Circuit Court for Montgomery County
Case No. 26242C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 760

September Term, 2015

CURTIS WAYNE MONROE

v.

STATE OF MARYLAND

Berger,
Friedman,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: August 24, 2017

In 1982, following a jury trial in the Circuit Court for Montgomery County, Curtis Wayne Monroe was convicted of murder, armed robbery, and lesser included offenses.[1]

In 2013, Monroe filed a motion to unseal the 1981 grand jury testimony of Valerie Lawson, a witness to the planning and aftermath of the robbery and shooting. After a summary denial by the circuit court, appeal to this Court, and remand, a hearing was held on February 27, 2015, at which the State reported that it could not locate the requested grand jury transcripts. The hearing was then continued so that further searches by the Clerk of Court and the State's Attorney could be undertaken. At the reconvened hearing, on May 21, 2015, after receiving testimony from the Clerk and reviewing reports from both the Clerk and the State, the court denied Monroe's motion to unseal the testimony, finding that the transcript no longer existed.

In this appeal, in which he appears *pro se*, Monroe alleges that the circuit court abused its discretion when it denied his requests to subpoena witnesses and, in so doing, accepted the State's report without sworn testimony. Additionally, Monroe claims that the court erred when it failed to order additional searches for the grand jury testimony.[2]

[1] He was sentenced to life in prison plus 65 years. Monroe's convictions and sentences were affirmed on direct appeal. *Monroe v. State*, No. 1745, Sept. Term 1982 (Filed Aug. 24, 1983).

[2] Monroe phrased the issues presented in his brief as follows:

1. The Lower Court Abused Discretion When It Restricted The Hearing Process By Denying Appellant's Application For Subpoena Of Witnesses.
2. The Lower Court Abused Discretion When It Acted Without Reference To The Guiding Rules And Principles And Relied On The State's Report In The Absence Of Sworn Testimony.

We find no merit to Monroe's contentions and affirm the orders of the circuit court.

BACKGROUND

In March, 1981, Monroe and others were indicted for the crimes noted, *supra*, following an armed robbery and deaths of two of the victims, in Montgomery County. The grand jury evidence that led to the indictment of Monroe and two co-defendants consisted, in part, of the testimony of Valerie Lawson, Detective Harry Harner, and an unnamed witness. In separate trials, in 1982, Monroe and each of his co-defendants were convicted.[3]

On July 13, 2013, Monroe filed a motion to unseal the grand jury testimony of Valerie Lawson, with a request for a hearing. Initially, the circuit court denied the motion without a hearing. On his petition for leave to appeal, this Court remanded, with instructions to hold a hearing on the motion pursuant to Rule 4-642.

Following the remand, and a month before filing a formal response to Monroe's motion, the State moved for an extension of time to allow for time to search for the grand jury transcripts. After the State sought the records from archives, then from the circuit court's Technical Services Department, and finally contacting the former prosecutor for his insights, it was determined that the records were no longer available. The State then filed its formal response to Monroe's motion stating that it did not believe Monroe was

3. The Lower Court Erred When It Failed To Direct The State To Carry Out A Reasonable Search For The Grand Jury Transcripts.

[3] In 1997, Monroe sought post-conviction relief, which was denied.

entitled to the records, but that it would provide them if found. The transcripts have not been found.

Three weeks before the February hearing, Monroe filed two requests for subpoenas *duces tecum* for Loretta Knight, a former Clerk of the Circuit Court for Montgomery County, and Carrie Williams, an Assistant Attorney General, requesting their appearance at the hearing, and production of the sealed transcripts of Valerie Lawson's grand jury testimony. Those requests for subpoenas were summarily denied, pre-hearing. At the hearing, the State proffered its search efforts and submitted that the grand jury transcripts were no longer available.

However, the State advised the court of a note found on a co-defendant's file suggesting the grand jury transcripts could be in the "Clerk's office safe." With that information, the hearing judge called for a recess in order to undertake his own brief search. Realizing, however, the volume of records to be examined, the court determined that much more time and effort would be required for a thorough search.

Thus, the hearing was continued and the court issued an order directing the Clerk to conduct searches of all facilities under the Clerk's jurisdiction. The Clerk was then to file a report outlining her efforts and results. The order also directed the State's Attorney's Office to review the two co-defendants' files for any additional information that might aid in the search and to likewise file a report of its findings.

Prior to the May hearing, Monroe filed two additional requests for subpoenas *duces tecum* that were issued to Barbara Meiklejohn ("Meiklejohn"), the current Clerk of the Court, and John McCarthy ("McCarthy"), the State's Attorney for Montgomery

County, requesting their appearance at the hearing and production of the grand jury transcripts. Pursuant to the court's order, the Clerk and the State submitted reports of their respective search efforts, neither of which resulted in locating the grand jury transcripts. At the ensuing hearing, the Clerk testified as to her efforts to locate the transcripts, at which point she was subjected to Monroe's cross-examination. An Assistant State's Attorney assigned to the case appeared, but McCarthy did not. The State offered the report of its additional search efforts to the court. Despite Monroe's protests to the contrary, the court accepted the report as evidence of the State's good faith efforts to locate the transcripts and, ultimately, of the unavailability of the records. The court denied the motion based on the inability to locate the transcripts.

DISCUSSION

State's Motion to Dismiss

We first take up the State's motion to dismiss.

The State asserts that, despite our holding to the contrary in *Causion v. State*, 209 Md. App. 391 (2013), we lack jurisdiction to address Monroe's claims. Indeed, the State posits that *Causion* was "wrongly decided." We are not persuaded of former error and, for reasons consistent with *Causion,* deny the State's motion to dismiss.[4]

Like the case before us, *Causion* presented a question of the appealability of an order denying disclosure of confidential grand jury testimony. Thirteen years after his conviction for murder, Causion filed a motion requesting the disclosure of grand jury testimony of four witnesses, with a request for a hearing. Following summary denial of

[4] Nor can a panel of this Court overrule the reported opinion of an earlier panel.

his motion Causion appealed to this Court. As in the instant matter, the State moved to dismiss for lack of jurisdiction, citing Courts and Judicial Proceedings ("C.J.P.") Article of the Maryland Code, section 12-301. The State contended that the order denying the motion to disclose grand jury testimony was neither a final judgment nor a statutorily authorized appeal from an interlocutory order, as permitted by § 12-301.

We disagreed and held that "the order denying Causion's motion is reviewable on appeal as a final judgment." *Causion,* 209 Md. App. at 402. We held that the issue of determining "whether an order is a final judgment, and thus appealable, does not depend on the grounds on which the order is based but rather upon the order's effect upon the rights of the parties or their ability to obtain the relief they seek." *Id*. at 399. Further, we established that the "court's order 'settled the rights of the parties and terminated the cause.'" *Id.* at 402 (quoting *In re Special Investigation No. 236*, 295 Md. 573, 575 (1983)). Because we conclude that *Causion* controls our review, we deny the State's motion to dismiss this appeal.[5]

Standard of Review

The disclosure of grand jury testimony is governed by Md. Rule 4-642. *See Causion,* 209 Md. App. at 403. *See also Office of State Prosecutor v. Judicial Watch,*

[5] In a footnote, the State also argues laches to bar this appeal, relying on *Jones v. State*, 445 Md. 324 (2015). However, the issue was not raised in the State's response to Monroe's motion or addressed below. This Court "will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court." Rule 8-131(a). We may, however, "decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." *Id.* Such a concern is not presented in the case *sub judice*.

Inc., 356 Md. 118, 131–32 (1999) ("Maryland Rule 4–642 … provides the exclusive vehicle for obtaining disclosure of grand jury records and documents[.]"). The only express requirements of the Rule are that the hearing "shall be on the record and shall be conducted out of the presence of all persons except those whose presence is necessary." Rule 4-642(b). The party seeking disclosure must show a "*particularized need"* for the testimony. *See Causion,* 209 Md. App. at 403. Here, the court's hearing on Monroe's motion focused on the availability of the transcripts and did not address the issue of whether Monroe had satisfied his burden of showing a "particularized need" for the testimony. Accordingly, the question of Monroe's entitlement to the grand jury transcripts is not an issue before this Court and our review is limited to the factual findings of the circuit court.

As this Court established in *Causion*, "appellate courts review a ruling on a Rule 4–642(d) motion for errors of law in the application of these principles and for abuse of discretion in the ultimate decision regarding disclosure." *Id.* Generally, "[w]e will not set aside factual findings made by the [court] unless clearly erroneous, and we will not interfere with a decision . . . that is founded upon sound legal principles unless there is a clear showing that the [court] abused [its] discretion." *McCready v. McCready*, 323 Md. 476, 484 (1991). A finding by the circuit court "is not clearly erroneous if there is competent or material evidence in the record to support the court's conclusion." *Goss v. C.A.N. Wildlife Trust, Inc.*, 157 Md. App. 447, 455–56 (2004) (quoting *Lemley v. Lemley*, 109 Md. App. 620, 628 (1996)). Abuse of discretion, on the other hand, is found "'where no reasonable person would take the view adopted by the [trial] court, or when the court

acts without reference to any guiding rules or principles.'" *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997) (quoting *North v. North*, 102 Md. App. 1, 13 (1994)).

Appellant's Evidentiary Arguments

Assuming, *arguendo*, that Monroe was entitled to subpoena witnesses for the motion hearing, the fact remains that those witnesses were not being sought on the merits of the motion. Rather, they were sought to elicit testimony on a collateral issue, namely the existence or location of the grand jury transcripts. Denial of the initial subpoena requests was appropriate.

Monroe's initial requests, for the February hearing, consisted simply of two letters to the Clerk's office asking that subpoenas *duces tecum* be issued for the former Clerk of the Court and an Assistant Attorney General, requiring their appearance and production of the Lawson grand jury transcripts. Because the requests were procedurally deficient and dealt with production of confidential sealed documents, they were treated as motions for subpoenas for tangible evidence and summarily denied.[6] The denial of the requests for subpoenas did not hinder Monroe's ability to satisfy his burden of proof of particularized need during the hearing or affect his ability to properly refile the request of subpoenas prior to the subsequent hearing. Indeed, Monroe properly filed two additional subpoena requests, on correct forms, before the May hearing that were then issued in due

[6] The filing requirements for subpoenas explicitly provide that "[e]xcept as otherwise permitted by the court for good cause, every subpoena shall be on a uniform form approved by the State Court Administrator." Md. Rule 4-266(a). Monroe's failure to request a proper form from the Clerk, or offer a reason showing good cause why he should be excepted from the requirements of the Rule, satisfies us that the court did not abuse its discretion in it denying Monroe's improperly filed requests for subpoenas.

course by the Clerk. Because the denial of the first two subpoenas was not dispositive of his motion and, because Monroe was free to refile the subpoenas on proper forms, the court did not abuse its discretion in denying them.

Additionally, Monroe demanded to have the State's Attorney testify under oath as to the adequacy of its efforts to locate the missing grand jury records. The supplemental testimony he hoped to elicit was an admission that the State had not exhausted its efforts by checking every possible location that Monroe had suggested be searched. Nevertheless, there is sufficient evidence in the record to support the court's recognition that reasonable efforts were made by the State without the need for additional sworn testimony on the subject.

The record illustrates that the State's Attorney undertook two – and perhaps three – separate searches for the grand jury records. The first prior to filing a formal response to Monroe's motion, the next before the first hearing, and again, at the court's direction, following the first hearing. Two of those searches were of its own accord. The second search, or perhaps a continuation of the first, is apparent from the February hearing transcript when the State's Attorney acknowledged that, on the day before the hearing a notation was discovered on a co-defendant's file of a possible location of the transcripts in the Clerk's office. This suggests either a continued or supplementary search by the State for the transcripts after its response to the motion was filed. With that information, the court ordered a more extensive search by the Clerk's office, which was then conducted and testified to by Meiklejohn, the current Clerk. At that point, there was sufficient evidence before the court to support the conclusion that the State and the Clerk

had each undertaken a thorough and reasonable, albeit, unproductive, search. Assuming, however, that because the court allowed testimony from the Clerk regarding her report, the court should also have required sworn testimony from the State, the error, if any, would have been harmless and would not require reversal.

Monroe contends that the State is required to search every location **he** suggested be searched. The cases upon which he relies, however, offer him no support as they deal only with the strict production requirements that apply specifically to post-conviction DNA identification evidence. The statute governing post-conviction DNA identification evidence construed in those cases, however, expressly requires the State to retain that particular evidence for the length of the petitioner's sentence. Md. Code Ann., Crim. Proc. ("C.P.") § 8-201(j)(2). Any such failure to produce that evidence, when requested, could result in the inference that the evidence would have been in the petitioner's favor at the subsequent post-conviction hearing. C.P. § 8-201(j)(3)(i)-(iii). *See also* Rule 4-710(a)(3). A preliminary hearing is held to "determine whether failure to produce evidence was the result of intentional or willful destruction." C.P. § 8-201(j)(3)(i). Absent a showing of deliberate destruction by the State, the court must deny a petitioner's request for evidence if it is unable to be produced.[7] Consequently, even application of the DNA retention rule would not provide the outcome Monroe desires.

[7] "*Denial of Petition.* The court shall deny a petition for DNA testing if it finds that:

> (A) the State has made an adequate search for scientific identification evidence that is related to the judgment of conviction, that no such evidence exists within its possession or within its ability to acquire from a third party on its own initiative or by court order, and that no such evidence that the

It is important to note that, unlike C.P. § 8-201, Rule 4-642 does not impose an ancillary burden on the State. Nor is there a provision that enforces a penalty if the State is unable to produce the requested grand jury records. The distinction between C.P. § 8-201 and Rule 4-642 requirements and procedures is clear.

Once again, assuming *arguendo*, that were we to apply the C.P. § 8-201 strictures to a search of grand jury records pursuant to Rule 4-642, the search efforts need only be reasonable and are not required to extend beyond the usual and ordinary repositories where such court records would be expected to be archived. *Washington v. State*, 424 Md. 632, 654 (2012) (holding "that unless there is a written record that the requested evidence has been destroyed in accordance with existing protocol, the State must check every location where the evidence could reasonably be located.")). Though Rule 4-642 and C.P. § 8-201 are tremendously different, and absent the imposition of any superfluous burden or penalty on the State, application of a reasonableness standard for search efforts, implicit in C.P. § 8-201 and its corresponding case law, is also appropriate in the context of locating grand jury transcripts. We are persuaded that a similar reasonableness standard is applicable to determine the sufficiency of the State's search efforts in locating missing grand jury testimony transcripts.

Unlike DNA evidence, which can be kept in any number of places that have tested or reviewed it, grand jury records are in the exclusive custody of the State's Attorney and disclosure is prohibited absent a court order. Md. Code Ann., Cts. & Jud. Proc. § 8-

State was required by law or applicable protocol to preserve was intentionally and willfully destroyed." Rule 4-710(a)(1)(A).

416(b)(2)-(3). We know from the record that the trial court ordered the grand jury testimony of Lawson and another witness be transcribed, sealed, and given to the court for review during a joint pre-trial hearing in 1981.

In that regard, Monroe also avers that the grand jury transcripts were produced to co-defendant Calhoun during a motion hearing in 1984. In support, he pointed to docket entries of Calhoun's case which, he asserts, reveal that the court granted the request for disclosure and a "release" to the defendant. We do not share Monroe's view of either the clarity or import of the docket entries. The courtroom clerk's handwritten notes found in Calhoun's file reveal, in relevant part:

> 1. 11/26/1984: Judge James J. McAulifffe ordered that State's Attorney [Mr. Barry Hamilton] will produce records. . . .
>
> 2. 11/26/1984: Joint motion that Clerk of the Court unseal grand jury records and produce *to court for evaluation*.
>
> 3. 11/26/1984: Order of the Court (McAuliffe, James, J.) that motion for grand jury records is granted and that the State transcribe and *provide to this court copies* of the grand jury testimony of all witnesses in this case. Filed.

(Emphasis added).

Those notes do not indicate that any grand jury transcripts were "released" to the co-defendant; rather, only an order that the testimony be transcribed and provided to the court.[8]

[8] Monroe asserts that he has proof of disclosure to Calhoun's attorneys from transcripts of the Calhoun motion's hearing that he obtained "several weeks" after the May 21, 2015 hearing. In fact, Monroe obtained the records of Calhoun's motion's hearing over a year after the order denying his motion for grand jury transcripts and six months after he filed his appellant's brief with this Court.

Regardless, the Calhoun records were not provided to the circuit court during its hearings on Monroe's motion and are not part of the record before us in this appeal. Accordingly, our review is limited to what was available to the circuit court and contained within the record of those proceedings. The unambiguous Calhoun docket entries do not indicate the records were disclosed to anyone other than the court. This is supported by the State's reiteration of the handwritten notes it observed in the Calhoun case file, that are consistent with the docket entries. Accordingly, there is no evidence in the record to confirm that the Lawson's grand jury testimony was disclosed to a co-defendant.

The Court of Appeals has discussed the "reasonableness" standard for the search efforts undertaken by the State, holding that "[i]n evaluating whether the State has conducted a reasonable search, we ask whether it has demonstrated sufficiently a prima facie case, either directly or circumstantially, that the requested scientific identification evidence no longer exists." *See Johnson v. State*, 440 Md. 559, 568 (2014) (internal quotation omitted). Monroe contends that since the Court of Appeals has held that an unsworn memorandum is insufficient to prove unavailability of requested post-conviction DNA evidence, the State's report here is also insufficient on the same grounds. *Blake v. State*, 395 Md. 213, 227 (2006). However, the court had before it more than a mere unsworn memorandum to support its finding of unavailability. Therefore, the only "reasonable" locations to be searched in the case *sub judice* are the State's Attorney's office and the Clerk's office. Presumably, that includes facilities within their use and control, which were also found to have been thoroughly examined.

As we have noted, there were three search attempts by the State, a proffer by the State on the record outlining its search efforts, and the State's report of its additional search efforts pursuant to the court's order. There was also a search attempted personally by the motions judge, another attempted by the Clerk's office with its corresponding report, and the Clerk's testimony of the efforts expended. The cumulative search efforts, reports, proffer by the State, and testimony by the Clerk, provide more than adequate evidence to satisfy a reasonableness standard pursuant to Rule 4-642.

Monroe next avers that his right to compulsory attendance of witnesses was violated when the circuit court failed to allow him subpoenaed witnesses or sworn testimony by the State at the hearing. A defendant's right to compulsory process "in all criminal *prosecutions* . . ." is guaranteed by the Maryland Declaration of Rights. Md. Decl. of Rts. art. 21 (emphases added). *See also* U.S. CONST. amend. VI. The hearing on Monroe's motion to unseal grand jury testimony was not a criminal prosecution subject to the compulsory process requirements and safeguards found in the Maryland Declaration of Rights and the Sixth Amendment of the United States Constitution. Accordingly, his argument is without merit.

Moreover, it is clear that Monroe was not demanding that sworn testimony be admitted to show that he was entitled to the grand jury transcripts. Instead, he was attempting to show that the transcripts could, potentially, still exist somewhere. He was afforded a hearing, as required when requested, and he was afforded the opportunity to be heard on his motion. He acknowledged that his motion might be moot if the State could

not locate the transcripts.[9] It was because of the potential for mootness that the court permitted the State to proffer its preliminary search efforts and, ultimately, ordered more searches to be undertaken by both the State and the Clerk's office. Additionally, there was no testimony elicited from the Clerk that caused the court to question the veracity of the report or challenge the search efforts. There is nothing in the record to suggest an abuse of discretion when the court accepted the State's proffer and supplemental report of its search efforts without additional sworn testimony.

We find no abuse of discretion by the motions court when it denied the improperly filed subpoenas for Ms. Knight and Ms. Williams or when it accepted the State's report outlining, what the court recognized to be, reasonable efforts to locate the 30-year old grand jury transcripts. Furthermore, there is substantial evidence in the record to support the court's determination that a reasonable search had been afforded, that the transcripts were no longer available and, thus, could not be produced. Indeed, at Monroe's behest, the court went to great efforts beyond the requirements of Rule 4-642 in order to locate the records.

MOTION TO DISMISS DENIED; JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.

[9] At the February 27th hearing, Monroe indicated that "I'd like [sic] know whether or not the State has attempted to locate the Grand Jury testimony before I go any further. Because it's [sic] *may be a matter of mootness*, I guess, if the State is contending that it can't, cannot locate the Grand Jury testimony." (Emphasis added).