Circuit Court for Baltimore City
Case No. 117240019 & 117240018

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1263

September Term, 2020

KEITH HAYES

v.

STATE OF MARYLAND

Beachley,
Shaw,
Adkins, Sally D.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw, J.

Filed: March 25, 2022

Appellant, Keith Hayes, was convicted by a jury in the Circuit Court for Baltimore City of sexually assaulting two minors. Hayes presents one question for our review, which we have rephrased:

> 1. Did the court err in denying the motion to suppress the DNA results and subsequent photographic identification when the DNA sample used to identify Hayes was obtained pursuant to a search warrant in a 2014 case[1] that was subsequently dismissed and expunged from Hayes's record?[2]

For reasons set forth below, we affirm.

BACKGROUND

On March 17, 2015, Hayes's DNA was collected pursuant to a search warrant as part of an investigation of a rape allegedly committed by Hayes in July of 2014. Hayes was arrested in connection with this incident on March 18, 2015. The case was later nol prossed. Hayes requested and was granted an expungement which ordered that police records about his "arrest, detention, or confinement on or about MARCH 18, 2015" and "the other court records in this action" be expunged.

On March 14, 2017, minors, J.P. and T.W., were raped in an abandoned house in Baltimore City. They were taken to the hospital and examined by SAFE nurses, and

[1] We refer to the rape that allegedly occurred in 2014 and was investigated in 2015 as the "2014 case" in order to maintain consistency with Hayes's previous appeal.

[2] "Where the motions court found that '[t]here was no dispute that the DNA sample from the dismissed [2015] case, 14G05413, was used in the comparison to identify [co-defendant] and Hayes as possible perpetrators in this case,' and that Hayes obtained an expungement order in Case 14G05413, did the court err in denying the motion to dismiss the DNA results and the subsequent photographic identification because the 2015 DNA sample was obtained pursuant to a search warrant?"

vaginal swabs were collected. Two months later, a Baltimore City forensic scientist contacted the Baltimore City Police Department to inform them of "high stringency matches" between the specimens taken from J.P. and T.W. by the SAFE nurses and a specimen attributed to Hayes from the 2014 case. The matches were found in a local DNA index system. Based on the match, the police created a photo array from which J.P. identified Hayes. An arrest warrant for Hayes was issued on July 27, 2017, and he was arrested several days after. A search warrant to obtain oral swabs from Hayes was obtained on August 28, 2017.

Prior to trial in the 2017 case, Hayes filed a motion to suppress the DNA evidence and the photographic identification that followed. The State responded, and a hearing was held on the motion on June 17, 2018. At the hearing, Hayes provided the written expungement order regarding the 2014 case to the court, and the prosecutor conceded that the State had no basis to challenge that order. The judge initially granted Hayes's motion to suppress based on her understanding that the "high stringency match[]" came from the specimen collected pursuant to the March 17, 2015 search warrant and that the expungement order prohibited the State's use of that specimen to establish probable cause. The judge, later, reconsidered her ruling on the motion to suppress and ultimately denied the motion.

Hayes was tried jointly with co-defendant Travis Burroughs before a jury in the Circuit Court for Baltimore City. He was convicted of conspiracy to commit second-degree rape of T.W., conspiracy to commit third-degree sexual offense of T.W., second-degree rape of J.P., third-degree sexual offense of J.P., conspiracy to commit third-degree

sexual offense of J.P., second-degree assault of J.P., and conspiracy to commit second-degree assault of J.P.

Hayes appealed his conviction to this Court, and we remanded the matter for further proceedings in May of 2020.[3] We asked the trial court to make findings of fact related to the source of the disputed DNA evidence and to resentence Hayes because of a numerical error. In July of 2020, the trial judge sent written findings of fact to this Court without holding a hearing on the matter or providing notice of its written findings to either party. On December 18, 2020, the trial court held a proceeding, but would not allow either party to offer evidence nor did the court allow the parties an opportunity to be heard prior to the court making "Findings of Fact." Hayes's Motion for Reconsideration was denied January 15, 2021, and this appeal followed.

STANDARD OF REVIEW

"When reviewing a circuit court's denial of a motion to suppress evidence, we interpret the record in the light most favorable to the prevailing party and accept the factual findings unless they are clearly erroneous." *Lewis v. State*, 470 Md. 1, 17 (2020). We consider matters of statutory interpretation *de novo*. *Bellard v. State*, 452 Md. 467, 481 (2017).

DISCUSSION

The Public Safety ("PS") Article of the Maryland Code provides:

> (a)(1) Except as provided in paragraph (2) of this subsection, any DNA samples and records generated as part of a criminal investigation or

[3] *See Hayes v. State of Maryland*, No. 2185, Sept. Term 2018 (2020).

> prosecution shall be destroyed or expunged automatically from the State DNA data base if:
>
> (i) a criminal action begun against the individual relating to the crime does not result in a conviction of the individual.

Md. Code Ann. PS § 2-511 (2022). COMAR states:

> This chapter governs only the collection, submission, receipt, identification, testing, storage, and disposal of DNA samples from individuals arrested and charged or convicted, or both, for various specified crimes and the entry of the samples into the State DNA Data Base System and CODIS pursuant to Public Safety Article § 2-501 et seq., Annotated Code of Maryland. This chapter does not govern evidentiary, suspect, and forensic samples otherwise legally obtained, whether by search warrant, court order, consent, or other method except as specifically provided in Regulation .16 of this chapter.

COMAR 29.05.01.02A(1).

Appellant Hayes argues that his motion to suppress should have been granted because the plain language of the Maryland DNA Collection Act is clear and, as a result, his DNA should have been expunged. Hayes also argues that the court erred in denying his motion to suppress because it erroneously extended this Court's holding in *Varriale v. State*, 218 Md. App. 47 (2014), *aff'd on other grounds*, 444 Md. 400 (2015). The State counters that the scope of the expungement statute is ambiguous, and therefore we must look to legislative intent, including COMAR. According to the State, the COMAR provision more fully explains the DNA statute that was broadly written, and thus weight must be given to the administrative agency's interpretation and application of the statute that it administers.

We agree that the plain language of PS § 2-511 alone does not provide sufficient specificity to determine whether or not Hayes's Motion to Suppress should have been granted, and we find *Varriale v. State* to be instructive. There, this Court held that the

Fourth Amendment and the Maryland DNA Collection Act permit the retention of voluntarily given DNA samples even after the suspect has been cleared of wrongdoing in the investigation for which the sample was obtained. *Varriale*, 218 Md. App. at 60. In the appeal,[4] Varriale argued that based on the expungement provisions of PS § 2-511, "Maryland's DNA Collection Act does not permit the retention of a person's DNA if he or she has been cleared of suspicion in the investigation in which the sample was obtained." *Id.* at 55. After reviewing the legislative history, this Court disagreed. We held the DNA Collection Act only applies to people who gave DNA samples "after being charged with or convicted of certain enumerated crimes" because all of the locations where DNA "shall be collected" in PS § 2-504 are places where a person would be found only if they were "'charged' with an offense, 'confined' for committing an offense, 'on probation' for committing an offense, or awaiting 'the imposition of sentence.'" *Id.* at 57-59.

We considered COMAR provisions relevant to Varriale's case, noting that

[4] The facts in *Varriale* are as follows. Varriale had voluntarily provided the police with a DNA sample to eliminate himself as a suspect in a rape case, signing a consent form that specifically stated evidence could be used "in any future criminal prosecution." *Varriale*, 218 Md. App. at 50-51. After he was cleared in that case, his sample was entered into the Local DNA Index System. *Id.* at 52. Later that year, during an unrelated criminal investigation, a detective ran a search of unknown DNA samples against DNA profiles of known persons. *Id.* Varriale's profile matched a sample found in an unsolved commercial robbery that had been committed a few years prior. *Id.* Based on the DNA match, Varriale was charged with crimes related to the robbery. *Id.* Varriale filed a Motion to Suppress, arguing that using the sample in that format was beyond what he had consented to and was therefore a violation of his Fourth Amendment rights and the Maryland DNA Collection Act. *Id.* at 52, 55. The circuit court denied the motion, and Varriale appealed. *Id.* at 49. This Court affirmed the trial court, holding without "a Fourth Amendment violation nor a DNA Collection Act violation, we conclude that the trial court did not err when it refused to suppress Varriale's DNA evidence." *Id.* at 60.

COMAR 29.05.01.02A(1) says the DNA Collection Act governs DNA samples from people "arrested and charged or convicted, or both." This Court then deferred to the Maryland State Police's "deliberate and well published interpretation" of the statute because it was the agency that was authorized to promulgate regulations under the Act. We held that the agency's interpretation supports the language of PS § 2-511. *Varriale* further instructs that the source of the DNA evidence is pertinent to determining if the DNA sample at issue was properly collected pursuant to PS § 2-504 and properly retained pursuant to PS § 2-511. *Id.* at 57-58.

In 2020, when this Court remanded this case back to the circuit court, we held:

> To determine whether the trial court erred in denying appellants' motions to suppress, there must first be a determination as to the source of the DNA. Specifically, how and when it was collected and whether it was collected pursuant to PS § 2-504. In accordance with Maryland Rule 8-604, we are compelled to remand with instructions to the trial court to make findings of fact regarding the source of the 2014 DNA sample.

Hayes v. State of Maryland, No. 2185, Sept. Term 2018 (2020) at 15. On remand, the judge made the following findings of fact:

> The Court instructed me to just make a finding of fact on the record and that's [*sic*] what Im [*sic*] going to do. On May 23rd, 2018, Travis Burroughs and Keith Hayes filed motions to suppress DNA evidence. On June 15th, 2018, a hearing was held before this Court. At the hearing Burroughs and Hayes both argued that the DNA sample used for Incident Number 146G, as in George, 05413, should have been expunged and should not have been used for probable cause.
>
> Burroughs and Hayes were charged as co-defendants for a rape that occurred on July 14th under Incident Number 146G05413. The State dismissed the charges in 2015. In support of their arguments, both defendants relied on the Annotated Code of Maryland Public Safety Article 2-511. The State argued that 2-511 was inapplicable, because the DNA collected and held in connection with the July 14th rape had been legally obtained under a search warrant. And PC, Public Safety Article 2-511

applies only to arrestees and convicted offender samples.

There are three different DNA databases. There is the local DNA database, Baltimore City. The State database, State Police, and the national database, FBI. The DNA from the vaginal swab taken from the two victims in this case were entered into the local DNA database by the DNA analyst and letters were generated for Burroughs and Hayes. The detective included the information from the letters as probable cause to obtain search warrant for Burroughs and Hayes DNA.

There were at least three cases in the local database for Burroughs and Hayes. The DNA analyst placed an asterisk next to Incident Number 146G05413. As stated in this incident number, from the dismissed rape case where Burroughs and Hayes were co-defendants. At the hearing, Defendant Hayes produced a letter of Expungement for Incident Number 146G05413. He argued that his case had been expunged and that the DNA sample from the Incident Number 146G005413 [*sic*] should have been automatically removed from the local database pursuant to Public Safety Article 2-511 and not used to establish probable cause.

The State argued that because Hayes only filed for expungement of the case itself and not the expungement of the DNA sample, the sample [was] legally retained in the local database. This argument is contrary to Public Safety Article 2-511(f)(1). Defendant Burroughs did not file for expungement of the two 2004 rape charges like Hayes. He argues that because the charges for the July 2014 rape case were dismissed, the DNA sample should have automatically been removed from the local database pursuant to Public Safety Article 2-511.

Mr. Kenneth Jones, Deputy Director of Analytical Sciences in the Crime Lab for Baltimore City Police Department, testified at the hearing and explained the three levels of the Combined DNA Index System, which is CODIS. He testified that there was a local level, a state level, and a national level. He testified that if samples are entered into the local level and samples matched samples already in the database, the analyst will draft a letter. The letter from the analyst will indicate the samples from the case matching the samples at the local level.

If multiple cases are hitting, the analyst will put all in the letter. Jones testified the DNA analyst assigned to this case generated letters and forwarded the letters to the detective in the case. There was no dispute that the DNA sample from the dismissed rape case, 146G05413, was used in the comparison to identify Burroughs and Hayes as possible perpetrators in this case. In the letters generated from Hayes, there were three cases. There was an asterisk placed next to Incident Number 146G05413, second specimen ID. The explanation of the asterisk was to indicate the specimen ID had been previously attributed to Keith Hayes.

Jones testified that the Hayes samples were received by the laboratory

> based on a search and seizure warrant. Jones further testified that 146G05413 is the case where the sample from Keith Hayes was obtained and tested. Accordingly, 146G05413, is the case where the vaginal swabs from the victims July 14th rape case were later matched to Hayes after his DNA was obtained under a search and seizure warrant.

Appellant argues the court did address the source of Hayes's DNA as being from a search and seizure warrant. The State argues the judge made a finding that the sample obtained was from a vaginal swab, but its brief concedes that "the court's findings were not a model of clarity." We agree that the court did make a finding that the source of the DNA was from a vaginal swab. The court then applied the principles laid out in *Varriale* and concluded that the DNA was properly collected and retained pursuant to PS § 2-504 or § 2-511. We hold that the court properly made its determination that the sample was not subject to expungement, in accordance with *Varriale*.

As a result, we hold the court did not err in denying the motion to suppress the DNA results and subsequent photographic identification.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.