Salzman*, *Vandegrift*, *Cantine*, *Haina*, and *Nye* each contained a "full and complete statement as to whether or not [surveillance was] tried and failed or why [it] reasonably appear[ed] to be unlikely to succeed if tried or to be too dangerous." CJP § 10–408(a)(1)(iii). In the case *sub judice*, all the affidavit says about the technique of surveillance is that it "appears unlikely to succeed in achieving the ultimate goals of the investigation." The affidavit does not allege that Dybas or Hapsis' residence is located in a remote area; neither does it state that either of the subjects drove erratically so as to evade surveilling officers; and nor does it declare that surveillance was terminated because it had begun to arouse suspicions. Instead, the affidavit contains the bald assertion that "Dybas and members of this drug organization are security conscious, and continue to seek new methods of hampering any investigations by Law Enforcement," which is completely contradicted by how recklessly Dybas and his associates operated their drug distribution scheme.

The affidavit describes how, in a period of just two months, Dybas sold drugs directly to three undercover detectives without ever questioning their motives or attempting to "screen" them. One after another, the detectives were introduced to Dybas and were subsequently able to purchase narcotics off of him quickly and without hassle. However, only minimal surveillance, all done in conjunction with the six controlled buys, was performed during the investigation. But despite surveillance only being conducted on these six occasions, this "normal" investigative procedure proved to be anything but a failure. By just conducting surveillance contemporaneously with the controlled buys, the detectives were able to garner the following evidence:

- At the predetermined meet up parking lot for a controlled buy during the second week of April, 2012, surveilling detectives watched as Dybas quickly entered and exited the passenger seat of two other occupied vehicles before approaching the undercover detective making the buy. As the majority indicates, "this led detectives to believe that Mr. Dybas had arranged for multiple drug transactions at the same time and location." Majority Slip Op. at 3.
- During the same controlled buy in the second week of April, 2012, Dybas was surveilled as he drove an undercover detective to a recreational area, where he was seen obtaining narcotics from Hapsis.
- During a controlled buy in mid-April, Dybas was surveilled to a shopping center, where he entered one of the businesses to meet with Hapsis and (presumably) obtain cocaine from him.
- In early May, Dybas was surveilled to Hapsis' residence, where he opened the driver's side door of Hapsis' unlocked vehicle that was parked outside and retrieved cocaine that had been planted there.

Therefore, the minimal surveillance that was performed proved highly successful. Had it been continued, how many other individuals would detectives have seen simultaneously purchasing drugs from Dybas in parking lot meetings? Who else might they have observed driving to Hapsis' residence to retrieve cocaine from his unlocked vehicle? And finally,

were there others who habitually met Hapsis at the same recreational area to obtain narcotics? The answers to these questions we will never know for certain because surveillance was discontinued despite, unlike in all of our prior cases dealing with the exhaustion requirement, there not being any facts in the affidavit to support the affiants' general assertion that "[surveillance] appears unlikely to succeed in achieving the ultimate goals of the investigation."

Although we give "considerable deference to the [circuit] court's determination that exhaustion has been shown," *Cantine*, 160 Md. App. at 401-02 (internal citations and quotations omitted), we "are not free to infer from the mere presentation of an application or petition, supported by an affidavit, that normal investigative procedure will not work." *Allen*, 89 Md. App. at 35 (citing *Calhoun*, 34 Md. App. at 376). The joint application of these two legal principles leads me to the conclusion that, despite the deferential standard of review, the contents of the affidavit were insufficient to demonstrate compliance with the exhaustion requirement insofar as it relates to the normal investigative technique of surveillance. In our previous exhaustion requirement cases, we required at least some factual support as to why surveillance had been exhausted. Here, the affidavit simply asserts that surveillance was exhausted without any mention as to *why*. In my opinion, statements such as "[surveillance] appears unlikely to succeed in achieving the ultimate goals of the investigation," and "Dybas and members of this drug organization are security conscious, and continue to seek new methods of hampering any investigations by Law Enforcement," say nothing of substance as to "whether or not [surveillance had] been tried

and failed or . . . [would be] reasonably . . . unlikely to succeed if tried or . . . too dangerous."

As the United States Court of Appeals for the Fourth Circuit aptly articulated,

> [w]hile the government's burden is not great, it still may not make the required showing through a mere boilerplate recitation of the difficulties of gathering usable evidence. Rather, the government must base its need on real facts and must specifically describe how, in the case at hand, it has encountered difficulties in penetrating the criminal enterprise or in gathering evidence with normal techniques.

United States v. Oriakhi, 57 F.3d 1290, 1298 (4th Cir. 1995) (internal citations and quotations omitted). In the case at bar, despite the nonexistence of supporting facts, the affidavit contained exactly that: "a mere boilerplate recitation of the difficulties of gathering usable evidence [through surveillance]" *Id.* It is for this reason, and because the members of this drug organization were not security conscious, that I believe the affidavit fails the exhaustion requirement.