Circuit Court for Harford County
Case No. 12-K-17-001707

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 597

September Term, 2018

DAVONNTE ONEAL SCONION

v.

STATE OF MARYLAND

Graeff,
Beachley,
Eyler, Deborah S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: February 21, 2019

In the Circuit Court for Harford County, Davonnte Oneal Sconion, the appellant, proceeding on a not guilty agreed statement of facts, was convicted of first-degree rape and attempted rape of two different victims. He was sentenced to life in prison, all but 25 years suspended, for first-degree rape, and a concurrent term of 25 years for attempted rape.

On appeal, Sconion presents one question for review, which we have rephrased:

> Was there substantial evidence to support the issuance of a DNA search and seizure warrant for him?

For the reasons to follow, we shall affirm the judgments of the circuit court.

FACTS AND PROCEEDINGS

Before trial, Sconion filed a motion to suppress DNA evidence obtained upon the execution of a search and seizure warrant issued against him. At the hearing on the motion, Sconion moved into evidence the application for and affidavit in support of the DNA search warrant and the warrant itself. As usually is the case, no other evidence was presented. *See Wilson v. State*, 132 Md. App. 510, 533 (2000). The warrant application, written by Detective Milton Alexander of the Aberdeen Police Department ("APD"), established the following, all of which took place in Aberdeen, Maryland.

On September 10, 2017, a woman we shall call "Ms. K." contacted the APD and reported that she had been raped. She told the police that she had gotten in touch with a man through the website "Backpage" and had agreed to meet him to have sex with him for money. Their meeting location was to be 40 Liberty Street. She was supposed to meet a taxi sent for her near her hotel room, and the taxi would take her to that location. At the appointed time, she left her hotel room and went outside to meet the taxi. A man

approached her, produced a knife, and forced her behind some businesses where he raped, robbed, and stabbed her. Afterward he fled on foot. Ms. K. described the rapist as a black male with a slim build, wearing a "gray hooded sweatshirt/jacket dark colored clothing." She did not know him. She was transported to Harford Memorial Hospital, where a SAFE exam was performed and a Rape Kit was collected and submitted to the police department as evidence.

The next evening, September 11, 2017, a woman we shall call "Ms. H." contacted the APD, reporting an attempted rape and armed robbery at 40 Liberty Street. When the police responded, she was inside 27 Liberty Street. She told the police she had gotten in touch with a man through the website "Backpage" and had agreed to have sex with him for money, at 38 Liberty Street. When she arrived at that address in her vehicle, it was dark and she did not see anyone. She called the phone number for the man twice, with no answer. The third time she called, a man answered and she told him to come outside. Moments later she saw a man standing in front of 40 Liberty Street.

Ms. H. got out of her vehicle and started walking toward the man. She began to feel uncomfortable, so she turned around to head back to her vehicle. The man approached her from behind, grabbed her by the hair, threw her to the ground, and attempted to rape her. He was holding a steak knife. They fought and she was cut and stabbed several times. She either bit the man or cut him with a knife/razor she was carrying, and she believed he was injured. During the struggle, she dropped her phone and accidentally picked up the

assailant's phone, thinking it was hers.[1] She managed to escape and jump into her vehicle. The assailant ran up and punctured her front driver's side tire with his knife. Ms. H. drove up Liberty Street, where a woman at number 27 offered her help. The police arrived with a K-9 unit. The dog began tracking at 40 Liberty Street, where there was "evidence on the ground," and then crossed Liberty Street to a footpath next to 29 Liberty Street. The dog "walked back and forth, behind 29 and 27 Liberty Street, before going left along a fence line leading to Aberdeen Avenue before the track ended."

Ms. H. described her assailant as a black male, thin build, medium complexion, around 5' 10" tall, and wearing a "gray hooded sweatshirt/jacket" and dark colored pants. She did not know him. The police collected DNA swabs from Ms. H.

On September 12, 2017, the police executed a search warrant for 40 Liberty Street, which was a vacant house. They collected some items, which they kept as evidence.

On October 3, 2017, Detective Alexander participated in a "Safe Streets" detail of officers who were canvassing on foot in the 100 block of East Belair Avenue, about a third of a mile from 40 Liberty Street. They saw a black male whose build, height, and complexion matched the description the victims had given and who was wearing a "gray hooded sweatshirt/jacket." Detective Alexander asked the man to identify himself. He gave his name as Davonnte Oneal Sconion, and his address as 29 Liberty Street. That address is about 10 yards from 40 Liberty Street, almost directly across the street. Sconion

[1]The phone later was determined to belong to a woman and did not produce any evidence.

told the police he recently had been locked up and was on probation for theft and that he had an upcoming court date. A warrant check did not reveal any open warrants. After the encounter, Sconion left, walking in the direction of his residence.

On October 6, 2017, Detective Alexander submitted the warrant application to a District Court judge. The application sought issuance of a warrant to take oral swabs from Sconion to compare his DNA to the assailant's DNA in both cases.[2] The warrant was issued that day.

After hearing argument of counsel, the suppression hearing judge denied Sconion's motion to suppress:

> Okay. Well, I hear the argument of the defense in this case and what we have is in relatively swift fashion we have the incidents happen and the address for both of these incidents were at this 40 Liberty Street address. The police department did what I think what the citizens would have requested or demanded of their police department, and that is to - - you know, they use the terminology safe streets. They sort of do a very intense review of the area on or about that time. Much in the way that this alleged second incident occurred, I think the hope was there wouldn't be a third. You know, who

[2]A paragraph on page 4 of the warrant application states:

> Evidence collected [in the two] cases and submission to the Maryland State Police Forensics Laboratory for analysis, collection and comparison were done. *The preliminary analysis results revealed the suspect standard collected in the two separate incidents are the same thus linking the suspect to both crimes.*

(Emphasis added). The factual basis for the forensic link stated in the warrant application is not included, but appears in the application for statement of charges, which states that the same DNA profile was found in the Rape Kit evidence from Ms. K. and in dried blood swabbed from Ms. H.'s left forearm. The State's response to Sconion's motion to suppress states that the investigators with the APD received the preliminary forensic report concluding that the DNA on the two victims was from the same person on October 4, 2017, two days before the DNA search warrant was applied for.

> knows, maybe if they had done a similar type of sweep after the first maybe the second one wouldn't have happened, but that was the very next day.
>
> But in this particular case the detail described by the police, a person came into the sweep area. The person that came into the sweep area, which apparently was in very close proximity to the 40 Liberty Street location, happened to be the Defendant here. There was some inter play as this application indicates, but what also is laid out there is that the Defendant left the area and went into the direction of his residence which was right near the crime location.
>
> So, where I disagree with the State to some extent, if there was some indication of your client that would have in essence put him outside the potentialities, then I might agree with the defense. In other words, if he was very, very tall or very, very obese that wouldn't match what the victim described. We're stuck with what those descriptions are. They are what they are. For example, if the victim had said this was an extremely short person had walked into the direction of the residence, then I would say okay, that doesn't fit. Likewise, if the victim had said this was an extremely obese person and the police sought DNA, I would agree with the defense.
>
> But, I think the most weighty bit of evidence here is the fact that the Defendant's residence to which he went was in such close proximity to the actual addresses of the alleged crimes in both of these cases I believe is sufficient enough and because his description was within the realm of possibilities, the Court will deny the defense motion in this case.

Thereafter, Sconion agreed to proceed by way of a not guilty agreed statement of facts with respect to one count of rape and a second count of attempted rape, preserving his right to challenge the suppression ruling on appeal. After conviction and sentencing he noted a timely appeal.

DISCUSSION

The sole issue on appeal is whether the District Court judge who issued the warrant had a substantial basis to conclude there was probable cause to believe DNA from Sconion would lead to evidence of the identity of the rapist of Ms. K. and the attempted rapist of

Ms. H. *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983). If we determine that there was a substantial basis for the issuing court's finding of probable cause, we must uphold the warrant. *Moats v. State*, 455 Md. 682, 700 (2017). In that circumstance, the circuit court correctly denied the motion to suppress. If there was not a substantial basis for the issuing court's finding of probable cause, the suppression motion should have been granted.

"The substantial basis standard involves something less than finding the existence of probable cause, and is less demanding than even the familiar 'clearly erroneous' standard by which appellate courts review judicial fact finding in a trial setting." *State v. Coley*, 145 Md. App. 502, 521 (2002). Probable cause is a "practical, nontechnical conception" that involves "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Gates*, *supra*, at 231. "The task of the issuing judge is to reach a practical and common-sense decision, given all of the circumstances set forth in the affidavit, as to whether there exists a fair probability that contraband or evidence of a crime will be found in a particular search." *Greenstreet v. State*, 392 Md. 652, 667-68 (2006).

Because warrants are encouraged, our standard of review of the decision to issue a warrant is highly deferential. *McDonald v. State*, 347 Md. 452, 467 (1997). "The preference for the warrant and the resulting presumptive validity of the warrant will be able to cover over flaws that might be more compromising if one were examining probable cause in a warrantless setting." *State v. Johnson*, 208 Md. App. 573, 587 (2012).

Sconion contends the issuing judge lacked a substantial basis to conclude there was probable cause to believe his DNA would produce evidence in the cases. He argues that his general proximity to the scenes of the crimes three weeks after they were committed and his inclusion in what amounts to a generic, non-specific description of the assailant "could not permit the reasonable degree of selectivity required to seize him and take his DNA." He relies primarily upon four cases, none of which concern warrant-based searches.

In *Cartnail v. State*, 359 Md. 272 (2000), a hotel was held up at gunpoint by three black males who fled, in an unknown direction, in a gold or tan car. An hour and fifteen minutes later, two miles from the robbery, the police stopped a gold car that was being driven by a black male and in which there was a black male passenger. The driver had not violated any rules of the road. The Court of Appeals held that under the totality of the circumstances, the police did not have reasonable articulable suspicion to make an investigatory traffic stop of the car and to seize the driver. In deciding the issue of reasonable suspicion, the Court evaluated factors suggested by Professor LaFave, including the particularity of the description of the suspects and their vehicle, the size of the area in which they might be found, the number of people in that area, the direction of flight, the activity of the person stopped, and the knowledge or suspicion that the person or vehicle stopped had been involved in other crimes. The Court found that these factors did not weigh in favor of reasonable suspicion, as the occupants of the car were engaged in facially lawful activity, the getaway car was described only by color, and the descriptions of the

robbers were generic, giving only their races and genders. There were no specific and articulable facts to support a suspicion that the driver and passenger in the gold car had committed the robbery.

Likewise, in *Stokes v. State*, 362 Md. 407 (2001), and *Madison-Sheppard v. State*, 177 Md. App. 165 (2007), the appellate Courts concluded that there was not reasonable articulable suspicion to support stops and seizures. In *Stokes*, the report to police of a robbery did not give the suspect's height or weight or describe the getaway vehicle. The only description of the robber was that he was a black male wearing a black tee shirt. Thirty minutes later, the police saw the defendant, a black male wearing all black clothing, drive quickly into a parking lot and park his car diagonally across two spaces. The police stopped and frisked him, and found marijuana on his person. The Court of Appeals held that the police did not have a particularized suspicion that the defendant had committed the robbery to stop and search him.

In *Madison-Sheppard*, the police broadcast a lookout for a black male, approximately six feet tall and 180 pounds, with cornrow-styled hair, on suspicion of having committed a murder in the Elkton area earlier the same week. The police saw the defendant in Elkton, standing on the steps of a house. He met the general description given in the broadcast. The defendant sat down and acted nervous. The police then handcuffed him and searched his person, finding cocaine. This Court held that the description of the wanted person was not specifically unique to believe that the defendant was that person, the defendant's location and the time elapsed from when the crime was committed did not

make it likely that he was the wanted person, there was nothing to suggest it was unusual to find a man of the defendant's general description in the location where he was seen, there was no flight, and nervousness upon being approached by the police was not unusual. All and all, the circumstances did not generate reasonable articulable suspicion to support the arrest and search.

Finally, in *Roundtree v. State*, 11 Md. App. 51 (1971), this Court held that there was not probable cause to support the warrantless arrest of the defendant soon after a crime because he did not meet the specific description of the perpetrator that was broadcast to the police.

In the case at bar, we are not dealing with a warrantless stop or search, which is unfavored under the law. We are dealing with a DNA search undertaken in compliance with a warrant. The question whether there was a substantial basis for the District Court judge to find probable cause to issue the warrant is not the same as the question whether there was reasonable articulable suspicion or probable cause to effect a warrantless stop, search, or seizure.

In response to Sconion's arguments, the State discusses at length the facts that would reasonably lead an issuing judge to think the rape and attempted rape were committed by the same person. Sconion does not appear to be disputing that conclusion, however. The crimes had much in common: the victims arranged to meet their perpetrators using the same website; the arranged sexual encounters were to take place either at 40 Liberty Street or next door at 38 Liberty Street, and Victim Two's assailant was seen

standing in front of 40 Liberty Street; the assailants both were wearing a "gray hooded sweatshirt/jacket"; both crimes were carried out with the perpetrator using a knife; and both assailants were black men with a slim build. And, although cryptically written, the warrant application gave sufficient indication that DNA from a single suspect was recovered from both victims. It is relevant that the crimes likely were committed by the same man, but the primary question is whether there was a substantial basis for the District Court judge to find probable cause that Sconion was that man.

On that critical issue, the State argues that the following evidence in the warrant application supports the issuing judge's finding of probable cause to believe the rape and attempted rape were committed by Sconion, and therefore his DNA would be evidence to prove those crimes. First, Sconion not only fit the physical description the victims had given of their assailants by height, build, and complexion, he was wearing the same hooded gray jacket they had described. Second, he lived immediately across the street from the vacant house that was the common location associated with both crimes. And finally, the K-9 track from that common location led across the street to a footpath next to Sconion's house, with the dog focusing on the area right behind Sconion's house and the house next door, before tracking the scent to its end at nearby Aberdeen Avenue. The State maintains that this evidence taken in its totality - - Sconion's physical resemblance to the attacker; his wearing the same jacket as the attacker; the location of his house right across the street from the attacks; and the tracking of the assailant's escape route after the second attack to

include, and concentrate on, his house - - make it likely that he was the person who committed these sexual attacks.

For the most part, the State distinguishes the cases Sconion cites as involving warrantless searches and argues that, if there is any analogy to be drawn to the warrantless search cases, some warrantless searches where the suspect was described with more particularity than in *Cartnail* and *Stokes* are supportive. *See, e.g., Collins v. State*, 376 Md. 359 (2003) (description of robber was more specific than in *Cartnail* and *Stokes* and included method of escape); *Williams v. State*, 212 Md. App. 396 (2013) (suspect's proximity to the scene of two recent crimes was a factor supporting reasonable suspicion).

The only warrant-based search case cited by the State is *United States v. Mason*, 59 M. J. 416 (2004). There, the victim was raped in her home, by a man she did not know and that she could not see well. Two months later, Mason, who fit the general description of the rapist - - a stocky black male between 5' 4" and 5' 6" - - was identified as the owner of a car seen in the vicinity of the site of the crime, at the same time of day as the crime had been committed. An investigation showed that Mason lived one or two blocks from the victim's house, and because of the nature of his employment, he would have had similar gloves to a glove the rapist left at the scene. Mason was known to have the same blood type as the rapist (a type found in 19% of the African-American population). Based on that information, a magistrate issued a DNA warrant for Mason.

After Mason was charged, a military judge denied a motion to suppress the DNA evidence obtained upon execution of the warrant. Mason was convicted, and on appeal,

the United States Army Court of Criminal Appeals held that the totality of the circumstances, as viewed by the issuing magistrate "applying her common sense," "supported a reasonable belief that evidence, in the form of DNA, would likely be found in [Mason]." 59 M. J. at 421.

Although not cited by either party, we find this Court's decision in *Wilson v. State*, 132 Md. App. 510 (2000), helpful. In that appeal, we were reviewing, among other issues, whether there had been a substantial basis for a judge to issue a DNA warrant for a man who was suspected of raping one woman and attempting to abduct two others, all in close proximity to each other. "The issue in dispute was whether the descriptions of their assailants by [the three victims] were sufficient to pinpoint the [defendant] as the probable culprit." *Id*. at 535. The assailant was described as a "black male, 6'2" to 6'3", 22 years old, dark complected, 190 to 200 pounds, well built, muscular[,]" not fat, hair "very short on the sides, slightly long and fuller at the top, slim thin mustache and a five o'clock shadow." *Id.* He had a metal watch or bracelet on his left arm, an average nose, slightly broad lips, clear facial skin, and was clean-cut. He had worn "a ski jacket with no hood" that was white with a royal blue "V" from the arms to the midriff area, with another "V" in the back, a front zipper, and perhaps a yellow accent stripe below the blue "V." *Id*. Two of Wilson's relatives had described him as recently wearing a jacket similar to that description. In denying the motion to suppress the DNA evidence, the suppression judge emphasized that the "V" on the jacket Wilson was seen wearing was a critical fact.

We held that there was a substantial basis to support the judge's probable cause determination. Although some witnesses had varied in the colors they had seen on the jacket, the "V" pattern had been seen by all of them. "In view of the very strong deference that should be extended to the [issuing judge's] determination that probable cause existed for the issuance of a warrant . . . . we cannot say that" the suppression judge erred in denying the motion to suppress DNA evidence. *Id*. at 537-38.

The warrant cases teach that in deciding whether there was a substantial basis for the judge to find probable cause that evidence of a crime would be found, we must view all the facts relevant to such a finding in their totality and we must give deference to the issuing judge's appraisal of those facts. Here, there are several facts set forth in the warrant application that, seen together, painted a picture supportive of probable cause. To be sure, the jacket the victims described the assailant as wearing did not have a unique design, but it was of a certain style and color that was exactly the same as the jacket Sconion later was seen wearing. And unlike some of the other cases, the physical proximity between Sconion's house and 40 Liberty Street, which was the meeting location for one victim and the attack location for the other, was unusually close. And the K-9 track from the locus of the second attack to Sconion's house was performed immediately after the attempted rape of Ms. H. That fact militates in favor of probable cause and therefore was not time-delayed, as Sconion complains his siting was. The description of the assailant was not distinctive but included enough features in common with Sconion that he could be identified as meeting the assailant's description.

This is a close case. Given the deference with which we are to treat a judge's probable cause determination, however, we conclude that the issuing judge in this case had a substantial basis on which to find probable cause to believe that a warrant for Sconion's DNA would produce evidence of the crimes against Ms. K. and Ms. H. Accordingly, we hold that the circuit court did not err in denying Sconion's suppression motion.

JUDGMENTS AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.