UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1437

September Term, 2013

STATE OF MARYLAND

v.

WALTER DWAYNE DAVIS

Krauser, C.J.,
Meredith,
Nazarian,

JJ.

Opinion by Meredith, J.

Filed: July 14, 2015

On August 23, 2012, Walter Dwayne Davis, appellee, was arrested at a shopping center in Largo, Maryland, as the primary suspect in two rape investigations. Appellee was subsequently indicted by the grand jury in Prince George's County on ten counts, including first and second degree rape, first degree burglary, and false imprisonment. Acting through his attorney, appellee filed an omnibus pretrial motion which included, *inter alia*, motions to suppress illegally obtained evidence and to dismiss the charges. Appellee also filed a *pro se* motion to dismiss the indictment, arguing that police violated the Fourth Amendment, as well as the Maryland Wiretapping and Electronic Surveillance statute, Maryland Code, Courts and Judicial Proceedings Article ("C.J."), § 10-402(c)(ii), when locating and arresting him. After conducting two motions hearings, the circuit court granted appellee's motion to dismiss the indictment. In this appeal, the State, appellant, challenges the dismissal of the charges.

QUESTIONS PRESENTED

The State presented one question for our review, which we have rephrased as follows: Did the circuit court err by dismissing the indictment by which the State charged appellee with rape and assault?[1]

Because we conclude that the circuit court erred in dismissing the indictment, we vacate the judgment and remand this case for further proceedings in the circuit court.

[1] The State phrased the question for our review as follows: "Did the circuit court err as a matter of law in dismissing rape charges against Davis, where [there] was no basis to suppress evidence, let alone a justification to dismiss the indictment?"

FACTS & PROCEDURAL HISTORY

In June 2012, a woman (whom we will refer to as "S.R.") reported to Prince George's County Police that she had been raped by a man she had met through the social networking website known as Facebook. S.R. did not know her attacker's real name, but told police that his Facebook user name was "Boss Man Aleem," and that his phone number was 202-292-####. She also provided investigators with a physical description of her alleged assailant. During the course of investigating S.R.'s complaint, Detective Patrick Killerlane, the lead detective in the case, learned that, in August 2012, a second local woman reported a rape involving a similar *modus operandi*. The second victim told Prince George's County Police detectives that she had contacted her attacker by telephone prior to the rape, and that his phone number was 202-292-####, the identical phone number as that of S.R.'s assailant. The detectives learned that that phone number was assigned to a cellular telephone that operated on the Sprint Nextel ("Sprint") network.

On August 22, 2012, police officers sent Sprint a document entitled "Exigent Circumstances Form," requesting information about the location of the cell phone used by the suspected serial rapist. Police did not obtain a warrant or a court order before requesting the information. On August 23, 2012, Sprint responded to the request and informed officers that, based on information from the global positioning system ("GPS") software in the suspect's phone, Sprint had determined that the phone was currently active in the Largo Town Center shopping mall. The Prince George's County Police warrant squad went to the mall and identified appellant as the suspect. Officers approached appellant, identified

themselves as police, and asked for his name and identification. Appellee was unable to produce any form of identification, but told officers that his name was "Duane Gary Johnson." After contacting a police dispatcher, the warrant squad learned that there was an outstanding arrest warrant for Duane Johnson. They arrested appellant. It is not apparent from the record that any incriminating evidence relevant to the rape charges was found on appellee's person. The following evening, S.R. was shown a photo array containing a photograph of appellant, and she immediately identified him as her rapist. Appellee was subsequently charged with ten counts related to the rape of S.R., including rape in the first and second degrees, assault, and burglary. On September 20, 2012, appellant was formally indicted on these charges.

Acting through his court-appointed attorney, appellee filed an omnibus pretrial motion which included, among other requests, a motion to suppress illegally obtained evidence and a motion to dismiss the charges. The motion did not specifically identify the evidence which appellee sought to suppress or the legal basis for asking the court to dismiss the charges.

On April 19, 2013, appellee filed a handwritten *pro se* motion to dismiss the indictment. In that motion, appellee argued that his arrest violated both the Fourth Amendment and the Maryland Wiretapping and Electronic Surveillance statute, C.J. § 10-402(c)(ii), because:

> On pg. 10 of [discovery documents provided by the State], Detective P. Killerlane (#1984) states in his summary "After having Sprint/Nextel conduct a track on the suspect phone, I was advised the suspect was located at Largo Town Center.["]

> This proves I was illegally apprehend[ed] for to conduct such electronic surveillance specified in Code. Ann. of Md § 10-402, one must have a court order from an authorizing judge. It seems to me that these detectives are writing there [sic] own subpoena's [sic] which renders any charges and/or evidence invalid as they are to be considered "Fruits of the poisonous tree."

Once again, appellee did not identify in the motion what evidence he sought to suppress.

The circuit court conducted two motions hearings — the first on July 17, 2013, and the second on August 23, 2013. At the July 17 hearing, Detective Killerlane described his efforts to locate and apprehend appellee:

> [Defense Counsel]: How is it that you came about getting information regarding this suspect?
>
> [Detective Killerlane]: We had had a sexual assault that had happened the day before, August 22, and based on the suspect or the description provided by the victim in that case, and it occurred right around the same, the Largo area.
>
> Q How is it that you directed Sergeant Hammid [of the warrant squad] to Largo Town Center?
>
> A We received information that there was a suspect possibly matching the description in that area.
>
> Q What information did you receive, sir?
>
> A Basically, not exactly sure how to phrase it[.] When the sexual assault had occurred the day before, we had contacted, we had a phone number that was provided by the victim, and we had contacted the carrier of that phone number and done what they call an exigent form to have the cell phone company trace that phone number.
>
> * * *
>
> THE COURT: Is that a warrant?

THE WITNESS: No. It's basically a form that we fill out in reference to exigent circumstances, such as a sexual assault, homicide, kidnappings. And we fax it to the cell phone company.

THE COURT: And they provide you with?

THE WITNESS: Basically, GPS for the cell phone and that's asked for.

* * *

Q [Defense Counsel] Now this GPS location, it's another word for a GPS track; is that correct?

A That's pretty much, yes.

* * *

THE COURT: So in other words that the, just the cell phone company can tell you where the call, where calls were originating from that phone or where calls were placed to that phone?

THE WITNESS: All of the above. If the phone is active, depending on the type of phone, obviously with your newer smarter phones, they are a lot better.

Some of the other, cheaper phones, they aren't able to do it with, but if the phone's capable of having [GPS] on it, then yes.

THE COURT: So if the victim gets a phone call from the person, and if she knows the victim [sic], the victim can tell you whether he got a phone call from this number, then you go to the phone company and then they put the GPS tracking software or whatever, and then they can tell you where that phone is?

THE WITNESS: In a situation like that, yes, an exigent form wouldn't be done because that's not an exigent circumstance, but yes, basically.

Detective Killerlane also testified that, in September 2012, after appellee had already been located and apprehended, the detective obtained a court order for his cell phone's GPS location data. At the end of the motions hearing, the court expressed concerns about the use of the exigent circumstances form and real-time GPS tracking to locate appellee. The court asked the parties to submit supplemental briefing on that issue.

The court conducted a second motions hearing on August 23, 2013, to address appellee's motion to dismiss the indictment. At the conclusion of that hearing, the court announced that it would grant the motion to dismiss the indictment. The court explained:

> Well, I've thought about this case and I, you know, I, again, I deplore the alleged actions of Walter Dwayne Davis, but at — at worst they are against individuals and a series of individuals, but I can't countenance the use of this blanket Exigency Form between Sprint and the police to locate a otherwise inscient [sic] consumers merely because — as targets for arrest — merely because the police say this is exigent.
>
> It seems to me that what is required is involvement of a judicial magistrate to issue a warrant for the use of that information between the third-party service provider and the consumer by police to say we are going to use this as a tracking device on the suspect. So for that reason Defense Motion to Dismiss Indictment is granted.

On August 29, 2013, the State filed a notice of appeal to this Court, which stated: "[T]he State . . . hereby notes an appeal in the above-captioned matter, pursuant to Sections 12-302(c)(1) and to Section 12-302(c)(3) of the Courts and Judicial Proceedings Article."[2] In accordance with the expedited time line for appeals taken by the State pursuant to C.J.

[2] Since August 2013, C.J. § 12-302(c) has been slightly modified and renumbered. In the interest of simplicity, we will use the numbering that was in effect when this appeal was filed, which is also the numbering cited by the parties in their briefs filed in this Court.

§ 12-302(c)(3), this Court scheduled argument for February 2014, with the State's brief due on December 2, 2013. On December 2, 2013, the State filed a motion for postponement, stating:

> In light of an ambiguity in the trial court's decision in this case, this state appeal was filed as both an appeal from the grant of a motion to suppress and an appeal from the dismissal of the indictment. It is not clear to undersigned counsel that the trial court dismissed all counts in the indictment . . . and that the appeal should not proceed under section 12-302(c)(3). This state appeal is properly filed under section 12-302(c)(1), and is therefore not subject to the time restrictions imposed by sub-section (c)(3)(iii).

On December 5, 2013, this Court granted the postponement, noting: "The State of Maryland asserts that it is no longer seeking appellate review of the decisions of the circuit court under § 12-302(c)(3) of the Courts and Judicial Proceedings Article. Rather [it is] seeking review under § 12-302(c)(1) which does not require expedited review."

DISCUSSION

I. Scope of the Appeal

As a threshold matter, appellee argues that the underlying question of whether police violated his Fourth Amendment rights by locating him via real-time GPS tracking is no longer properly before this Court because, he argues, that the State "forfeited appellate review" of that issue when it requested postponement of the briefing schedule beyond the time limits applicable to appeals of suppression rulings pursuant to C.J. § 12-302(c)(3)(i). Appellee points out that the State indicated in its December 2013 postponement motion that it was pursuing this appeal under only C.J. § 12-302(c)(1) — the portion of the statute which permits appeals from the dismissal of an indictment — rather than C.J. § 12-302(c)(3)(i) —

the portion of the statute permitting interlocutory appeals by the State "from a decision of a trial court that excludes evidence offered by the State . . . ." In appellee's view, this Court must therefore assume that appellee's Fourth Amendment rights were violated, and can only determine whether dismissal of the indictment was an appropriate remedy for that violation.

Because we conclude that the remedy issue is dispositive of this appeal, we do not need to reach the underlying Fourth Amendment issue, and therefore need not address appellee's argument that the merits of the circuit court's Fourth Amendment ruling is not properly before this Court. The State's appeal of the judgment granting appellee's motion to dismiss is properly before us pursuant to C.J. § 12-302(c)(1), which expressly provides that, "[i]n a criminal case, the State . . . may appeal from a final judgment granting a motion to dismiss or quashing or dismissing any indictment, information, presentment or inquisition."

II. Dismissal of the Indictment

Appellee contends that dismissal of the indictment was appropriate because the State violated his Fourth Amendment rights by effectively "co-opt[ing] [his] personal private property to serve as a government tracking device." Appellee concedes that dismissal of an indictment is not the typical remedy for a Fourth Amendment violation, but argues that the circuit court has "inherent power to dismiss charges" to sanction "flagrant police misconduct" and prevent "manifest injustice." The State argues that it did not violate appellee's Fourth Amendment rights by simply using the real-time GPS location data provided by Sprint for the purpose of locating and arresting him. In any event, however, the State contends that, even if the use of the GPS location data *did* amount to an illegal search

or seizure, dismissal of the indictment was not an appropriate remedy for an improper search and seizure.

Both parties devote a substantial portion of their briefs to addressing the constitutionality of appellee's arrest, and raise interesting issues regarding the legality of warrantless GPS surveillance of suspects. *See generally United States v. Jones*, ___ U.S. ___, 132 S. Ct. 945 (2012) (addressing the constitutionality of warrantless GPS surveillance of suspect); *Upshur v. State*, 208 Md. App. 383, 398-99 (2012) (no exclusionary rule applies when police improperly obtain cell phone subscriber data in violation of Maryland Stored Communications Act). However, because we are convinced that this appeal can be resolved on narrower grounds, we decline the invitation to create new law in this area. *See VNA Hospice of Maryland v. Dep't of Health & Mental Hygiene*, 406 Md. 584, 606 (2008) (courts should "avoid deciding the constitutional issues and decide the case on a non-constitutional ground if reasonably possible").

We agree with the State's assertion that, assuming *arguendo* that appellee's Fourth Amendment rights were in some manner violated, dismissal of the indictment was not warranted as a remedy for that violation. The appropriate remedy for a Fourth Amendment violation is suppression of the illegally obtained evidence, not dismissal of the indictment. *See Everhart v. State*, 274 Md. 459, 486 (1975) ("'the validity of an indictment is not affected by the character of the evidence considered'" (quoting *United States v. Calandra*, 414 U.S. 338, 344-45 (1974)). When ruling on a motion to dismiss an indictment, the circuit court analyzes "the legal sufficiency of the indictment on its face," *not* "the quality or

quantity of the evidence that the State may produce at trial." *State v. Taylor*, 371 Md. 617, 645 (2002). Dismissal of an indictment is an appropriate remedy when the indictment itself is flawed, that is, "where there is some substantial defect on the face of the indictment, or in the indictment procedure, or where there is some specific statutory requirement pertaining to the indictment procedure which has not been followed." *State v. Bailey*, 289 Md. 143, 150 (1980). In those circumstances, "the motion to dismiss attacks the sufficiency of the indictment, not the sufficiency of the evidence." *Id*.

In contrast, when a court concludes that evidence was obtained in violation of the Fourth Amendment, the exclusionary rule may apply to improperly obtained evidence. *See Myers v. State*, 395 Md. 261, 282 (2006) ("When government officials violate the dictates of the Fourth Amendment, the usual remedy is to suppress any of the resulting physical, tangible materials and verbal evidence."). Accordingly, we need not address the underlying Fourth Amendment issue because, assuming *arguendo* that the State violated appellee's right by using real-time, warrantless GPS tracking to locate him, the correct remedy would be suppression of any illegally obtained evidence, not dismissal of the indictment.[3]

The Court of Appeals was faced with a somewhat similar factual scenario in *Matthews v. State*, 237 Md. 384 (1965), and explicitly held that dismissal of an indictment is not the

[3] As noted above, it is not clear from the record what, if any, evidence appellee sought to suppress as a sanction for the alleged improper utilization of the Exigent Circumstances Form to learn appellee's location on August 23, 2012. Because the circuit court decided to dismiss the indictment, the court made no finding that any specific evidence should be suppressed. Upon remand, that issue remains open to be addressed by the circuit court.

proper remedy for an illegal arrest. In that case, a Baltimore Housing Authority employee alerted a nearby police officer after observing Matthews and an accomplice jimmying open a mailbox in the lobby of an apartment building. *Id*. at 386. The officer, who did not actually see the crime take place, arrested Matthews, who was subsequently convicted of larceny. *Id*. At trial, Matthews argued that the arrest was illegal because the crime was not a felony and was not committed in the officer's presence, and therefore, the officer could not arrest him without a warrant. *Id*. at 387. On appeal, Matthews argued that, because the arrest was illegally effected, the State could not proceed with the prosecution and he was entitled to judgment of acquittal. *Id*. The Court of Appeals rejected his argument, stating: "[T]he sole fact that an arrest may have been unlawful does not affect the jurisdiction of the court, **is not a ground for quashing the indictment and does not preclude trial and conviction for the offense**." *Id*. (emphasis added).

In *United States v. Morrison*, 449 U.S. 361 (1981), the United States Supreme Court held that dismissal of the indictment in Morrison's case was not an appropriate remedy for the alleged violation of his Sixth Amendment rights. The Court stated: "The Sixth Amendment violation, if any, accordingly provides no justification for interfering with the criminal proceedings against respondent Morrison, much less the drastic relief [*i.e.*, dismissal of the indictment] granted by the Court of Appeals." *Id*. at 366-67 (footnote omitted). In support of this holding, the *Morrison* Court stated:

> [A]bsent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate. This has been the result reached where a Fifth Amendment

> violation has occurred, and **we have not suggested that searches and seizures contrary to the Fourth Amendment warrant dismissal of the indictment. The remedy in the criminal proceeding is limited to denying the prosecution the fruits of its transgression**.

Id. at 365-66 (emphasis added) (footnotes omitted). *See also Gelbard v. United States*, 408 U.S. 41, 60 (1972) ("The 'general rule,' as illustrated in [*United States v.*] *Blue,* is that a defendant is not entitled to have his indictment dismissed before trial simply because the Government 'acquire(d) incriminating evidence in violation of the (law),' even if the 'tainted evidence was presented to the grand jury.'" (quoting *United States v. Blue,* 384 U.S. 251, 255 n.3 (1966)); *United States v. Blue, supra*, 384 U.S. at 255 ("Even if we assume that the Government did acquire incriminating evidence in violation of the Fifth Amendment, Blue would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial. . . . Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that **the remedy does not extend to barring the prosecution altogether**. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book." (Emphasis added.)).

Even though dismissal of an indictment is not normally an appropriate remedy for a Fourth Amendment violation, appellee argues that *State v. Siegel,* 266 Md. 256 (1972), and *State v. Bailey, supra*, 289 Md. 143 (1980), stand for the proposition that the circuit court has the inherent authority "to dismiss charges as a remedy for police misconduct in obtaining evidence." Appellee notes that, in both cases, the Court of Appeals affirmed the circuit

court's dismissal of indictments after determining that law enforcement officials failed to comply with statutory wiretap requirements. We are not persuaded that *Siegel* and *Bailey* support appellee's argument that circuit courts have the inherent authority to dismiss indictments generally as a sanction for Fourth Amendment violations.

First, despite appellee's suggestion to the contrary, absent some express statutory authority, the circuit courts do not have inherent authority to dismiss criminal charges in order to sanction misconduct by the State. *Wynn v. State*, 388 Md. 423, 443 (2005) (in criminal cases, circuit courts do not have inherent authority to dismiss charges as a sanction for State's failure to comply with scheduling order). In a concurring opinion in *Wynn*, Judge Alan Wilner wrote: "I concur entirely with the Court's holding that a Maryland trial court has no conferred or inherent authority to dismiss a criminal case merely because a prosecutor has violated some provision of a scheduling order issued by the court." *Id*. at 444. Similarly, in *Gonzales v. State*, 322 Md. 62, 74 (1991), the Court of Appeals held that the circuit court abused its discretion by dismissing an indictment "to teach the prosecution a lesson so as to deter a prosecutor from coming to trial in the future so unprepared." The Court of Appeals held that the circuit court exceeded its authority, explaining: " The State, as the representative of the public, may not be deprived of trying a person duly charged with the commission of a crime merely to teach the prosecutor a lesson for his lack of diligence in pursuing a prosecution, there being no constitutional or statutory rights of an accused to be timely tried involved." *Id*. at 74.

Second, appellee's reliance on *Bailey* and *Siegel* is misplaced. As appellee admits, neither case actually addresses the circuit court's authority to dismiss charges to remedy a Fourth Amendment violation. Further, although both cases addressed indictments that were dismissed after it was determined that wiretap evidence obtained in violation of a statute could not be used in the prosecution, the reasoning in those cases is inapplicable here. In *Bailey*, the Court of Appeals acknowledged the general rule that "a defendant is not entitled to dismissal simply because the prosecution acquired incriminating evidence in violation of [the] law, even if tainted evidence was presented to the grand jury." But the *Bailey* Court reasoned that, because the statute expressly prohibited the use of illegally obtained wiretap evidence in a grand jury proceeding, dismissal of the indictment was an appropriate remedy because the indictment and the illegally obtained evidence were "inextricably intertwined." *Bailey*, 289 Md. at 149–51. The statute in that case, however, applied only to illegally obtained *wiretap* evidence, and the Court's rationale in *Bailey* — that illegal wiretap evidence was presented to the grand jury to obtain the indictment in violation of the State statute — has no application to the facts of this case because here, the crimes charged in the indictment had nothing to do with the alleged violation of the electronic surveillance statutes. The dismissal in *Siegel* was, similarly, based on the fact that the indictment was obtained solely "[o]n the basis of this electronically acquired evidence." 266 Md. at 259. Consequently, once the Court of Appeals ruled that the wiretap orders were invalid, it also held that the indictment had been properly dismissed because "the evidence that arose from

[the improper surveillance] must be suppressed," and there was no other basis for the indictment.

In the years since *Bailey* and *Siegel* were decided, the Court of Appeals has reiterated that the appropriate remedy for a violation of the Fourth Amendment is suppression of illegally obtained evidence, not dismissal of the indictment. *State v. Holton*, 420 Md. 530, 542–43 (2011) ("the general rule" is that "suppression of inadmissible evidence, *rather than dismissal of the indictment*, is the appropriate relief" (emphasis added)). "Ordinarily, because there is no limitation on the character of evidence that may be presented to a grand jury, *a defendant is not entitled to the dismissal of an indictment founded on evidence that is inadmissible at trial*." *Id.* at 542 (emphasis added). Consequently, we are persuaded that dismissal of the indictment in the present case was reversible error.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY VACATED. CASE REMANDED FOR FURTHER PROCEEDINGS.
COSTS TO BE PAID BY APPELLEE.