Circuit Court for Baltimore City
Case No. 113254013, 15, 16

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2865

September Term, 2015

DAWNTA DONNELL BASKERVILLE

v.

STATE OF MARYLAND

Friedman,
Beachley,
Fader

JJ.

Opinion by Fader, J.
Concurring Opinion by Friedman, J.

Filed: July 20, 2018

A jury in the Circuit Court for Baltimore City convicted appellant Dawnta Donnell Baskerville of first-degree felony murder, robbery with a dangerous weapon, use of a handgun in the commission of a felony, and conspiracy to commit robbery with a dangerous weapon. Mr. Baskerville contends that the trial court erred in denying his motion to suppress evidence, which he based on two independent grounds: (1) the Baltimore Police Department's allegedly unconstitutional StingRay search; and (2) his subsequent allegedly illegal arrest. Based on the Court of Appeals's recent decision in *State v. Copes*, 454 Md. 581, 595-96, 600 (2017), we will remand to the circuit court for a determination as to whether the police officers were acting in good faith in undertaking the StingRay search. And as to the illegal arrest claim, the State concedes that the trial court erred in not granting the motion to suppress; we agree. We therefore reverse Mr. Baskerville's convictions and remand for further proceedings.

For the benefit of the court on remand, we also address Mr. Baskerville's separate contention that the trial court erred in asking a compound *voir dire* question. In light of controlling Court of Appeals precedent, we agree that the question was improper.

BACKGROUND

The Investigation

Laconte Dontrell Mitchell was found dead—naked, with no personal belongings, and with 38 stab wounds—in a field on the morning of March 8, 2013. Mr. Mitchell's mother, with whom he lived, told investigating detectives that Mr. Mitchell had received a phone call at approximately 9:00 p.m. the night before, left the house, and never returned.

Phone records revealed that Mr. Mitchell's cell phone received approximately 20 to 25 calls from just two different numbers leading up to 9:15 p.m. on March 7. Because the owner of one of the phones could not be determined from cell phone records, the police department's Advance Technical Team ("ATT") was tasked with locating the phone, determining who was in possession of it, and bringing that person to the police station. For that purpose, the Baltimore Police Department's lead investigator, Detective Martin Young, applied to the Circuit Court for Baltimore City for an order to authorize "the installation and use of a device known as a Pen Register \ Trap & Trace and Cellular Tracking Device." Detective Young made the application on a form frequently used by the Department for that purpose. With the exception of passages setting forth facts related specifically to Mr. Mitchell's case, both the application and the order granting it were substantively identical to the forms used and discussed at length by the Court of Appeals in *State v. Copes*, 454 Md. 581, 595-96, 600 (2017).

Armed with the court's order, the ATT used a StingRay device to locate the cell phone. A StingRay device is a cell site simulator, which, as explained in *Copes*, is, in essence, "an undercover cell tower." *Id*. at 586. The simulator mimics a cell tower on the network of the target phone's service provider and "takes advantage of the fact that a cell phone—when turned on—constantly seeks out nearby cell towers, even if the user is not making a call." *Id.* at 589. When the target phone is close enough to the simulator, the phone "will connect to it as though it were a cell tower." *Id.* The device can then be used to "produce a fairly accurate estimate of the target phone's location." *Id.*

On March 15, 2013, using the StingRay device, the ATT found the phone for which they were looking in Mr. Baskerville's possession. At approximately 4:00 p.m. that afternoon, four ATT officers handcuffed Mr. Baskerville, placed him in a police wagon, and transported him to the police station for questioning. Once at the station, officers took two cell phones, a knife, and money from Mr. Baskerville and then placed him in an interview room. Sometime during the first hour after Mr. Baskerville arrived, Detective Young entered the interview room, read Mr. Baskerville his *Miranda* rights, confirmed that he would agree to answer questions, and then left. Detective Young did not return to start the interview until after 8:00 p.m.

During the interview, Mr. Baskerville initially contended that he had only contacted Mr. Mitchell by phone on March 7, 2013, but he eventually admitted to having gone with a man named Marcus "Chip" Lesane to meet with Mr. Mitchell that evening. Mr. Baskerville also admitted to having robbed both Mr. Mitchell and a woman who was with him. When the interview ended at approximately 10:30 p.m., Detective Young returned Mr. Baskerville's money but not his cell phones or his knife. Mr. Baskerville did not leave the police station until approximately seven hours after his detention began.

The details of the police investigation that followed this initial interview are not particularly important here. It is sufficient for our purposes to observe that, according to Detective Young, Mr. Baskerville provided him with additional information after the interview, including the passcode to his phone and the name and address of Janel Cephas, the woman Mr. Baskerville claims was with Mr. Mitchell on the evening of March 7.

Notably, it was Ms. Cephas's testimony at trial that connected Mr. Baskerville to a confrontation with Mr. Mitchell on the evening of the murder.

Detective Young conducted a second interview with Mr. Baskerville on April 15, after Mr. Lesane disappeared.[1] Mr. Baskerville, who had not yet been identified as a suspect in Mr. Mitchell's murder, again cooperated in the interview and again answered questions voluntarily after having been read his *Miranda* rights. At the conclusion of this interview, the detectives obtained a sample of Mr. Baskerville's DNA pursuant to a search and seizure warrant.[2] The police then arrested Mr. Baskerville on unrelated drug charges stemming from the execution of a search warrant at Mr. Baskerville's home.

Following additional investigation, an arrest warrant issued for Mr. Baskerville on August 4, 2013 relating to Mr. Mitchell's murder.

The Motion to Suppress

Mr. Baskerville moved to suppress on two grounds. He claimed that the use of the StingRay device constituted a search for Fourth Amendment purposes and, in the absence of a warrant, was unconstitutional. He also contended that his initial detention on March 15, 2013 was an arrest that was made without probable cause. He argued that both of these alleged constitutional defects required suppression of all evidence that the police subsequently gathered as fruit of the poisonous tree. The State argued that use of the

[1] Mr. Lesane was later found dead. It does not appear that Mr. Baskerville is a suspect in that crime.

[2] Mr. Baskerville's DNA did not match any DNA recovered from the crime scene. Indeed, no physical evidence implicated Mr. Baskerville in Mr. Mitchell's death.

StingRay device was not a Fourth Amendment search and, in any event, was authorized by the court order. The State also contended that the initial interrogation of Mr. Baskerville was simply an investigatory interview, not an arrest.

The court denied the motion to suppress. As to the initial detention, the court acknowledged that some factors weighed heavily in Mr. Baskerville's favor but ultimately concluded that he was not arrested. The court based that conclusion on the evidence that the officers told Mr. Baskerville that he was not under arrest, read him his *Miranda* rights, and released him at the conclusion of the interview.[3] The court also rejected Mr. Baskerville's StingRay argument. Without the benefit of either our decision in *State v. Andrews*, 227 Md. App. 350 (2016) or the Court of Appeals's decision in *Copes*, the court found that the use of the StingRay technology did not violate Mr. Baskerville's Fourth Amendment rights, reasoning that the device was "not so intrusive" because "everyone has the ability to decide whether or not any cell tower . . . can be aware of [them]" by turning off their phones. Thus, the court concluded, the police did not overstep constitutional bounds by tracking Mr. Baskerville's cell phone pursuant to the court order.

At trial, it was the testimony of Ms. Cephas, whose name and contact information the police say Mr. Baskerville provided after his first interrogation, that connected Mr. Baskerville to a confrontation with Mr. Mitchell on the evening of the murder. Ms. Cephas

[3] The court also determined that Mr. Baskerville was under arrest during the second interrogation, but that the arrest was proper based on the unrelated drug charges. Mr. Baskerville argues that the arrest on the unrelated charges was itself fruit of the poisonous tree and so should be excluded. In light of our disposition here, that issue will be for the circuit court to resolve on remand.

testified that she was with Mr. Mitchell that evening, that she heard Mr. Mitchell call Mr. Baskerville about what she assumed was a drug transaction, that she then dropped Mr. Mitchell off at an apartment building, and that she observed the beginning of a fight between Mr. Mitchell and an individual he met there.

The jury convicted Mr. Baskerville of first-degree felony murder, robbery with a dangerous weapon, use of a handgun in the commission of a felony, and conspiracy to commit robbery with a dangerous weapon. This appeal followed.

DISCUSSION

When reviewing a ruling on a motion to suppress evidence, we defer to the suppression court's findings of fact unless they are clearly erroneous. *Holt v. State*, 435 Md. 443, 457 (2013). We "look[] only to the evidence that was presented at the suppression hearing," *Belote v. State*, 411 Md. 104, 120 (2009), and "view the evidence and all reasonable inferences" from it "in the light most favorable to the prevailing party," *Sizer v. State*, 456 Md. 350, 362 (2017) (quoting *Longshore v. State*, 399 Md. 486, 498 (2007)). We review the suppression court's legal conclusions de novo, and "mak[e] our own independent constitutional evaluation as to whether the officer's encounter with the defendant was lawful." *Id.*

I. THE SUPPRESSION COURT ERRED IN DENYING MR. BASKERVILLE'S MOTION TO SUPPRESS.

Mr. Baskerville first argues that the trial court erred in denying his motion to suppress evidence obtained as a result of the police department's "unconstitutional StingRay search and subsequent illegal arrest." Relying on *Andrews*, he first claims that

the use of the StingRay device to locate him was an unauthorized warrantless search that required all subsequent evidence obtained by the police to be excluded from trial. Mr. Baskerville further argues that even if the use of the StingRay device itself were lawful, "the subsequent handcuffing, deprivation of personal property, transport to the police station, and placement in a locked interrogation room constituted an illegal arrest and all subsequent statements and evidence obtained as a result of that statement should have been suppressed as fruits of the poisonous tree."

A. The Suppression Court Should Determine Whether the Police Officers Conducting the StingRay Search Acted in Good Faith.

This is a case in which legal developments subsequent to the circuit court's decision have altered the playing field. At the time the suppression court ruled, this Court had not yet decided *Andrews*. At the time Mr. Baskerville filed his opening brief with this Court, the Court of Appeals had not yet decided *Copes*. The timing of those decisions has made all the difference.

In *Andrews*, we concluded "that cell phone users have an objectively reasonable expectation that their cell phones will not be used as real-time tracking devices through the direct and active interference of law enforcement." 227 Md. App. at 394-95. Thus, we held, the use of a cell site simulator to locate someone is a search requiring a valid warrant including particular information, and the pen register/trap and trace order obtained there (and here) was insufficient. *Id.* at 412-13. As a result, we upheld the suppression of evidence.

In *Copes*, the Court of Appeals declined to decide whether the use of a cell site simulator is a search for Fourth Amendment purposes and, if so, whether the type of order at issue there (and here) is sufficient to serve the function of a warrant.[4] 454 Md. at 586-87, 604. The Court concluded that even if the use of the StingRay simulator did violate Mr. Copes's Fourth Amendment rights, the exclusionary rule would not require suppression because the detectives acted in "objectively reasonable good faith" based on the judicial approval supplied by the pen register/trap and trace order. *Id.* at 586-87, 626-29.[5]

Notably, the Court of Appeals in *Copes* reviewed in detail the creation and use of the form application and order submitted both there and here to authorize the use of the cell site simulator. *Id.* at 595-96, 600. The application and order, and the way in which they were used and carried out, are in all relevant respects indistinguishable here from those

[4] In his opening brief, Mr. Baskerville understandably relied heavily on *Andrews*. Before responding, the State sought and obtained a stay in light of the pendency of *Copes* in the Court of Appeals. We granted the stay, which we then lifted after the Court of Appeals issued *Copes*. Although we said when we initially issued the stay that Mr. Baskerville would have the opportunity to file a supplemental brief addressing *Copes* once it was decided, he did not do so.

[5] In addition to concluding that it need not resolve the constitutional issues, the Court of Appeals also identified reasons why it would have been imprudent to do so. One such reason was the impending decision of the United States Supreme Court in *Carpenter v. United States*, 137 S. Ct. 2211 (2017) (granting certiorari), which may "provid[e] authoritative guidance for" the "closely-related issue" of "whether law enforcement access to [cell site location information] implicates the Fourth Amendment." 454 Md. at 617. Moreover, although no statute expressly governed authorization to use a cell site simulator at the time the order at issue in *Copes* (and here) was issued, a statute passed in 2014 now requires a different process, and probable cause, to obtain such authority. *Id.* at 590-92; *see also* Md. Code Ann., Crim. Proc. § 1-203.1 (2008 Repl.; 2015 Supp.). As a result, any decision regarding the validity of the type of order at issue there (and here) would have been of little prospective utility.

at issue in *Copes*. Here, as in *Copes*, the law enforcement officers were "engaged in 'objectively reasonable law enforcement activity' when they used the cell site simulator pursuant to the order based on the Pen Register Statute." *Id.* at 626. Here, as there, similar applications had been used and approved many times and had apparently never been denied. *Id.* Moreover, on their face, the application and order seemed to satisfy warrant requirements. *Id.* And here, as there, the application and order, although not without flaws, "clearly inform a reasonably diligent reader of what the officers seek to do and how they plan to do it . . . ." *Id.* at 628-29.

The only difference here as compared with *Copes* is that the circuit court here did not make an express determination as to whether the police officers were acting in good faith in applying for and then acting pursuant to the court order that, on its face, clearly authorized their activities. *See id.* at 601 (recounting the circuit court's finding that the officers acted in good faith). Although the record does not suggest any reason to doubt that the officers here were proceeding in good faith,[6] to gain the advantage of the good faith exception to the exclusionary rule, the State must demonstrate, and the court must find, that the officers were acting in good faith. *Id.*

In *Copes*, based on case law existing at the time the officers acted, the Court concluded that "it was objectively reasonable for the detectives to believe that their use of the cell site simulator pursuant to the court order was permissible under the Fourth

[6] As the Court implied in *Copes*, that conclusion would not necessarily adhere if the application and order at issue had post-dated our decision in *Andrews*. *Id.* at 618.

Amendment." *Id.* at 629-30. The good faith exception to the exclusionary rule thus applied to preclude suppression of the evidence. *Id*. at 630. *Copes* thus compels the conclusion that *if* the police officers here acted in the good faith belief that their application for and actions pursuant to the court order were properly authorized, that belief was objectively reasonable and the good faith exception to the exclusionary rule will thus apply.[7] On remand, if Mr. Baskerville again moves to suppress on this ground, the court will need only determine whether the officers acted in good faith.[8] If so, the motion to suppress based on

[7] The concurrence argues that the circuit court should be required to examine the good faith of the State's Attorney for Baltimore City and the Chief of the Baltimore Police Department in addition to the good faith of the individual police officers involved in applying for the order and conducting the search. Friedman op. at 1-2. We believe that issue to have been foreclosed by *Copes*, which applied the exception based on the good faith of the officers alone. 454 Md. at 617-18.

[8] The Supreme Court's recent decision in *Carpenter v. United States*, 585 U.S. __, 2018 WL 3073916 (June 22, 2018), does not alter this conclusion. There, the Court concluded that the government's acquisition of historical cell site records revealing aggregated location information constituted a Fourth Amendment search. *Id.* at *15. For two primary reasons, that decision does not alter our analysis here. First, the Court was very careful to emphasize that its decision "is a narrow one" that does not apply to, among other things, "real-time" cell site location information such as that at issue here. *Id.* at *13. Second, the Court's decision is limited to determining that obtaining such historical cell site location information (1) is a search, and (2) generally requires a warrant. *Id.* at 13. The decision does not address the applicability of the exclusionary rule at all, much less the good faith exception to that rule. Instead, the Court remanded the case. *Id.* at *15. Notably, the district court had already concluded that that exception would constitute an alternative grounds for denying suppression, *United States v. Carpenter*, 2013 WL 6385838, at *2 n.1 (E.D. Mich. Dec. 6, 2013) (agreeing with the United States "that if [the statute] were found unconstitutional in this case, the evidence should not be suppressed in any event because the agents relied in good faith on the [statute] in obtaining the evidence"), and at least one judge on the Sixth Circuit panel agreed, *see United States v. Carpenter*, 819 F.3d 880, 893-94, 896 (6th Cir. 2016) (Stranch, J., concurring) (noting that, even though the collection of cell site locational information may constitute a search, Mr.

the StingRay search must be denied; if not, it must be granted unless the State is able to purge the taint, as discussed further below.

B. The Suppression Court Erred in Denying the Motion to Suppress Based on Mr. Baskerville's Initial Detention.

The State now concedes that the initial detention of Mr. Baskerville was an arrest without probable cause and that the suppression court should have granted in part his motion to suppress. We agree. Mr. Baskerville was detained by four officers, handcuffed, loaded into a police wagon, and transferred to the police station. His belongings were then seized from him and he was held in an interview room that was locked from the outside for nearly four hours before being interviewed. He was then interviewed for approximately two hours and was not allowed to return home until more than seven hours after the detention began. Notwithstanding the mitigating factors noted by the suppression court, we agree with both parties that under these facts and governing case law,[9] Mr. Baskerville

Carpenter's motion to suppress was properly denied "because some extension of the good-faith exception to the exclusionary rule would be appropriate").

[9] In *Howes v. Fields*, the United States Supreme Court identified the relevant issue in determining whether a suspect is in custody is "whether, in light of 'the objective circumstances of the interrogation' a 'reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.'" 565 U.S. 499, 508-09 (2012) (quoting *Stansbury v. California*, 511 U.S. 318, 322-23, 325 (1994) (per curiam) & *Thompson v. Keohane*, 516 U.S. 99, 112 (1995)) (internal citation omitted; alteration in original). Relevant factors to that totality of the circumstances inquiry include the length and location of the detention, how many officers were present, what the officers and defendant did, whether the defendant was restrained, whether he was questioned as a suspect or witness, and how the interrogation started and concluded. *Brown v. State*, 452 Md. 196, 210 (2017); *Howes*, 565 U.S. at 509. "[W]hether an individual's freedom of movement was curtailed, however, is . . . a necessary [but] not a sufficient condition" in this analysis; the court must also determine "whether the relevant environment presents the

was subjected to a custodial interrogation. Because the parties also agree that the police lacked probable cause to arrest Mr. Baskerville at that time, his arrest violated his rights under the Fourth Amendment and evidence obtained as a result of that arrest and interrogation should have been suppressed.

Although the State concedes that the motion to suppress should have been granted, and that this Court must therefore reverse Mr. Baskerville's convictions, the parties dispute what should happen on remand. Mr. Baskerville contends that all evidence obtained by the police following his unlawful interrogation must be suppressed as fruit of the poisonous tree. He also asserts that the State lost its opportunity to demonstrate that some evidence should survive suppression when it failed to make that case at the original suppression hearing. The State argues that the court on remand should have the opportunity to perform an attenuation analysis to determine what evidence should be suppressed.

Under the "fruit of the poisonous tree" doctrine, all evidence acquired by virtue of "an illegal arrest will be excluded from a subsequent criminal prosecution." *Myers v. State*, 165 Md. App. 502, 524 (2005) (citing *Wong Sun v. United States*, 371 U.S. 471, 485-86 (1963)), *aff'd*, 395 Md. 261 (2006). The exclusionary rule "applies to any 'fruits' of a constitutional violation—whether such evidence be tangible . . . or confessions or statements of the accused obtained during an illegal arrest and detention." *Pringle v. State*,

same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Howes*, 565 U.S. at 509 (internal quotation omitted). Although not all of these factors favor a conclusion that Mr. Baskerville's was a custodial interrogation, we agree with the State and Mr. Baskerville that those that do are dispositive.

370 Md. 525, 547 (2002) (quoting *United States v. Crews*, 445 U.S. 463, 470 (1980)), *rev'd on other grounds*, 540 U.S. 366 (2003).

However, the State can avoid exclusion of particular evidence by showing that the "resulting evidence was not derived from that illegality." *Pringle*, 370 Md. at 548 (quoting *Miles v. State*, 365 Md. 488, 576 (2001) (Raker, J., dissenting)). The "taint of the primary illegality" can be "purged" in any of three ways: (1) by attenuation, if "the causal nexus between the illegality and the subsequently discovered evidence is sufficiently attenuated so that the taint has been dissipated"; (2) if an independent source provided the subsequently discovered evidence; or (3) if, even "absent the illegality, the State still inevitably would have discovered the later evidence." *Id.* at 548 (quoting *Miles*, 365 Md. at 576 (Raker, J., dissenting)); *see also Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016) (discussing these three exceptions to the exclusionary rule).

Here, because the suppression court denied outright Mr. Baskerville's motion to suppress, it never considered whether there was sufficient attenuation of the evidence obtained from the detention; whether the evidence obtained from Mr. Baskerville's properly-obtained cell phone, including arguably inculpatory text messages, was independent of the tainted arrest; or whether the evidence obtained from the phone and witness interviews made the discovery of Mr. Baskerville's involvement in Mr. Mitchell's murder inevitable. If the State raises those issues in a suppression hearing on remand, Mr. Baskerville will have the opportunity to respond and the circuit court will have the opportunity to resolve them in the first instance. In reversing the judgments and remanding for a new trial, we return the matter to square one. *See Hammersla v. State*, 184 Md. App.

295, 313 (2009) (After a conviction is reversed on appeal, "with an order for a new trial," the slate is, in effect, wiped clean "and the case beg[ins] anew procedurally.").

II. THE COURT ERRED IN ASKING A COMPOUND *VOIR DIRE* QUESTION.

Mr. Baskerville also asserts that the trial court improperly asked a compound *voir dire* question about whether the nature of the charges against him was so upsetting that it would affect the prospective jurors' ability to be fair and impartial. We address this issue for the benefit of the court and parties on remand. We review a trial court's decision whether to propound a *voir dire* question for an abuse of discretion. *Thomas v. State*, 454 Md. 495, 504 (2017).

Before trial, Mr. Baskerville submitted his proposed *voir dire* questions in writing, including: "Does any member of the jury panel have strong feelings about the crimes for which the defendant is charged, including murder and robbery?" Instead of posing that question, the Court posed the following:

> Now, I don't want the next question I ask to sound like I'm stupid, okay? Because I'm going to ask you if you think the charges are serious. And I don't mean to say—do you think murder is a serious crime? No, that's not what I need to know. Do you think robbery's a serious crime? I don't need to know that. My question to you is—the charges involve robbery and murder. Is there anyone who finds those charges so upsetting that it would [a]ffect your ability to be a fair and impartial juror, all right? If there's anyone who would find those charges so upsetting that they would find it difficult to perform their duties, please stand and I'll take your number.

Defense counsel objected and asked that the question be worded as originally proposed. The trial court refused, asserting that the Court of Appeals's decision in *Pearson v. State*, 437 Md. 350 (2014), compelled him to ask the question the way he had.

In *State v. Shim*, the Court of Appeals instructed trial courts to ask the "strong feelings" question in a compound format, as the court did here. 418 Md. 37, 54-55 (2011). In *Pearson*, however, the Court of Appeals abrogated *Shim* and unambiguously rejected the compound question formulation. *Pearson*, 437 Md. at 360-63. The Court determined that asking the compound question gives too much discretion to jurors to evaluate their own potential bias, which is a task that is supposed to be left to the trial court. *Id.* at 361-63. Thus, "on request, a trial court must ask during *voir dire*: 'Do any of you have strong feelings about [the crime with which the defendant is charged]?'" *Id.* at 364. A positive response would then be cause for follow-up. *Id.*

The State argues that because *Pearson* was decided in the context of a drug case, where jurors might actually have differing views about whether the underlying conduct really should be criminal, we should read *Pearson* as narrowly limited to drug cases. *Pearson* does not allow for such a limited interpretation. In prescribing what courts must do going forward, the Court of Appeals did not articulate a question specific to narcotics cases. Instead, the Court promulgated a generic question using the placeholder "[the crime with which the defendant is charged]." *Id.* at 354, 363, 364. Although we could perhaps entertain the possibility of an exception for a category of crimes that is rare or esoteric, the Court's language applies broadly, without regard to the particular crime at issue. It would strain reason for us to conclude that it simply slipped the Court's mind that defendants are sometimes charged with murder, rape, robbery, and other crimes of which we might expect that the members of a venire will universally disapprove.

Here, Mr. Baskerville requested a *voir dire* question phrased nearly identically to the question the Court in *Pearson* said must, upon request, be asked. The trial court instead asked one phrased nearly identically to the question the Court in *Pearson* held was improper. In doing so, the trial court erred. Although we are certainly not unsympathetic to the trial court's concern about the utility of asking jurors whether they have strong feelings about murder or robbery, the Court of Appeals has spoken.

JUDGMENTS REVERSED. CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE CITY FOR A NEW TRIAL CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY MAYOR AND CITY COUNCIL OF BALTIMORE CITY.

Circuit Court for Baltimore City
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Concurring Opinion by Friedman, J.

Filed: July 20, 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.

I concur. I write separately to express my disagreement with the state of the good faith analysis regarding police use of StingRay (and similar)[10] technology after *Andrews* and *Copes*.

I agree with the majority's result, and with much of its analysis. A StingRay search is a Fourth Amendment search, Slip op. at 7-8; *State v. Andrews*, 227 Md. App. 350, 395 (2016), and the police lacked a valid warrant. Slip op. at 7-8; *Andrews*, 227 Md. App. at 408. Therefore, absent a finding of good faith, which is determined on a case-by-case basis by the trial court, the evidence resulting from the StingRay must be suppressed. Slip op. at 9-10; *State v. Copes*, 454 Md. 581, 629 (2017). The majority is correct that the appropriate solution is for the trial court to take up the question of good faith on remand. Slip op. at 11.

I disagree with the majority that the trial court's evaluation of good faith need only examine the good faith of the police officers seeking and executing the pen register/trap & trace order. Slip op. at 10 n.8. The *Copes* Court did not address the *Andrews* Court's holding that the State's Attorney for Baltimore City and the Chief of the Baltimore Police Department—by executing a nondisclosure agreement which prevented the State's Attorney and the Police Department from disclosing to the courts the existence and use of StingRays—acted in such a manner as to exclude themselves from any possible definition

[10] Harris Company, the manufacturer of this equipment, is very adept in coming up with clever new names for this equipment, including StingRay, TriggerFish, Hailstorm, and KingFish. LINDA LYE, ACLU OF NORTHERN CALIFORNIA, STINGRAYS: THE MOST COMMON SURVEILLANCE TOOL THE GOVERNMENT WON'T TELL YOU ABOUT 2 (2014), https://perma.cc/K7TN-U97L. For my purposes, they are all the same.

of good faith. *Andrews*, 227 Md. App. at 376-77.[11] Because this was not addressed by the *Copes* Court, that question, at least in my mind, remains open. Therefore, I believe that it is necessary at the suppression hearing, on remand, for the State to try to provide evidence of its alleged good faith: by the officers seeking the warrant; by the officers' willingness to testify in violation of the nondisclosure agreement; and by the State's Attorney for Baltimore City and the Chief of the Baltimore Police Department in agreeing to the nondisclosure agreement.

[11] In our constitutional system, it is the function of courts to ensure that law enforcement does its work within constitutional limits. E.g. ERWIN CHEMERINSKY & LAURIE L. LEVENSON, CRIMINAL PROCEDURE: INVESTIGATION 4 (2018) ("[J]udges … review police conduct to determine if evidence should be suppressed because of constitutional violations."). For prosecutors and law enforcement to enter into a nondisclosure agreement by which they agree, in advance, to hide their enforcement tactics from courts, mislead judges, and to dismiss cases rather than answer legitimate judicial questions, is an evasion of our system and to me, most assuredly, unconstitutional. Barry Friedman, *Secret Policing*, 2016 U. CHI. LEGAL F. 99, 103-09 (2016) ("[T]he people surely are entitled to govern policing practices like Sting[R]ays …. Secrecy and democratic governance are fundamentally incompatible."); Shawn Marie Boyne, *Stingray Technology, The Exclusionary Rule, and the Future of Privacy*, 119 W. VA. L. REV. 915, 921-25 (2017) (describing the difficulty for the judiciary in negotiating law enforcement's use of StingRay technology when bound by these non-disclosure agreements as a "shell game"); Carrie Leonetti, *A Hailstorm of Uncertainty*, 85 U. CIN. L. REV. 665, 689-91 (discussing the difficulties courts face in dealing with these nondisclosure agreements). If this conduct does not fit neatly within one of *Leon*'s four categories, *United States v. Leon*, 468 U.S. 897, 923 (1984) (describing four categories of situations in which the exclusionary rule is appropriate), it doesn't follow that law enforcement's conduct was acceptable and entitled to be considered "in good faith." Rather, it suggests that the State's misconduct in entering these nondisclosure agreements was beyond the *Leon* Court's powers of foresight and imagination.