Circuit Court for Howard County
Case No.: 13-K-17-058042

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 504

September Term, 2018

LESLIE ELMORE

v.

STATE OF MARYLAND

Fader, C.J.
Gould,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: August 2, 2019

Appellant, Leslie Elmore, was convicted by a jury in the Circuit Court for Howard County of second degree burglary, two counts of fourth degree burglary, theft between $1,000 and $10,000, and malicious destruction of property. The court sentenced appellant to a term of ten years for second degree burglary and a concurrent term of 60 days for malicious destruction of property, with the remaining counts merged at disposition. In this timely appeal, appellant asks us to address the following questions:

1. Is the evidence insufficient to sustain the convictions?

2. Did the circuit court err in denying appellant's motion to suppress?

For the following reasons, we shall affirm.

BACKGROUND

Motions Hearing

Prior to trial, appellant moved to suppress historical cell site location data obtained from his cellphone from AT&T Mobility following issuance of a pen register order, dated June 27, 2017, pursuant to Md. Code (1973, 2013 Repl. Vol.) § 10-4A-04 of the Courts and Judicial Proceedings ("C.J.P.") Article and 18 U.S.C. § 2703(d). Those statutes permit disclosure of such "records or other information," respectively, where there is reason to believe that the information is relevant to a "legitimate law enforcement inquiry" or "an ongoing criminal investigation." *See* C.J.P. § 10-4A-04(c); 18 U.S.C. § 2703(d).[1]

[1] Both statutes define "records or other information" to include "local and long distance telephone connection records, or records of session times and durations, length of service (including start date) and types of service utilized . . . ." *See* C.J.P. § 10-4A-04(b)(1)(i); 18 U.S.C. § 2703(c)(2).

Appellant's counsel argued that this was a lower standard than probable cause and that the motions court should rely on arguments made in a case then pending in the United States Supreme Court, *Carpenter v. United States*, No. 16-402 (argued Nov. 29, 2017), specifically, that a warrant, based upon probable cause, should be required to obtain cell site location data records.

Appellant acknowledged that current law in Maryland allowed for the seizure of a limited class of phone-related data following issuance of a pen register order, such as outgoing phone numbers from a landline. *See Smith v. State*, 283 Md. 156, 173 (1978) (holding "that there is no constitutionally protected reasonable expectation of privacy in the numbers dialed into a telephone system and hence no search within the fourth amendment is implicated by the use of a pen register installed at the central offices of the telephone company"), *aff'd*, 442 U.S. 735 (1979); *see also State v. Copes*, 454 Md. 581, 590-91 (2017) ("The Fourth Amendment does not require law enforcement officers to obtain a search warrant in order to use a pen register or trap and trace device") (citing *Smith v. Maryland*, 442 U.S. 735 (1979)). But, appellant continued, the Supreme Court had also recently decided that attaching a GPS-location device to an automobile constituted a "search" under the Fourth Amendment. *See United States v. Jones*, 565 U.S. 400, 404 (2012). Contending that this case, involving the seizure of historical cell phone location data, was more akin to *United States v. Jones* than *Smith v. Maryland*, *supra*, appellant concluded that this case involved a warrantless search and that the fruits of that search, i.e., the location of appellant's cell phone at certain dates and times, should be suppressed. Appellant also argued that the seizure could not be saved under the good faith doctrine.

See United States v. Leon, 468 U.S. 897, 917-20 (1984) (recognizing a good faith exception to the warrant requirement when police officers exercise their professional judgment and could have reasonably believed that the statements within an affidavit in support of a warrant application related sufficient probable cause).

Acknowledging that the issue presented was pending in the Supreme Court in *Carpenter v. United States*, *supra*, the State responded: that there was no reasonable expectation of privacy in the cell site location information records; that *United States v. Jones*, *supra*, which concerned more precise GPS locations, was distinguishable; and, that *Smith v. Maryland*, *supra*, supported its argument. In any event, the State argued in the alternative that the good faith doctrine from *United States v. Leon*, *supra*, applied, noting that "it's a little ridiculous to ask a police officer to differentiate between two semi-competing appellate cases." Concluding that the officer in this case acted in good faith by applying for and obtaining a pen register order under existing federal and state statutes, the State asserted "[i]f an officer can't rely on an order, then what can an officer rely on?"

The court denied the motion in a written order, which states in relevant part:

> ORDERED, that because the Court finds that Defendant lacks a legitimate expectation of privacy in the subject business records containing cell site data; and that the State's acquisition of such business records by Court Order does not constitute a search, the Motion to Suppress such records is denied; and it is further
>
> ORDERED, that, assuming arguendo a reasonable expectation of privacy and a search, good faith reliance upon existing statutory provisions would not justify suppression.

Trial

This case involves the June 11, 2017 after-hours burglary of the California Grill and Pizza located in Elkridge, Maryland. The burglary was captured by a video surveillance recording system inside the restaurant, comprised of four surveillance cameras, as it occurred between approximately 12:40 and 12:43 a.m. Evidence established that someone threw a large rock through the front plate glass window, entered the restaurant, and then stole money from the cash drawer and the manager's office.

The recording of the burglary, included with the record on appeal, was played for the jury at trial. The recordings were taken from the four surveillance cameras situated throughout the restaurant. Those recordings show that, at approximately 12:40:58, after the break-in, an individual that appears to be a Caucasian male enters the backroom area of the restaurant. The surveillance video shows that the man is wearing gloves, a baseball cap, a short sleeve shirt, shorts, a long belt hanging down at the waist, sneakers, and what appears to be a watch on his left wrist. From 12:41:04 to 12:41:31, this individual moves through the back-storage area to the office. He grabs several items, and then backs out of the office and returns towards the front of the restaurant. One of the restaurant co-owners, Ravi KC, would later testify that approximately $3,000 was stolen from the office area.

From 12:41:31 to 12:42:41, the individual, who now appears to be next to the counter, then opens a cash till stored underneath a register. Apparently finding it empty, he then moves to his right, and removes another cash till stored underneath a second register. Mr. KC testified he believed between $200 and $300 was stolen from this second register.

Notably, at around 12:41:33, Camera 1, which is situated above and behind the main cash register, records a close-up view of the back of the individual's head and neck area. A portion of the individual's neck tattoo and hairline are clearly visible in the recording. The individual then hunches over and picks up several documents from the floor, including U.S. currency, and then leaves with the aforementioned till from the second cash register. Neither Ravi KC, nor his cousin, Umesh KC, the other co-owner, knew appellant or gave him permission to enter the restaurant and take the money.

Detective Tae Yoon, assigned to the Property Crimes Division of the Howard County Police Department, was the lead investigator in this case. Detective Yoon agreed that investigation of the burglary led the police to suspect appellant. Appellant was subsequently arrested on June 28, 2017 and then interviewed at the police station. During the interview, Detective Yoon noticed that appellant had several tattoos and, although shaved, what appeared to be a distinctive hairline on the back of his neck. Photographs of appellant's person taken at the time of his arrest, including the tattoos and his hairline, were admitted into evidence for the jury's consideration.

During the interview, appellant provided the detective with his cellphone number.[2] As will be discussed in more detail in the discussion that follows, Detective Yoon then obtained a court order for appellant's cellphone records from AT&T Mobility. Detective Yoon also seized the long belt appellant was wearing at the time of his arrest, and that belt was admitted into evidence at trial.

[2] The police did not recover appellant's cellphone.

Detective Corporal Daniel Branigan, accepted as an expert in cellphone technology, the analysis of cellular phone records and cellular tower location, performed a historical cell site location data analysis on the AT&T cellphone number provided by appellant. Detective Branigan observed that three text messages were either made or received at around 12:42 a.m. on the day in question by the cellphone associated with the number provided by appellant. And, at the time and day in question, this cellphone accessed a cellular tower that was located approximately 1.44 miles east of the crime scene.

We may include additional detail in the following discussion.

DISCUSSION

I.

Appellant first contends that the evidence was insufficient to establish that he was the person who burglarized the California Grill and Pizza on the day and time in question. The State responds that the jury could conclude that appellant was the same individual seen burglarizing the restaurant in the surveillance video. We agree.

In reviewing for sufficient evidence, we ask "whether, 'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Hall v. State*, 233 Md. App. 118, 137 (2017) (quoting *State v. Coleman*, 423 Md. 666, 672 (2011)); *accord Jackson v. Virginia*, 443 U.S. 307, 319 (1979). This Court has noted that in this undertaking, "the limited question before us is not 'whether the evidence should have or probably would have persuaded the majority of fact finders but only whether it possibly could have persuaded any rational fact finder.'" *Smith v. State*, 232 Md. App. 583, 594

(2017) (emphasis omitted) (quoting *Allen v. State*, 158 Md. App. 194, 249 (2004), *aff'd*, 387 Md. 389 (2005)). "In short, the question 'is not whether we might have reached a different conclusion from that of the trial court, but whether the trial court had before it sufficient evidence upon which it could fairly be convinced beyond a reasonable doubt of the defendant's guilt of the offense charged[.]'" *Spencer v. State*, 422 Md. 422, 434 (2011) (emphasis omitted) (quoting *Dixon v. State*, 302 Md. 447, 455 (1985)).

The jury was presented with surveillance video of the burglary itself, as it occurred, as well as photographic evidence of appellant's person when he was arrested and booked. It was for the fact finder to compare these items of evidence to determine if the person arrested was the same person depicted on the surveillance video. We simply note that the individual in the video and appellant both appear to be Caucasian males of a similar age and body type, with a similar hairline and neck tattoos. Further, based on the evidence presented, the suspect in the video and the appellant were wearing similar attire, notably a long belt that hung down, as well as shorts, sneakers, and a short sleeve shirt. There was also evidence that appellant was near the crime scene at the time it transpired, because his cellphone was used less than a mile and half from the restaurant at around the time of burglary. We conclude that this evidence was sufficient to sustain appellant's convictions.

II.

Appellant next maintains that the motions court erred in denying his motion to suppress the cell-site location information obtained from his cellphone carrier on the grounds that the court order authorizing the search was not a warrant supported by probable cause. Appellant also asserts that the search cannot be justified under the good faith

doctrine. The State responds that the motion court's ruling can be upheld because the executing officers acted in good faith reliance on established law at the time of the search. We agree with the State.

Appellate review of a motion to suppress is "'limited to the record developed at the suppression hearing.'" *State v. Johnson*, 458 Md. 519, 532 (2018) (quoting *Moats v. State*, 455 Md. 682, 694 (2017)). "We view the evidence and inferences that may be drawn therefrom in the light most favorable to the party who prevails on the motion," here, the State. *Raynor v. State*, 440 Md. 71, 81 (2014) (citation and quotation marks omitted). And, "[w]e accept the suppression court's factual findings unless they are shown to be clearly erroneous." *Id*. We give "due weight to a trial court's finding that the officer was credible[.]" *Ornelas v. United States*, 517 U.S. 690, 700 (1996). "'[W]e review legal questions *de novo*, and where, as here, a party has raised a constitutional challenge to a search or seizure, we must make an independent constitutional evaluation by reviewing the relevant law and applying it to the unique facts and circumstances of the case.'" *Grant v. State*, 449 Md. 1, 14-15 (2016) (quoting *State v. Wallace*, 372 Md. 137, 144 (2002)).

Appellant's primary contention is that the Supreme Court's opinion in *Carpenter*, *supra*, involving a search pursuant to a pen register order, is sufficiently analogous to the present case for us to hold that the motions court erred. *See Carpenter v. United States*, ___ U.S. ___, 138 S.Ct. 2206, 2220-23 (2018) (concluding that the government's acquisition of cell site location information ("CSLI") constituted a Fourth Amendment search and generally requires a warrant). Accepting appellant's argument solely for purposes of this appeal, we are persuaded that the search was justified under the good faith

doctrine. *See Marshall v. State*, 415 Md. 399, 408 (2010) (holding that reviewing courts may consider "'to decide the question of the officer's good faith, and the applicability of the objective good faith exception, without deciding whether probable cause is lacking under the Fourth Amendment'") (quoting *McDonald v. State*, 347 Md. 452, 469 (1997)).[3]

In *United States v. Leon*, the Supreme Court held that evidence seized under a warrant, subsequently determined to be invalid, may be admissible if the officers executing the warrant acted in objective good faith and with reasonable reliance on the warrant. *Leon*, 468 U.S. at 919-20. The *Leon* Court reasoned that because "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates," the rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." *Id.* at 916, 919; *see also Massachusetts v. Sheppard*, 468 U.S. 981, 989-90 (1984) (a police officer is not "required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested"). This Court has explained:

> The Good Faith Exception was a watershed. Read in their totality, *Leon* and *Sheppard* explain that the Fourth Amendment's fundamental protection consists of taking the decision to search or to seize out of the hands of the officer, engaged in the often competitive enterprise of ferreting out crime, and entrusting it to the neutral and detached judicial figure. That location of the decision-making authority in the judge, whenever possible, is the very function and purpose of the Fourth Amendment's warrant clause.

[3] We note that in *Carpenter*, after the case was remanded by the Supreme Court, the Sixth Circuit concluded the agents acted in good faith reliance on the federal statute, 18 U.S.C. § 2703(d), when they originally obtained the CSLI at issue. *See United States v. Carpenter*, 926 F.3d 313, 318 (6th Cir. 2019).

Joppy v. State, 232 Md. App. 510, 539, *cert. denied*, 454 Md. 662 (2017) (citation omitted); *see also Leon*, 468 U.S. at 921 ("'[O]nce the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law.' Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.") (citation omitted).

The case of *State v. Copes*, 454 Md. 581 (2017), is instructive. In *Copes*, a murder victim's cellphone was stolen and believed to be in the possession of someone with knowledge of the crime. *Copes*, 454 Md. at 586. With advances in technology permitting investigators to possibly locate that cellphone, which had remained active after the murder, the police obtained a pen register trap and trace order. That order authorized the seizure of historical CSLI regarding that cellphone, as well as the use of a cell site simulator, a device that emulates a cell tower and allows its user to obtain real-time location information. *Id.* at 595-96.

The issues before the Court of Appeals included whether the order authorizing the use of the cell site simulator: (1) required the issuance of a search warrant under the Fourth Amendment supported by probable cause; and, (2) whether the order was the functional equivalent of such a warrant. *Id*. at 586-89, 604. Recognizing that this Court had decided that use of a cell site simulator was a search under the Fourth Amendment in *State v. Andrews*, 227 Md. App. 350 (2016), *see Copes*, 454 Md. at 615-16, the Court of Appeals declined to offer a decisive opinion on these questions. *Copes*, 454 Md. at 626.

Instead, the Court concluded that even if the use of the cell site simulator violated Mr. Copes' Fourth Amendment rights, the exclusionary rule would not require suppression

because the detectives acted in "objectively reasonable good faith" based on the prior judicial approval supplied by the order. *Id*. at 586-87, 626-29. The Court held that "based on existing case law, it was objectively reasonable for the detectives to believe that their use of the cell site simulator pursuant to the court order was permissible under the Fourth Amendment. Given that the Supreme Court has instructed that suppression should be a 'last result' and not a 'first impulse,' this is an appropriate case for application of the good faith exception." *Id*. at 629-30; *see also Kelly v. State*, 436 Md. 406, 426 (2013) (although recognizing that the installation and use of a GPS device on a target's vehicle is a Fourth Amendment "search," under *United States v. Jones*, 565 U.S. 400, 404 (2012), where existing Maryland law permitted GPS tracking of vehicle, the police acted in "objectively reasonable reliance on that authority" and the search would be upheld under the good faith doctrine).

Here, the police were acting under a judicially-issued and approved order permitting them to obtain the historical cell site location information for a specific phone number associated with appellant. Their actions were authorized under existing precedent, prior to the Supreme Court's decision in *Carpenter v. United States*, *supra*. We hold that the police acted in objectively reasonable reliance on the order and that the motions court properly concluded that the search was justified under the good faith doctrine.

JUDGMENTS AFFIRMED.

COSTS TO BE ASSESSED TO APPELLANT.