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 Y. Ausby, Motions Judge)

RESPONSE TO MOTION TO DISMISS AND REPLY BRIEF OF APPELLANT

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RESPONSE TO MOTION TO DISMISS

Appellant, State of Maryland, by and through its attorneys, Brian E. Frosh, Attorney General of Maryland, and Robert Taylor, Jr., Assistant Attorney General, in response to the Motion to Dismiss filed by the Appellee Andrews, states for cause the following:

1. The State appeals from a ruling of the Circuit Court for Baltimore City, made from the bench on August 2, 2015.

2. On September 3, 2015, the State filed a Notice of Appeal in the Circuit Court for Baltimore City. Attached to the notice of appeal was a Certificate of Service which was signed and dated, and noted that service was made by mail, but did not name the party served.

3. On September 4, 2015, the Office of the Public Defender – which then, as now, represented Andrews – received its copy of the Notice of Appeal. (Motion to Dismiss at 3).

4. Citing *Lovero v. DaSilva*, 200 Md. App. 433 (2011), Andrews asks that the State's appeal be dismissed. (Motion to Dismiss at 2).

5. Andrews also cites Md. Rule 1-323 (2015), which states that the clerk of the court "shall not accept for filing any pleading . . . unless it is accompanied by an admission or waiver of service or a signed certificate showing the date and manner of making service."

6. The failure to note the name of the party to be served is, to be sure, a defect in the certificate of service. Nonetheless, the certificate complied with the literal requirements of Md. Rule 1-323. It was signed, it was dated, and it stated the manner of making service.

7. Moreover, there is no dispute but that the opposing party was actually served in a timely fashion.

8. While Andrews cites *Lovero*, the case which actually controls is *Director of Finance v. Harris*, 90 Md. App. 506 (1992).

9. In *Harris*, a pro se defendant attempted to file a pleading in the Circuit Court for Baltimore City which did not name the opposing party in the certificate of service. 90 Md. App. at 509. The clerk of the court refused to accept that filing. When Harris returned with a proper certificate of service nine days later, the time for filing the pleading had expired. *Id.* at 510.

10. This Court examined the history of Md. Rule 1-323, and noted that after the 1984 revision of the Maryland Rules, Rule 1-323 no longer included language which required the certificate of service to properly name the opposing party or its counsel.

> The minutes of the Rules Committee do not reveal the reason for this omission, but it may have been a recognition that the function of the certificate was merely to document compliance with the underlying requirement of service and that that requirement extended to *all* parties in the action and not just 'opposite' parties. Md. Rule 1-321(a) directs that papers be served "upon each of the parties" or their attorneys. Whatever the reason, the omission, we think, has significance.

90 Md. App. at 512-13. Because the rule no longer required the certificate of service to name the opposing party, this Court held, the clerk erred in refusing to accept the filing. "If the paper has not been presented timely or if it suffers from some other deficiency, it is subject to being stricken by the court, usually upon motion of a party objecting to the paper, but so long as it is properly presented, the clerk must accept and file it." *Id.* at 513.

11. Therefore – as *Lovero* itself acknowledges – there is a distinction between a filing with no certificate of service and a filing with a defective certificate of service. A certificate of service

which is signed, dated, and states the manner of service must be accepted by the clerk. *Harris*, 90 Md. App. at 513; *Lovero*, 200 Md. App. at 443.

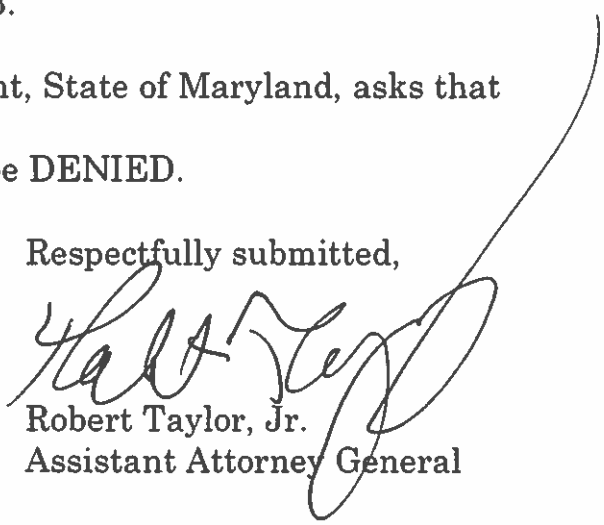
11. Therefore, *Lovero* on its face does not apply. In *Lovero*, the Court of Special Appeals held that the clerk erred in accepting a Notice of Appeal with no certificate of service whatsoever. 200 Md. App. at 446. Moreover, the Court held that the appropriate sanction for failing to comply with Md. Rule 1-323 was to deem the document not filed at all, pursuant to Md. Rule 1-201 (2015) (giving courts the discretion to determine the appropriate sanction for violating a rule which did not itself mention sanctions). 200 Md. App. at 448.

12. Where the certificate of service complies with Md. Rule 1-323 but contains some other technical defect, and when there has been actual timely service of the pleading at issue, none of the reasoning of *Lovero* applies, and dismissal of the appeal would be an improper remedy. The clerk was required, under *Harris*, to accept the filing, and the Appellee suffered no prejudice whatsoever, because his attorneys received the Notice of Appeal in

a timely fashion. There was compliance, therefore, with both the letter and intent of Md. Rule 1-323.

WHEREFORE, the Appellant, State of Maryland, asks that the Appellee's Motion to Dismiss be DENIED.

Respectfully submitted,



Robert Taylor, Jr.
Assistant Attorney General

REPLY 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.

A. The record generated in this case does not support the allegations and speculation of Andrews and the amici.

The extent to which Andrews and the amici rely upon allegations not in the record – that is to say, nearly the entirety of his assertions regarding how cell site simulators function – underscores the lack of any meaningful factual basis to support the motions court's findings in this case. This is understandable. As noted in the State's opening brief, the testimony upon which the motions court relied in making its ruling was never elicited with the intention of exploring how cell site simulators work. Indeed, the hearing at which the testimony was elicited had nothing whatsoever to do with the Fourth Amendment. It was a hearing to determine what information, if any, the State had failed to turn over in discovery.

It is beyond serious dispute that review of the rulings of a motions court is limited to the facts developed at a motions hearing, and the reasonable inferences which may be drawn therefrom. *Haley v. State*, 398 Md. 106, 131 (2007). Moreover, this Court is charged with deciding the actual case before it, and not indulging the dystopian fantasies and "what-ifs" posited by Andrews and the amici. Accordingly, fair consideration of this case begins with rejecting the far-reaching and speculative allegations presented in the briefs filed on behalf of the Appellee.

There is no evidence that any police officer ever learned of the existence of, let alone the ID number for, any cell phone other than Andrews's in this case. There is no evidence that the cell simulator device in this case ever obtained any information whatsoever from Andrews's cell phone other than its ID number. There is no information that the cell simulator device in this case directed Andrews's phone to undertake any action. There is no information that the cell simulator prevented anyone's phone from operating properly.

As the amici filed in this case clearly show, the defense bar is anxious for a major Fourth Amendment battle over the use of

cell phone locating devices. This is not that case. Not only is the record far too thinly developed to allow this Court to reach any sweeping conclusions regarding the "reasonableness" of the use of a cell site simulator (if, indeed, the Fourth Amendment is even implicated at all, under *Smith v. Maryland*, 442 U.S. 735 (1979)), but the fact that a judge made a finding of probable cause and explicitly authorized the use of a cell site simulator, and the fact that the police relied in good faith upon both that authorization and a subsequent search warrant, and the fact that, inexplicably, the motions court simply refused to require Andrews to establish standing, means that this case may be, and should be, decided on narrow grounds, confined to the actual record below.

B. Andrews voluntarily shared this information with third parties.

While cell phones are ubiquitous, they all come with "off" switches. If a cell phone is turned on, it is receiving signals from cell towers, and sending signals back out to cell towers. The cell site simulator used in this case took advantage of that fact in order to locate Andrews's phone. Because Andrews chose to keep his cell phone on, he was voluntarily sharing the location of his cell phone

with third parties. Under the doctrine set forth by the Supreme Court in *Smith*, *supra*, he cannot claim a Fourth Amendment privacy right in this case. Again, in order to avoid the conclusions of *Smith*, he is forced to distort the facts of this case.

Andrews complains that the police "invaded" a "constitutionally protected area," and therefore this search triggered Fourth Amendment protections under *United States v. Karo*, 468 U.S. 705 (1984) and *Kyllo v. United States*, 533 U.S. 27 (2001). (Appellee's Br. at 36). But in *Karo*, the suspect was unaware that he had brought a police transponder into his home, and in *Kyllo*, the suspect was unable to prevent grow-lights (or his body) from emitting heat. Andrews, by contrast, was quite aware that he was bringing his own cell phone into the house. And he was quite capable of turning it off.

Andrews further attempts to distinguish between the act of dialing and the act of keeping one's cell phone turned on, calling the former volitional and implying that the latter is not. (Appellee's Br. at 37). He also incorrectly equates the act of transmitting information to cell towers (which he quite plainly, and voluntarily, undertook) to the way in which that information

was used by the police in this case. Just as the telephone company in *Smith* used transmitted phone numbers in a way quite distinct from the way in which the police used them, so, too, Andrews's cell service provider used the ID number broadcast by his cell phone in ways quite distinct from the way in which the police used it. The way in which the information was used does not alter the "expectation of privacy" in the information itself. *Smith* controls here. Andrews's addition of the adjective "exact" to the noun "location" does not alter that fact. (Appellee's Br. at 37). The issue is not whether Andrews was aware that the police could find the location of his cell phone to within 20 yards. The issue is whether Andrews can claim an objectively reasonable expectation of privacy in information which he was voluntarily broadcasting to third parties at all times. Under *Smith*, the answer is no.

There is no Fourth Amendment right to evade a valid arrest warrant. Andrews was wanted on multiple counts of attempted murder. A life "on the lam" may require some inconveniences, such as not staying in one's home, and turning one's cell phone off when not in use. There is no constitutional right to avoid being arrested for one's crimes, and nothing unreasonable about the police using

the same information that Andrews was sharing with the rest of the world to apprehend him.

C. To the extent applicable, the tracking of the phone was authorized by a court order, as was the search of the home.

Andrews's attempts at explaining away the existence of a signed court order, explicitly finding probable cause to allow the use of a cell site simulator, are meritless. He simply conjures new Fourth Amendment doctrine out of thin air to argue that the order does not mean what it says.

To be clear: while a finding of probable cause is not required under the pen register statute, in this case, *there was an express finding of probable cause*. (R.64, 67). There was a written application from the police attesting to the reasons why they were seeking permission to use the cell phone tracking device. There were facts establishing that the request was not stale and the nexus between the phone, the crimes, and Andrews. Andrews's litany of the ways in which a pen register authorization could, in

theory, have differed from a search warrant is meaningless; in this case, there was no meaningful distinction.[1]

Thus, to the extent that a warrant was required in this case, a warrant existed in this case. A warrant creates a presumptive safe harbor for police. The State is not aware of any case, and Andrews cites none, holding that a magistrate's express, written finding of probable cause to conduct a specific search, supported by detailed facts, nonetheless does not satisfy a warrant requirement simply because the word "warrant" is not written across the top of the page. It is the finding of probable cause that is critical.

Even if construed as a Fourth Amendment search, the court order obtained by the police made such a search presumptively reasonable. However, the suppression court failed to extend proper deference to the existing order. The question, again, was not

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[1] As noted in the State's opening brief, there is now a separate statute governing requests to use cell tracking devices. *See* Md. Code Ann., Crim. Proc. Art. 1-203.1 (2015 supp.) (requiring court order to use cellular tracking device). While the requirements for an order under this new statute differ significantly from the requirements for a pen register / trap-trace order under the Courts article, in this particular case, the police application and the subsequent court order differed very little from what would have been required under the new law.

whether the suppression judge would have signed the warrant. The question was whether there was a "substantial basis" for signing the order. *State v. Jenkins*, 178 Md. App. 156, 174 (2008).

In his brief, Andrews repeats the errors of the suppression court. First he argues that the judge who signed the warrant did not "scrutinize the application for its probable cause, particularity, nexus, scope and intensity, or any other concern attendant to search warrants." This is nonsense. The standard of review does not entail attempts at retroactively reading the mind of the signing judge. There is an express finding of probable cause in the order signed by the judge. The application itself contains a detailed statement of facts and a lengthy description of the various technical tools the police wished to bring to bear in order to location Andrews (or, more precisely, his cell phone). Far from being a deferential, "substantial basis" review of the warrant, Andrews (and the suppression court) are urging some sort of "de novo plus" level of review, where both the contents of the application and the actual written findings of the signing judge are ignored.

Second, Andrews invents out of whole cloth a demand that the warrant application include more technical details on precisely

how the "cell site simulator" repeatedly referenced in the application operates. There simply is no such requirement, and moreover, to the extent that the judge presented with the warrant wanted more details, he had the power to ask for them. Nothing in the warrant application is false. Nothing in it is misleading. Andrews simply creates new requirements when he insists that the failure to include detailed explanations of how (Andrews avers) the simulator works was fatal to the warrant. (Appellee's Br. at 46).

There was a substantial basis for the signing judge to have made his express finding of probable cause. There was a substantial basis for expressly authorizing the use of a cell site simulator. The suppression court erred when it failed to respect that warrant.

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.

Andrews argues that he was not obligated to prove standing because the State did not raise standing in its response to his

written motion to suppress. (Appellee Br. at 48.) That was not, however, the ruling of the motions court. The motions court never ruled that the State had waived standing, or that it was barred from raising a challenge to standing as a sanction for failing to raise it in its written response. It simply did not rule on the standing issue, after making a single inquiry of the defense – "what about the standing issue?" – and then declining to take any actual testimony on the question. (S.42).

Andrews then repeats the same legal fallacy made by trial counsel – that he believes, based on discovery, that the State's trial theory will be that Andrews had a possessory interest in the house, and that this somehow obviates his need to prove standing as a threshold requirement to making a Fourth Amendment challenge.

That is not now, and never has been, the law. *See, e.g., State v. Savage*, 170 Md. App. 149, 175 (2006) (if State challenges standing, burden is on defendant to prove it); *Thompson v. State*, 62 Md. App. 190, 201-02 (1985) (State has no burden to prove "nonstanding"; burden is on defendant to prove standing). The reason is simple: this is a threshold issue to be resolved before a court can even consider any substantive Fourth Amendment

questions. In order for the Fourth Amendment to even apply, a defendant must show some basis for him to assert a reasonable expectation of privacy in the place where he was found. He cannot assert the Fourth Amendment rights of another; as the Supreme Court has noted, the Fourth Amendment protects people, not places. *Katz v. United States*, 389 U.S. 347, 351 (1967).

Andrews then attempts to recharacterize defense counsel's monologue regarding the unfairness of having to prove standing as a "proffer" that he was an overnight guest at the place where he was found. (Appellee's Br. at 49). This mischaracterizes both what actually transpired at the hearing and what a "proffer" is. A party cannot evade its obligation to present evidence by simply making unsupported assertions during an argument. There is nothing in the record indicating that the State agreed to accepting a "proffer" in lieu of actual evidence, or that the court considered counsel's argument to be an adequate proffer.[2]

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[2] It should be noted, too, that merely declaring someone an "overnight guest" does not magically convey standing to challenge any search of the premises in any capacity. In *Minnesota v. Carter*,

One may not simply dispense with proof of standing by arguing that the State eventually was going to admit standing for the defendant at trial anyhow. Nor may one make unsupported assertions at trial and later declare them "proffers" which prove standing. The suppression court erred when it simply refused to take evidence and make a ruling on standing.

III.

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

The motions court correctly ruled that the key taken from Andrews's pocket would not be suppressed, because he was arrested pursuant to a valid warrant. The same reasoning applies to the gun seized from the couch where Andrews was sitting. First,

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525 U.S. 83 (1998) – relied upon by Andrews (Appellee's Br. at 48) – the Supreme Court noted that while an overnight guest may have standing, "one who is merely present with the consent of the householder may not." 525 U.S. at 90. At the suppression hearing, there was no testimony from Andrews or from the woman who consented to the entry of the police as to whether Andrews was an overnight guest or merely "present with the consent of the householder." Just as Carter did not have Fourth Amendment standing to challenge a search of another's residence he merely used for packaging cocaine, so too Andrews would not have Fourth Amendment standing to challenge a search of another's residence he merely used to hide from police.

for the reasons stated above, there was no Fourth Amendment violation inherent in Andrews's arrest. Second, Andrews failed to establish any reasonable expectation of privacy in the home of another person, entered by the police with the consent of the homeowner. Third, the court erred in finding that the search warrant for the home was invalid because its application contained "fruit of the poisonous tree." As discussed in the State's opening brief, the "fruit of the poisonous tree" doctrine does not suffice to suppressed evidence of an arrest itself. *Gibson v. State*, 138 Md. App. 399, 414 (2001). *See also Grimm v. State*, 6 Md. App. 321, 328-29 (1969) (even if arrest itself was unlawful, search warrant for residence of defendant supported by probable cause).

The Exclusionary Rule should not be used to put police in worse position than they would have occupied had there been no Fourth Amendment violation. There was a valid arrest warrant for Andrews, which had nothing to do with the use of a cell site simulator. Andrews has no Fourth Amendment right to evade arrest. The entry into the home itself where Andrews was located was undertaken with the consent of the apparent owner or resident. Accordingly, the search warrant for the house where

Andrews was arrested was valid, and the fruits of that search should not have been suppressed.

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

Perhaps least defensible of all was the motions court's ruling that the police could not rely in good faith upon the warrants they obtained in this case. The police had written findings of probable cause to (a) use the cell phone locator and (b) search the home where Andrews was arrested. There were no material omissions or falsehoods in the applications for either warrant.[3] There was no basis whatsoever for refusing to apply the good faith exception here. Even if this Court were to declare, as a matter of law, that the search warrant for the house in this case was invalid, the police certainly had no reason to believe that was the case at the time

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[3] Moreover, there was never a *Franks* hearing to establish what deliberate misstatements Andrews believed were in the warrant application(s). *Franks v. Delaware*, 438 U.S. 154 (1978). Certainly the discovery hearing conducted on an earlier date, for a different reason, before a different judge, could not possibly have constituted a *Franks* hearing. *See Fitzgerald v. State*, 153 Md. App. 601, 642 (2003), aff'd, 384 Md. 484 (2004) (hearing challenging accuracy and reliability of drug detection canine not equivalent of *Franks* hearing challenging warrant which relied upon canine).

they conducted the search. Under any reasonable interpretation of *United States v. Leon*, 468 U.S. 897 (1984), the search for Andrews, and the subsequent search of the place where he was arrested, should not be suppressed.

CONCLUSION

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

Dated: January 20, 2016

Respectfully submitted,

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Counsel for Appellee

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

This brief complies with the font, line spacing, and margin requirements of Md. Rule 8-112. The Response to the Motion to Dismiss contains 835 words, and the Reply Brief contains 2954 words, excluding the parts exempted from the word count by Md. Rule 8-503.

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