IN THE

COURT OF SPECIAL APPEALS OF MARYLAND

SEPTEMBER TERM, 2015

NO. 1496

STATE OF MARYLAND

Appellant,

v.

KERRON ANDREWS,

Appellee.

APPEAL FROM THE CIRCUIT COURT
FOR BALTIMORE CITY

(Hon. Kendra Ausby, Motions Judge)

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

A warrant for the arrest of Kerron Andrews, charging him with, inter alia, attempted murder, was issued on May 2, 2014. (R.1). He was arrested on or about May 5, 2014. (R.41). On July 1, 2014, his attorney entered her appearance and filed various generic "omnibus" motions and discovery requests. Trial was postponed several times. On May 12, 2015, Andrews's attorney filed a motion seeking sanctions due to discovery violations. After a series of hearings on the discovery violations, the Hon. Charles J. Peters, presiding, certain sanctions were levied against the State, and defense counsel was given the opportunity to examine several state police witnesses under oath. Some of these examinations related to the police officers' use of a cell site simulator, or "Hailstorm" device, to locate Andrews's cell phone in an attempt at serving the arrest warrant. Andrews subsequently moved to suppress "all evidence obtained from the warrant executed at 5032 Clifton Avenue" (R.18), the address where Andrews had been found by the Warrant Apprehension Task Force of the Baltimore City Police Department.

After considering the motion and the testimony taken at the earlier discovery hearing, Judge Ausby granted the motion to suppress the items recovered from the address where Andrews was arrested.[1] The State thereupon filed this appeal.

QUESTIONS PRESENTED

1. Did the motions court err in finding that the use of a cellular tracking device to locate Andrews's phone violated the Fourth Amendment?

2. Did the motions court err in finding that Andrews did not have to show standing before challenging the search of the home where he was arrested?

3. Did the motions court err in finding that the search warrant for the home where Andrews was located was invalid?

4. Did the motions court err in excluding the items recovered in this case?

STATEMENT OF FACTS

On April 27, 2014, three people were shot when they attempted to purchase drugs on the 4900 block of Stafford Street in Baltimore City. (R.5). Police identified Andrews as a subject, and a warrant was issued for his arrest. (R.6). After they were unable to locate Andrews at his last known address, (R.41), police sought, and obtained, an order from the Circuit Court for Baltimore City authorizing the use of a "Pen Register \ Trap & Trace and Cellular Tracking Device to include cell site information, call detail, without

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[1] The court ruled that the phone taken from Andrews's pocket would not be suppressed. (S.49). The handwritten docket entry to the contrary is incorrect, and the State requests that this Court's mandate include an order to amend the docket entries to reflect that the phone was not ordered suppressed. See *State v. Prue*, 414 Md. 531, 546 n.8 (2010) (listing cases supporting proposition that where docket entries conflict with transcript, transcript is controlling).

geographical limits" pursuant to "Section 10-4B-04 of the Courts and Judicial Proceedings Article[.]" (R.67). The Advance Technical Team of the Baltimore Police Department then used cell phone company records to locate the general area where Andrews's phone was last used, and then used a cellular tracking device known under the brand name "Hailstorm"[2] to identify the address where Andrews's phone was believed to be located. (D.47).[3] The Warrant Apprehension Task Force then went to the house and asked for permission to enter. Permission was granted by the woman who opened the door, (D.79), and Andrews was found sitting on a couch in the home. (D.84). His phone was in his pocket. (D.89). Police then secured the house and obtained a search warrant for the premises. A search incident to that warrant revealed a gun, later shown to be the one used in the shooting, in the cushions of the couch where Andrews was sitting.

Andrews moved to suppress all of the items recovered at the time of his arrest, arguing that the use of a cell site simulator required a valid warrant, that the May 5, 2014 order authorizing the use of a cell site simulator was invalid, and that the items recovered after Andrews was found were therefore

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[2] Cellular tracking devices similar to the Hailstorm device go by a variety of names, including "cell site simulators," "IMSI catchers," and "Stingrays." While "Stingray" is often used to refer to any such device, it is actual a specific, early model of cell site simulator.

[3] For the sake of clarity, the State will refer to this transcript as "D.__" and refer to the transcript of the August 20, 2015 hearing on the Motion to Suppress as "S.___"

all "fruit of the poisonous tree." (S.37). The State argued that the court order was valid, that Andrews had no standing to challenge the search of the home where he was found, and that the good faith exception to the exclusionary rule applied. (S.27-28).

The court disagreed with the State, finding instead that the cellular tracking device was "taking information from the phone" and therefore was beyond what the court order authorized. The search warrant for 5032 Clifton Avenue was, the court held, "just fruit of the poisonous tree of the illegally obtained information about the defendant's location." (S.50). The court acknowledged the State was challenging Andrews's standing, but held that it did not need to reach the question of standing because the search warrant was invalid. (*Id.*). The Court further held that "the good faith exception doesn't really apply here." (S.53).

ARGUMENT

I. THE MOTIONS COURT ERRED IN FINDING THAT THE USE OF A CELLULAR TRACKING DEVICE TO LOCATE ANDREWS'S PHONE VIOLATED THE FOURTH AMENDMENT.

The court erred in its determination that "the government violated the Defendant's Fourth Amendment rights by essentially using the Hailstorm to locate him at that residence." (S.50). It erred for at least two reasons. First, the use of the cell site simulator is not a "search" in the Fourth Amendment sense. Second, to the extent the use of the cell site simulator is a search, it

was specifically authorized by a valid court order. The court's decision was based upon both factually unreasonable conclusions about how the cell site simulator worked in this case, and legally incorrect determinations about what constitutes a "search" and what was authorized by the court order in this case.

A. Standard of Review and Burden(s) of Proof.

When reviewing a motion to suppress evidence, this Court will "consider only the evidence contained in the record of the suppression hearing;" it does "not consider the evidence that was admitted at trial." Moreover, it does "not engage in de novo fact-finding. Instead, [it] extend[s] great deference to the findings of the motions court as to first-level findings of fact and as to the credibility of witnesses, unless those findings are clearly erroneous." *Jones v. State*, 213 Md. App. 483, 496 (2013) (citations and quotations omitted). When making its ruling, the court "review[s] the evidence and the inferences that may be reasonably drawn in the light most favorable to the prevailing party[.]" However, the Court makes its "own independent appraisal as to whether a constitutional right has been violated by reviewing the law and applying it to the facts of the case. *Id.*

The factual findings of a lower court will be found to be clearly erroneous

> where, with respect to a proposition or a fact as to which the proponent bears the burden of production, the fact-finding

> judge has found such a proposition or fact without the evidence's having established a *prima facie* basis for such a proposition or fact. The holding should be confined to situations where, as a matter of law, the burden of production has not been satisfied.

State v. Brooks, 148 Md. App. 374, 398-99 (2002).

In a Fourth Amendment challenge to a search, the burden of proof may shift over the course of the hearing. Initially, it is the defendant's burden of proof to show that the Fourth Amendment is even implicated by the complained-of state activity. "On the threshold issue of Fourth Amendment applicability [. . .], the burden of proof is clearly on the defendant to establish that applicability." *Fitzgerald v. State*, 153 Md. App. 601, 662 (2003), *aff'd*, 384 Md. 484 (2004). *See also Rakas v. Illinois*, 439 U.S. 128, 130 n.1 (1978) (party bringing motion to suppress bears burden of showing own Fourth Amendment rights at stake). Moreover, if the search is conducted pursuant to a warrant, the search is presumptively valid, and therefore even if the Fourth Amendment applies, the defendant must overcome the presumption of validity. Once it is established, as it was in this case, that the police obtained a search warrant, there is a presumption that the warrant was valid. 153 Md. App. at 625.

Moreover, courts reviewing a warrant do not undertake a de novo assessment of whether there was probable cause to issue the warrant. Rather, courts engage in a "deferential" review to determine only whether there was

a "sufficient basis" for the warrant to issue. *Massachusetts v. Upton*, 466 U.S. 727, 733 (1984).

Here, the motions court disregarded both the appropriate standards of review and the various burdens of proof. Moreover, as will be discussed below, the motions court's legal errors were compounded by clearly erroneous factual findings. As a preliminary matter, the motions court made findings of fact regarding how a cell site simulator works which are incorrect and unsupported by any evidence in the record.

B. How the cell site simulator worked in this case.

When appearing before the court on Andrews's Motion to Suppress, the parties opted to refer the court to the transcript of the June 4, 2015, discovery hearing before Judge Charles Peters, rather than presenting live testimony. As a result, the factual basis for the court's rulings must be contained within the June 4, 2015 transcript, included in the record to this Court as Exhibit 2 to the State's Motion to Reconsider (R.86).

Most of the technical information about how the Hailstorm device works was presented through the testimony of Detective John Haley, of the Advanced Technical Team. (D.45). Haley's presentation was necessarily rather summary, because he was testifying in the context of a discovery hearing, not for the suppression hearing. Haley explained that once a court order is signed authorizing the disclosure of information by the cell phone

provider, he obtains the GPS coordinates of the cell phone tower showing most recent activity from the target's cell phone. (D.47). Armed with that information, he takes the Hailstorm device to the area covered by that cell tower and uses the machine to further refine the area where the phone can be found. (*Id.*) The cell site simulator "acts like a cell tower," and waits to receive a signal bearing the target IMSI.[4] (D.48).

The cell site simulator, Haley noted, does not extract information from the target's cell phone, (S.48); rather, it waits to receive a signal from the target's cell phone containing only the IMSI. (D.50). While he agreed to defense counsel "metaphorically" referring to the process as "peering in," Haley clarified that the process of a cell phone sending its identifying information to a cell tower was indistinguishable from the process of a cell phone sending its identifying information to a cell site simulator. (*Id.*) Defense counsel's questions all arose from an unproven assumption that it was the cell site simulator which was sending signals to the cell phone, but Haley's testimony clarified that, in fact, it was the phone which sent signals to the Hailstorm device – "our equipment acts just like a cell tower. So, it draws the phone to our equipment." (D.53). When the device detects a signal from the target phone, it notifies the operator the direction of the signal and

[4] IMSI stands for International Mobile Subscriber Identity. Cellular tracking devices such as Hailstorm are variously referred to as cell site simulators, IMSI catchers, Stingrays, or "triggerfish."

the relative signal strength, allowing the operator to estimate the probable location of the phone. (D.51). The device is not used to capture any data kept on the phone; it merely reads the ID number regularly transmitted by activated cell phones as part of their ordinary use. (D.50-51). It can only detect phones which are turned on and which are not being used to make a call. (D.53).

This testimony contrasts sharply with the factual determinations of the suppression court. The suppression court judge based her ruling on her determination that the device "goes through the wall of the house" and "into the phone." (S.31). It does not. The cell site simulator detects the signal emitted by the cell phone, just as a regular cell tower would. (D.54). The suppression court's apparent belief that the device somehow sends a signal into the home and reads the data on the targeted phone is not supported by anything in this record, and is therefore clearly erroneous.

C. A warrant is not required to collect information voluntarily shared with third parties.

What occurred in this case was not a search; Andrews failed to meet his initial threshold burden of proving that the Fourth Amendment was implicated in the use of a cell site simulator to locate his phone. The police used data which Andrews voluntarily shared with third parties – specifically, his cell phone provider – to locate his phone. Under the principles set forth

in *Smith v. Maryland*, 442 U.S. 735 (1979), no Fourth Amendment search occurred here.

Smith addressed a similar situation, albeit with slightly different technology. In that case, the telephone company – at the request of police, but without a warrant – installed a "pen register" which recorded the numbers dialed from Smith's home phone. 442 U.S. at 737. The Supreme Court held that the Fourth Amendment was not implicated when the police obtained information voluntarily transmitted to third parties. "When he used his phone, petitioner voluntarily conveyed numerical information to the telephone company and 'exposed' that information to its equipment in the ordinary course of business. In so doing, petitioner assumed the risk that the company would reveal to police the numbers he dialed." 442 U.S. at 744.

Citing *Smith* for the proposition that a person has no reasonable expectation of privacy in information he provides to a telephone company, this Court has noted that "[c]ourts have drawn a distinction between the *contents* of communications and identifying information conveyed to an Internet or cellular telephone service provider." *Upshur v. State*, 208 Md. App. 383, 395 (2012). In *Upshur*, a police officer obtained the subscriber information for Upshur's phone without first complying with Maryland's Stored Communications Act. This Court held that such information was not protected by the Fourth Amendment, and therefore its improper acquisition did not trigger the Exclusionary Rule. *Id.* at 398.

In addition to *Smith*, *supra*, four decisions of the Supreme Court are particularly relevant in understanding why this is not a Fourth Amendment search. In *United States v. Knotts*, 460 U.S. 276 (1983), the Supreme Court upheld the use of an electronic beeper used to track an item in a suspect's vehicle. The Court held that there was no reasonable expectation of privacy in the comings and goings of a vehicle, since its course of travel was regularly displayed to the public. 460 U.S. at 281-82. Similarly, here, one's cell phone is constantly emitting "pings" (D.50) giving its location to the nearest cell tower, and thus there can be no reasonable expectation of privacy in information which is regularly and routinely transmitted for third-party use.

And for that reason, *United States v. Karo*, 468 U.S. 705 (1984), is distinguishable. *Karo* also stemmed from the use of a beeper to track cans of ether being used in the drug trade. 468 U.S. at 708. However, unlike *Knotts*, in *Karo* police used the emission of signals from a private residence to form the basis for a search warrant. *Id.* at 710. The Supreme Court found that monitoring beeper signals inside a private residence constituted a "search" for which a warrant was required, because *Karo* was unaware that the beeper was present in the cans and had a reasonable expectation of privacy concerning the location of private property that he had deliberately withdrawn from public view. "Indiscriminate monitoring of property *that has been withdrawn from public view* would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth

Amendment oversight." *Id.* at 716 (emphasis added). But here, Andrews was well aware that he had in his possession a cellular telephone which routinely and regularly connected with outside cell towers, advising third parties of its location. The whereabouts of a cellular telephone are not "withdrawn from public view" until it is turned off, or its SIM card removed. Anyone who has ever used a smartphone is aware that the phone broadcasts its position on the map, leading to, for example, search results and advertising tailored for the user's location, or to a "ride-sharing" car appearing at one's address. And certainly anyone who has ever used any sort of cellular telephone knows that it must be in contact with an outside cell tower to function.

Thus, that which distinguished *Knotts* from *Karo* also distinguishes Andrews's claims from Karo's. Just as Knotts was presumably aware that his vehicle could be observed by members of the public when he drove it on public roads (and as Karo presumably believed that no one could tell when he had cans of ether in his home), Andrews was aware, or should have been aware, that an activated cell phone is constantly emitting a signal giving its location to the outside world.

Thus, *Kyllo v. United States*, 533 U.S. 27 (2001), too, is distinguishable. In *Kyllo*, the government used thermal imaging devices to detect heat emitting from private residences; excessive heat was indicative of a marijuana grow operation. *Id.* at 29. A sharply divided Court held that the use of the thermal imaging device constituted a search: "Where, as here,

the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant." *Id.* at 40. But in Andrews's case, the government used a device which was, functionally, almost indistinguishable from the cell towers that dot the landscape. And the "detail" the police learned – that his phone was at 5032 Clifton Street – was already known to third parties. Moreover, while the occupants of Kyllo's home in Oregon had no ability to stop emitting heat, Andrews could have simply turned his cell phone off to stop broadcasting its location.

United States v. Jones, 565 U.S. ___, 132 S.Ct. 945 (2012), emphasized the above distinction between *Knotts* and *Karo*, thus supporting the view that information which one knows to be available to the public is distinguishable from that which one deliberately removes from the public view. In Jones, police officers place a GPS tracking device on Jones's Jeep and tracked it for four weeks. 132 S.Ct. at 948. The tracking of Jones's vehicle constituted a search, the Court held, not because it disclosed the public location of the Jeep, but because the installation of the tracking device constituted a trespass to his property. *Id.* at 952. The tracking of the Jeep itself was not, under *Knotts*, a Fourth Amendment "search. *Id.* at 953-954. As noted above, here, the government was "tracking" an object which Andrews knew was emitting signals giving its location at all times, and which

Andrews voluntarily chose to keep activated and on his person. As with the visual surveillance of a vehicle on a public highway, Andrews cannot raise an objectively reasonable expectation of privacy in the location of his phone under these circumstances.

D. To the extent applicable, the tracking of the phone was authorized by a court order.

Simply because a police activity does not violate the Fourth Amendment does not mean that it should be exempt from any regulation or policy considerations, of course, and thus in the wake of the *Smith* decision, the federal government and most states (including Maryland) adopted legislation which created a layer of judicial supervision over pen register and "trap/trace" requests.[5] *See* 18 U.S.C.A. § 3121 (West 2015) (federal pen register and trap/trace statute); Md. Code Ann., Cts. & Jud. Pro. Art. § 10-4B-01 *et seq.* (2013) (Maryland pen register and trap and trace statute). Similarly, Maryland has enacted a statute which regulates the use of cell site simulators, such as the one used in this case. Effective October 1, 2015, Section 1-203.1 of the Courts Article requires a court order to use a device such as the Hailstorm, upon a showing of probable cause to believe that the owner of the targeted phone has committed a crime, and that the use of the

[5] A pen register records identifying numbers or signals sent from a particular phone; a trap/trace records identifying numbers sent to a particular phone. *See* Md. Code Ann., Cts. & Jud. Pro. Art. § 10-4B-01(c)-(d) (defining pen register and trap and trace device).

device will lead either to the collection of evidence relevant to the crime, or to the apprehension of the individual. *Id.* at 1-203.1(b).

However, this statute was not in effect when Andrews was arrested. As noted, since the activity in question is not a "search" in the Fourth Amendment sense – there is no intrusion on any information in which Andrews held a reasonable expectation of privacy, as his phone was constantly emitting its identification number to nearby cell towers whenever it was on – there were not yet any policy limitations on the deployment of the Hailstorm device as it was used in this instance.

Nonetheless, the police did obtain a court order before using the device. Behaving precisely as good policy would dictate, the police erred on the side of caution and obtained a court order specifically authorizing the use of a cellular tracking device to find Andrews's phone. Because § 1-203.1 did not yet exist, the police obtained an order under the nearest analog – Section 10-4B-02 of the Courts Article, which, as noted above, is Maryland's pen register and trap/trace statute. That law requires police to obtain a court order before seeking the numerical data being transmitted to and from an individual user and the telephone service provider.

To be sure, the court order described under that statute does not use the words "warrant" or "probable cause." Rather, an application for an order under the statute requires a "[a] statement under oath by the applicant that the information likely to be obtained is relevant to an ongoing criminal

investigation being conducted by that agency." However, in this instance, the application for the court order went far beyond the requirements of the statute. The application for the order requested "an Order authorizing the installation and use of a device known as a Pen Register/Trap & Trace and Cellular Tracking Device to include cell site information, call detail, without geographical limits, which registers telephone numbers dialed or pulsed from or to the telephone(s) having [Andrew's cell phone number]." (R.54). The application then describes the investigation involving Andrews, including how the police confirmed that the listed number was Andrews's number; that other attempts to locate him and serve the outstanding arrest warrant were unsuccessful; and that the police wished to "track/monitor Mr. Andrews' cell phone activity to further the investigation an[d] assist in Mr. Andrews' apprehension." (R.55). The application was for an order allowing the police

> to employ surreptitious or duplication of facilities, technical devices or equipment to accomplish the installation and use of a Pen Register\Trap & Trace and Cellular Tracking Device [. . .] and shall initiate a signal to determine the location of the subject's mobile device on the service provider's network or with such other reference points as may be reasonable available, Global Position System Tracing and Tracking, Mobile Locator tools, R.T.T. (Real Time Tracking Tool), Reveal Reports, PCMD (Per Call Measurement Data) Report, Precision Locations and any and all locations, and such provider shall initiate a signal to determine the location of the subject's mobile device on the service provider's network or with such other reference points as may be reasonably available and at such interval and times as directed by the law enforcement agent/agencies service the Order.

(R.57-58). The application also requested an order directing the cell service provider to provide police with the cell phone ID number for Andrews's phone, (R.58), prohibiting the service provider from alerting Andrews to the existence of the cellular tracking device, (R.60), and directing the cell service provider to provide the police with "cell site data simultaneous with all communications over [Andrews's cell phone number]." (R.63). The application concludes with:

> Upon a finding that probable cause exists based upon the information supplied in this application, that the said individual is using the cellular phone number of [Andrews's number] for criminal activity and that the application will lead to evidence of the crime(s) under investigation.
>
> Sworn and subscribed to before me this 5 of May, 2014,
>
> [/s/]
> Judge Barry G. Williams
> Circuit Court for Baltimore City

(R.64). The order itself stated that "probable cause exists" to authorize the use of a "Cellular Tracking Device[.]" (R.67).

This was, in other words, a sworn application for a court order authorizing precisely what was done in this case, supported by a finding of probable cause by a Baltimore City Circuit Court judge. Moreover, the Pen Register and Trap and Trace statute does not contain an exclusionary provision; to the extent that – prior to October 1, 2014 – the use of a cellular tracking device required approval under §10-4B-04, the remedy for failing to comply with the statute is not the exclusion of evidence. *See Thompson v.*

State, 395 Md. 240, 259 (2006) ("In the absence of statute or a rule promulgated by this Court, the Circuit Court does not have the inherent power to create an exclusionary rule of evidence under a statute that itself does not have an exclusionary rule."); *see also Upshur*, *supra*, 208 Md. App. at 399 (rejecting call for exclusion of cell phone information obtained in violation of Stored Communications Act; "we will not create a suppression remedy for Upshur where the legislature did not create one at the time it enacted the statute.")

There was no Fourth Amendment "search." There was no cellular tracking device statute in effect at the time. There was an order from a neutral magistrate, finding probable cause to authorize precisely what was done in this case; the closest applicable statute does not contain an exclusionary provision. Thus, the court erred in excluding evidence in this case.

E. Even if construed as a Fourth Amendment search, the court order obtained by the police made such a search reasonable.

Even if the use of the cellular tracking device in this case is considered a "search," the court order that issued in this case made the search presumptively reasonable. The court's finding that there were "material misrepresentations" in the application for the court order is not supported by any evidence. Moreover, the court applied the incorrect standard when reviewing the order.

1. *The order rendered the search presumptively reasonable.*

The Fourth Amendment does not require a warrant for a search. The Fourth Amendment requires that searches be "reasonable." The Fourth Amendment jurisprudence of the Supreme Court has, however, created two general categories of searches under the Fourth Amendment – searches pursuant to a warrant, which are presumptively reasonable, and searches without a warrant, which are presumptively unreasonable, unless they fall within one of the various exceptions to the warrant requirement.

In this case, even if (disregarding *Smith* and *Upshur*) the use of the cellular tracking device is considered a "search," it was undertaken pursuant to a court order which was the functional equivalent of a warrant.[6] While it is true that ordinarily, the standard for approving a pen register order may be less than the probable cause standard required for a search warrant, in this cases, there was an express finding of probable cause on the part of the judge signing the order. (R.64, 67). This is what the Fourth Amendment requires. The Constitution does not require a document entitled "warrant" to fall

[6] Including the cellular tracking device, there were three searches and one seizure in this case. The use of the cellular tracking device was pursuant to a court order indistinguishable from a search warrant. The search of the home on Clifton Street was pursuant to a search warrant. The seizure of Andrews's person was pursuant to an arrest warrant. The only even arguable Fourth Amendment event which was not expressly authorized by a warrant was the search of Andrews's person incident to his arrest – and the court properly declined to suppress the results of that warrantless search.

within the presumptively reasonable category of searches. What it requires is

> that the deliberate, impartial judgment of a judicial officer be interposed between the citizen and the police. Over and again this Court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment subject only to a few specifically established and well-delineated exceptions.

Katz v. United States, 389 U.S. 347, 357 (1967) (alterations, quotations, and citations omitted). *See also Johnson v. United States*, 333 U.S. 10, 14 (1948) (probable cause should be determined "by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."). "The animating philosophy is that balls and strikes should be called by a neutral umpire or referee—in our context by a member of the third branch of government—rather than by a member of the investigative team." *Herbert v. State*, 136 Md. App. 458, 486 (2001). It is the intervening judicial process, not the affixing of the word "warrant" at the head of the document, which renders a police officer's subsequent search presumptively reasonable. And that process was satisfied here.

2. *The suppression court did not extend proper deference to the existing orders.*

Given the reality of this finding of probable cause and signed order of the court, the suppression court was not entitled to simply disregard its

conclusion (or existence). Nor was the court entitled to substitute its own judgment for that of the authorizing magistrate with regard to probable cause. Instead, the court was only to determine if a "substantial basis" existed for signing the order. This is a low threshold – less than probable cause, less, even, than a "prima facie" showing. *State v. Jenkins*, 178 Md. App. 156, 174 (2008); *see also Greenstreet v. State*, 392 Md. 652 667-68) (2006) (reviewing court does not engage in de novo review, but only determines if there was substantial basis for issuing court's "practical and common-sense decision" that there was, under totality of circumstances, "fair probability" of finding contraband or evidence of crime).

The application for the order speaks for itself. There was an arrest warrant for Andrews, which in and of itself established probable cause to believe he was wanted for attempted murder. (R.55). His phone number was found on a victim's cell phone. (*Id.*). As it happened, Andrews was also working as a confidential informant for the police, and his police "handler" confirmed Andrews's cell phone number. (*Id.*). The detective who sought the warrant noted that "[i]n order to hide from police, investigators know suspects will contact family, friends, girlfriends, and other acquaintances to assist in their day to day cover affairs. Det. Spinnato would like to track/monitor Mr. Andrews' cell phone activity to further the investigation an[d] assist in Mr. Andrews' apprehension." (*Id.*) The application also averred that "suspects typically use cellular phones until service is terminated

or the phone becomes non-functional." (R.56). The application added that "the information likely to be obtained concerning the aforesaid individual's location will be obtained by learning the numbers, locations and subscribers of the telephone number(s) being dialed or pulsed from or to the aforesaid telephone and that such information is relevant to the ongoing criminal investigation being conducted by the agency." (*Id.*).

This more than met the requirements of a warrant. From this, it is plain that a warrant had issued charging Andrews with attempted murder, that Andrews's cell phone itself was evidence of a connection between Andrews and at least one of the victims, that police were in possession of Andrews's cell phone number, and that by tracking the phone number, police believed they could find both the phone and Andrews. The court's determination that the order authorizing tracking was invalid is simply without any legal or factual basis.

The court expressed concern that the application for the order did not provide enough technical details about how the cellular tracking device worked. (S.36). This is a non sequitur. There is no requirement that such details be provided. If the issuing judge had any questions or concerns, of course, he could have asked the applicant, or simply refused to issue the order. Given the lengthy and detailed nature of the request in the application – spanning 11 typed pages – it is unlikely that anyone could read the application and be unaware that police were seeking authority to "install and

use a Pen Register\Trap & Trace and Cellular Tracking Device to include cell site information" (R.56) – that is, to attempt to use cell phone signals to locate Andrews's cell phone. That the suppression court judge herself had questions and concerns about the way in which the equipment operated is, frankly, irrelevant. There was a substantial basis for the issuing magistrate to make his finding of probable cause and sign the order, and therefore the "search" – to the extent there was a search – was conducted pursuant to the valid authorization of a "neutral and detached magistrate."

Lastly, it should be noted that even if there was some technical error in obtaining the court order under the Pen Register and Trap/Trace statute, exclusion is not the appropriate remedy. The exclusionary rule is a sanction which only applies to federal Constitutional violations, not statutory violations, unless the statute itself creates an exclusionary provision. The Court of Appeals has declared that "[t]he exclusionary rule generally applies only to violations of the Fourth Amendment." *McFarlin v. State*, 409 Md. 391, 410 (2009). This Court has also has noted that the exclusionary rule "can apply only to a violation of federal law and not of state law and only to a violation of the United States Constitution and not of a mere statute." *In re Special Investigation No. 228*, 54 Md. App. 149, 163 (1983).

To the extent, therefore, that this conduct is regulated by statute, the court erred in applying the sanction of exclusion. Therefore, its rulings should be reversed.

II. THE MOTIONS COURT ERRED IN FINDING THAT ANDREWS DID NOT HAVE TO SHOW STANDING BEFORE CHALLENGING THE SEARCH OF THE HOME WHERE HE WAS ARRESTED.

The court's ruling on standing was, frankly, incoherent. Andrews was not arrested in his home. The person who answered the door at 5032 Clifton Avenue gave the police permission to enter. (D.79). The State challenged Andrews's standing to protest the search of someone else's home. (S.27). The court simply refused to entertain the standing challenge, apparently under the belief that standing is not an issue when the warrant authorizing the search is invalid. (S.50). This is legally incorrect.

Standing is the ability to assert a reasonable expectation of privacy in a particular area. Police obtained a warrant to search 5032 Clifton Avenue. This was not Andrews's home, and someone other than Andrews answered the door and gave police permission to enter in the first place. (D.79). The State raised standing. (S.27). What should have happened next was that the defense should have put on whatever evidence it had to establish Andrews's standing to challenge the search – that is, his basis for claiming he had a reasonable expectation of privacy in the contents of someone else's home.

"If the State timely challenges a defendant's standing, the law is clear that, on this threshold issue, the burden is on the defendant to establish standing." *State v. Savage*, 170 Md. App. 149, 175 (2006). This is true even if the State intends, in its case in chief, to put forth evidence which may well

have the net effect of demonstrating that the defendant has standing to challenge the search; at the time of the suppression hearing, the inquiry is not on what the State will present at trial, but what the defense will present at the hearing to establish standing. *Thompson v. State*, 62 Md. App. 190, 201-02 (1985). In *Thompson*, this Court quoted with approval R. Gilbert & C. Moylan, *Maryland Criminal Law: Practice and Procedure* 291-292 (1983):

> "Procedurally, it is clear that there is an initial burden on the prosecution to raise the challenge to standing. If the State fails to raise a timely challenge and the court goes on to reach the Fourth Amendment merits, the State will be estopped from raising the challenge at a later stage. If the prosecution does raise the challenge, however, by even the most informal of oral pleadings, it is then clear that the burden of proof is allocated to the defendant to show his standing. The State has no obligation to show nonstanding."

62 Md. App. at 202-203.

The court's finding that there was no need to prove standing makes no sense. (S.50). There can be no inquiry into whether a search violated Andrews's reasonable expectation of privacy until he first established that he had a reasonable expectation of privacy in the place to be searched.

III. THE MOTIONS COURT ERRED IN FINDING THAT THE SEARCH WARRANT FOR THE HOME WHERE ANDREWS WAS LOCATED WAS INVALID.

The search which recovered the gun was conducted pursuant to a warrant. The probable cause for the warrant was, to put it succinctly, that Andrews was found in the home. (S.41-42). The motions court ruled that because the police would not have known that Andrews was in the home but

for its use of the Hailstorm device, and that the use of the Hailstorm device violated Andrews's Fourth Amendment rights, the warrant was based upon "the fruits of the poisonous tree" and therefore the search warrant for the home was invalid.

This is incorrect. First, as argued above, the use of the Hailstorm did not violate Andrews's Fourth Amendment rights. There was no "search" in the Fourth Amendment sense, and to the extent that the use of the device did implicate any Fourth Amendment concerns, there was a court order specifically authorizing what occurred in this case. Second, even if the use of the Hailstorm device was improper, there was a valid arrest warrant for Andrews at the time he was taken into custody. That arrest warrant issued before the police considered using the Hailstorm device to find him. How the police came to find him had no bearing on the validity of the warrant to search the place where he was found.

The exclusionary rule does not negate the fact of an arrest – that is to say, the body of an arrestee, his identity and his address, cannot be "suppressed" due to a Fourth Amendment violation. "[A] person's name and address are not excludable evidence and may not serve either as second-generation excludable 'fruits' or as the first-generation 'poisonous tree' that may yield such fruits." *Gibson v. State*, 138 Md. App. 399, 414 (2001). This is especially true when the arrest is made pursuant to a warrant, and where, accordingly, there is no question of any after-the-fact rationalization of the

arrest. The presence of a fugitive wanted for attempted murder and suspected of having shot three people two weeks earlier in a particular home provided probable cause to search the home for evidence of the crime. Thus, the police sought, and obtained, a warrant to search the home. There is, in the words of this Court in *Gibson*, neither a "poisonous tree" nor any "excludable fruits."

The suppression court reasoned that because the use of the cellular tracking device to locate Andrews was improper, and therefore police awareness that Andrews was in the home where they arrested him was "fruit of the poisonous tree" that could not support the issuance of an arrest warrant. This is simply inconsistent with the legal principle that an arrest is not itself suppressible if the method by which it was effectuated is later determined to be improper, and that the exclusionary rule does not operate to put police in a worse position than they would have occupied had the Fourth Amendment violation not occurred. Indeed, the court itself seemed to recognize this principle when it correctly ruled that the phone taken from Andrews's pocket incident to his arrest would not be suppressed. (S.49).[7]

The arrest here was not illegal. There was an arrest warrant for Andrews, and police had the consent of the apparent owner of the home to

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[7] As noted above, the docket entries incorrectly indicate that the court ordered both the phone (recovered incident to Andrews's arrest) and the gun (recovered incident to a search warrant for the premises) were ordered suppressed. Regardless of this Court's ruling on the issues related to the seizure of the gun, its mandate should indicate that the docket entries be amended to reflect that the phone was not suppressed.

enter the home to take Andrews into custody. (*See Steagald v. United States*, 451 U.S. 204, 216 (1981) (arrest warrant may be served in home of another only with consent of resident or other special circumstances). Andrews had no reasonable expectation of freedom from detection and apprehension, although he fervently may have hoped for it. *See State v. Savage*, 170 Md. App. 149, 184 (2006) ("the subjective expectation of not being discovered [is not] a sufficient predicate to establish standing.")

It simply makes no sense for the police, or the courts, to pretend that Andrews's apprehension did not occur in some physical space, and having occurred in this particular physical space – 5032 Clifton Avenue – it makes no sense to prohibit the police from undertaking an otherwise perfectly reasonable search, pursuant to a warrant, of the home. Nothing about the way in which Andrews was located negated the probable cause to believe that there could be evidence of the crimes at that address. Andrews's person was not the "fruit of the poisonous tree" because there already was an arrest warrant for him, and the entry into the home was gained with the consent of the lawful occupant. The court erred in suppressing the results of the search warrant, separately and independent of its ruling on the use of the cellular tracking device.

IV. THE MOTIONS COURT ERRED IN FINDING THAT THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE DID NOT APPLY.

The Supreme Court has held that "suppression is not an automatic consequence of a Fourth Amendment violation. Instead, the question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct." *Herring v. United States*, ___ U.S. ___, 129 S.Ct. 695, 698 (2009). In *United States v. Leon*, 468 U.S. 897 (1984), police conducted searches based upon a warrant later deemed invalid. The Supreme Court refused to apply the exclusionary rule to the evidence recovered pursuant to the invalid warrant. "[T]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates." *id.* at 916. The same principle should apply here. The court erred in refusing to consider the good faith exception to the exclusionary rule.

In a good faith exception case, the inadequacy of the warrant is a given. There is otherwise no need for the exception. Therefore, for the exception to have any meaning, the standard for applying the good faith exception must be even more deferential. "[T]he standard of factual support required to be presented by the affidavit in order for evidence to be admitted under the good faith exception is considerably lower than the standard for establishing a substantial basis for a finding of probable cause by a judge issuing a search warrant." *Marshall v. State*, 415 Md. 399, 410 (2010). *See also Patterson v. State*, 401 Md. 76, 105 (2007) ("The application of the good

faith exception does not hinge upon the affidavit providing a substantial basis for determining the existence of probable cause"). Police officers need not become reviewing magistrates each time they receive a signed warrant. "[T]he officer has no duty to second guess the judge; the officer's duty is to withhold from presentation an application for a warrant that a well-trained officer would know failed to establish probable cause." *Minor v. State*, 334 Md. 707, 715 (1994).

Thus, even if one assumed that the court order authorizing the use of the cellular tracking device were invalid, and even if one assumed that the invalidity of this order rendered the ensuing search and seizure warrant invalid, nonetheless the police officers acted in good faith in relying upon the warrant when they conducted the search. The suppression court did not find that the warrant was facially insufficient, or stale, or contained any misrepresentations. Instead, it found that the warrant relied upon the location of Andrews, which was determined through the use of a cellular tracking device authorized by a court order – but that this court order was inadequate because the application did not contain enough technical information about the technology behind the cellular tracking device. This is good faith squared – not only did the arresting officers relying in good faith on the court order authorizing the use of the cellular tracking device, but the officers who searched the home – who had no reason to believe the use of the tracking device was improper – acted in good faith in applying for, and receiving, a

search warrant for the premises. There is simply no officer misconduct to deter in this case. The good faith exception to the exclusionary rule applies in this case.

CONCLUSION

The State respectfully asks the Court to reverse the judgment of the Circuit Court for Baltimore City.

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Respectfully submitted,

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CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112.

This brief complies with the font, line spacing, and margin requirements of Rule 8-112, and contains 7687 words, excluding the parts exempted from the word count by Rule 8-503.

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