

Circuit Court for Baltimore City
Case No. 115363026

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1527

September Term, 2021

RONALD EATON CORNISH

v.

STATE OF MARYLAND

Wells, C.J.,
Graeff,
Eyler, Deborah, S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: September 30, 2022

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

On November 3, 2016, a jury in the Circuit Court for Baltimore City found Ronald Eaton Cornish, appellant, guilty of first-degree murder, use of a handgun in a crime of violence, wearing, carrying, or transporting a handgun in a vehicle, wearing and carrying a handgun on a person, and possession of a regulated firearm by a person with a prior felony conviction. The court sentenced appellant to life imprisonment on the first-degree murder conviction, and 20 years, consecutive, on the conviction for use of a handgun in a crime of violence, with a sentence of five years, concurrent, on the conviction of possession of a firearm with a prior felony conviction. All other convictions merged for purposes of sentencing.¹

Appellant subsequently filed a motion for a new trial. The circuit court denied the motion without a hearing, but in *Cornish v. State* (“*Cornish I*”), 461 Md. 518 (2018), the Court of Appeals reversed, holding that appellant established a prima facie case of newly discovered evidence that entitled him to a hearing on his motion. The circuit court subsequently held a hearing, after which it denied appellant’s motion for a new trial.

On appeal, appellant presents the following question for this Court’s review, which we have rephrased slightly, as follows:

Did the circuit court err or abuse its discretion in denying appellant’s motion for a new trial?

For the reasons set forth below, we shall reverse the judgments of the circuit court.

¹ This life sentence was to run consecutively to a life sentence appellant was serving in Georgia for his conviction of robbery with a deadly weapon. At the time of sentencing, appellant also was awaiting trial for federal charges for robbery and use of a deadly weapon in Maryland.

FACTUAL AND PROCEDURAL BACKGROUND

I.

The Murder and Appellant's Trial

On November 8, 2012, at approximately 3:21 p.m., Warren Boone was found dead, near apartment buildings located at the 5100 block of Goodnow Road in Baltimore City. At approximately 3:30 p.m., Detective Brian Kershaw arrived at 5100 Goodnow Road and observed “a pool of blood in the parking lot” near a wooded area. Detective Kershaw saw Mr. Boone’s body approximately 30 to 40 feet away, in the woods. Mr. Boone’s Maryland ID and other personal effects were strewn about near his body.

At approximately 8:00 or 9:00 p.m., Detective Kershaw went to Mr. Boone’s registered address, which was Mr. Boone’s mother’s house. Mr. Boone’s mother and his girlfriend, Rachelle Bellot, advised that Baltimore County police officers notified them regarding Mr. Boone’s car, a Lexus, which had been found engulfed in flames just a few miles away. Detective Kershaw requested that the vehicle be towed to the City’s processing bay, but all that was left of Mr. Boone’s melted vehicle was the frame.

Ms. Bellot, who lived with Mr. Boone and was the mother of his daughter, testified that Mr. Boone sold marijuana. He had two phone numbers, one that was in her name at XXX-XXX-4363, which he used for personal communications, and another phone number that was used for his drug transactions, XXX-XXX-9380.

The last time Ms. Bellot spoke with Mr. Boone was by phone on November 7, 2012, at approximately 6:00 or 7:00 p.m. He told her that he was going to “make a run,” and he

was going to meet an individual named “Black.” After Detective Kershaw arrived at Ms. Boone’s house and told her that Mr. Boone’s body had been found, Ms. Bellot gave Detective Kershaw a photograph depicting Mr. Boone, “Black,” and two other men from “Black’s” Facebook page. That night, when Ms. Bellot went to her and Mr. Boone’s house, she saw that someone had been in the house; various clothes and other items had been thrown around. No part of the door, including the lock, was damaged, and she had to use her keys to enter. She advised Detective Kershaw of the break-in and left.

Detective Kershaw went to the house and observed that it had been ransacked, but there were no signs of forced entry on the doors. In the bedroom, the cover of an air duct on the floor had been removed. Detective Kershaw, testifying as an expert in the sales, distribution, and packaging of street level narcotics, stated that there likely had been narcotics, such as marijuana, stored in the air duct.

Detective Kershaw subsequently determined that “Black” was Richard Pope. In an interview on November 15, 2012, Mr. Pope identified appellant, who he called “Rowe,” as the man who had killed Mr. Boone. During this interview, Mr. Pope said that he was not at the scene of the murder, but he had arranged for the two men to meet because appellant was looking to sell marijuana, and Mr. Boone wanted to purchase from him.²

He said that appellant advised that he had 20 pounds of marijuana to sell for \$1,000 per pound, and Mr. Pope called Mr. Boone and appellant to come meet him at the auto

² As explained in more detail, *infra*, this version of events was different from his testimony at trial.

shop Bumper to Bumper because it “was mutual grounds” for the parties. After Mr. Pope introduced Mr. Boone and appellant, they got into Mr. Boone’s vehicle and had a drink. Mr. Pope then exited the vehicle and got on the bus downtown to his residence on Bessemer Avenue in Dundalk, where he lived with appellant. Appellant later returned to the house at Bessemer, driving Mr. Boone’s vehicle. Appellant told Mr. Pope: “He gone. He’s in a better place.” Appellant subsequently stated that he burned Mr. Boone’s Lexus. The last time Mr. Pope saw appellant was just before appellant left for Atlanta, Georgia.

Mr. Pope provided Detective Kershaw with his own cellphone number, and he provided Detective Kershaw with appellant’s phone number from his contacts, which listed appellant’s cellphone number, under “Rowe.” Multiple times, Mr. Pope denied any involvement in the murder.

On April 22, 2013, Detective Kershaw interviewed Mr. Pope again, this time about appellant’s suspected involvement in other crimes unrelated to Mr. Boone’s murder. Mr. Pope reiterated that he had connected appellant with Mr. Boone because appellant had marijuana to sell. He was supposed to get a “cut” because he connected Mr. Boone and appellant, but Mr. Pope was never given the money.

Appellant’s trial began on November 1, 2016. On the morning of November 2, 2016, the prosecutor informed appellant’s trial counsel and the court that, while Mr. Pope was being transported to the courthouse that morning, he told detectives that he was present for the murder and other events. As discussed in more detail, *infra*, appellant’s trial counsel

considered asking for a postponement, but after speaking with appellant, she did not do so, and the trial went forward.

Mr. Pope testified that he knew appellant, who he called “Rowe,” because, at the time of the murder, he was dating appellant’s sister, who he lived with for a time. He and Mr. Boone were friends, and they sold marijuana together. Appellant asked Mr. Pope if he knew anyone who wanted to buy his marijuana, and Mr. Pope told Mr. Boone. Mr. Pope arranged by telephone for appellant and Mr. Boone to meet on November 7, 2012, at Bumper to Bumper. A woman named Melissa drove Mr. Pope and appellant to the location to meet Mr. Boone.³ She picked up the two men at 7:00 or 7:30 p.m. and dropped them off at Bumper to Bumper, where they waited for approximately 15 to 20 minutes for Mr. Boone to arrive. Mr. Boone then drove Mr. Pope, who was sitting in the front seat, and appellant, who was sitting behind Mr. Pope and providing directions, in his silver Lexus to the spot where appellant kept the marijuana. They arrived at the apartment complex at the 5100 block of Goodnow Road.

Mr. Pope got out of the vehicle and was going to light a cigarette, when he heard Mr. Boone and appellant struggling in the back seat, and he heard two gunshots. “[I]t happened real fast.” Appellant got out of the vehicle and dragged Mr. Boone’s body out of the car, asking Mr. Pope for help. Mr. Pope helped appellant move Mr. Boone’s body “[t]o the brink of the grass area,” and appellant dragged him the rest of the way. Appellant

³ Melissa Malott testified that she regularly provided rides for appellant. She recalled that, around Election Day in 2012, she provided a ride for appellant and his friend “Black” in her red minivan.

then took out money, which Mr. Pope estimated to be “anywhere from [\$]1,000 to \$2,000,” from Mr. Boone’s pockets. Appellant had a silver revolver in the front of his pants. Mr. Pope testified that he was in shock, and he did whatever appellant told him to do because he felt intimidated and because he was involved with appellant’s sister. Mr. Pope and appellant then got in Mr. Boone’s vehicle, with appellant driving, and they drove approximately 15 to 20 minutes to the house on Bessemer. They went through the rest of Mr. Boone’s car. Mr. Pope then took the bus back to Bumper to Bumper.

The following day, November 8, 2012, Mr. Pope and appellant met up again, and appellant was driving Mr. Boone’s Lexus. Appellant drove Mr. Pope, with another car following them, to Mr. Boone’s apartment, and appellant told Mr. Pope that they were going to look for money and drugs. They used a key from Mr. Boone’s keyring to enter the apartment. They searched for money and drugs but found nothing. They then drove past the murder scene and saw that the police had already sectioned it off, so they decided to get rid of Mr. Boone’s Lexus. They filled up gas containers at a gas station, went to a wooded area, and “doused the whole car down with gas, the whole inside and lit it.” They left in the other vehicle that had been following them. The two parted ways after that, but the next day, appellant told Mr. Pope that he was going to Atlanta, Georgia.

Regarding the change in his testimony, Mr. Pope admitted that he did not initially tell the police “exactly everything, but [he] did tell them everything except being there.” As to how and when he changed his story, the following exchange occurred:

[DEFENSE COUNSEL]: And so in the car riding here this morning is the first time that you told this version of events that you just sat here and told the ladies and gentlemen of this jury. Is that a fair statement?

[MR. POPE]: It's the first time I put myself at the place of the crime.

* * *

[DEFENSE COUNSEL]: Okay. And it's the first time that you put yourself being present at the burning of the car?

[MR. POPE]: Yes.

[DEFENSE COUNSEL]: And it's the first time that you said a lot of the things that you said this morning, right?

[MR. POPE]: Just those two things.

[DEFENSE COUNSEL]: Those two things. And how did this subject come up in the car with the detectives this morning?

[MR. POPE]: I can't recall. Just came up.

With regard to his reasons for changing his story, he stated: "No apparent reason. I don't know. Just decided to tell them. Right thing to do."

Detective Kershaw testified that Mr. Pope told him that his phone number was XXX-XXX-7819, and the phone number that Mr. Pope provided to Detective Kershaw for "Rowe" was XXX-XXX-6993. Detective Kershaw requested cell site information for these phones, as well as Mr. Boone's phone number, for November 7-8, 2012. Detective Kershaw had a pen register installed for the phone he connected to appellant, and the tower site locations informed him that the phone was located in Marietta and Smyrna, Georgia, suburbs of Atlanta. Detective Kershaw traveled to Smyrna, Georgia, and he was able to make contact with appellant.

Detective Albert Rotell, a member of the Advanced Technical Team of the Baltimore Police Department, testified as an expert in the field of call detail records, call analysis, and cellphone plotting. Detective Rotell explained that cell phone locations can only be tracked when they are generated by an “event,” like receiving or sending a phone call or text message or surfing the internet, which would use a cell site, and create a record of the individual’s location. Detective Rotell acknowledged that he had “no way of knowing who had any of these phones that were moving on that night.”

Detective Rotell reviewed phone records for the phone number ending in -4363, which was registered to Ms. Bellot, and the State argued that was Mr. Boone’s phone. On November 7, 2012, at approximately 7:09 p.m., the cellphone registered its “last outgoing call,” meaning that it was the last time that someone made a call from that cellphone. At approximately 8:00 p.m., Mr. Boone’s cellphone utilized a cell tower near the Druid Hill Park in Baltimore, and then at 8:55 p.m., Mr. Boone’s cellphone utilized a cellphone tower in the direction of the 5100 block of Goodnow Road, which indicated to Detective Rotell that the cellphone was “making its way across Baltimore.” From 9:05 to 11:21 p.m., there was one incoming and five routed calls, meaning that the calls went to voicemail, and this activity utilized a cell site near Bessemer Avenue. At approximately 11:52 p.m., the cellphone traveled “towards East Baltimore Street, near Madison Avenue.” The cellphone pinged this location again repeatedly from 12:44 a.m. on November 8, 2012, until 8:56 a.m., after which point the phone stopped communication with the network, meaning that it either lost battery or someone turned it off.

Detective Rotell presented phone records for the phone number ending in -7819, which was registered to Mr. Pope. On November 7, 2012, at approximately 6:09 to 6:34 p.m., two incoming calls placed him near Bessemer Avenue. At approximately 7:24 p.m., one incoming call registered near Druid Hill Park. At 7:53 p.m., an incoming call indicated that he was traveling northwest, and another incoming call at 7:55 p.m. placed him near Northern Parkway and I-83. At 8:29 p.m., his phone used the cell site directly next to the 5100 block of Goodnow Avenue. At 9:29 p.m., Mr. Pope made an outgoing call that utilized a tower near Bessemer Avenue.

Finally, Detective Rotell provided cellphone records for a cellphone number ending in -6993, which was the phone number that Mr. Pope gave to Detective Kershaw for appellant. On November 7, 2012, from 6:09 to 6:39 p.m., three incoming calls used a cell site near Bessemer Avenue. There was no location on this cellphone between 6:39 and 8:33 p.m., indicating that there was no cellphone activity during this time. At 8:33 p.m., the cellphone moved to I-895, which was just north of Bessemer Avenue and near Goodnow Road. Between 8:49 and 11:38 p.m., the cellphone again used different cell sites near Bessemer Avenue, likely because of increased phone usage. On November 8, 2012, from 12:11 to 12:14 a.m., there were six incoming calls and three outgoing calls, which used a cell site next to West Belvedere Avenue. At 12:38 a.m., the cellphone moved to the Owings Mills area. At 1:24 a.m., the cellphone moved toward Druid Hill Park. At 1:49 a.m., the cellphone again registered at a tower near Bessemer Avenue. From approximately 9:48 to 9:53 a.m., the cellphone made calls that registered near Bessemer Avenue. Then,

at approximately 10:02 a.m., the cellphone moved through the City toward the East side, and between 10:23 and 11:47 a.m., the cellphone registered near West Belvedere Avenue.⁴

Dr. Stephanie Dean, Assistant Medical Examiner and expert in forensic pathology, testified that Mr. Boone had two gunshot entrance wounds, one on the right side of his head, behind his right ear, and the other was on the right side of his neck, just below the right ear. She testified that gunpowder on the right side of Mr. Boone's neck indicated that there was close-range firing. She concluded that appellant's manner of death was homicide.

The parties stipulated that appellant previously was convicted of a crime that disqualified him from possessing a regulated firearm. Detective Kershaw testified that the Firearms Unit determined that the firearm used to kill Mr. Boone was a .38 caliber handgun. The gun was never recovered.

II.

Motion for a New Trial

On January 26, 2017, counsel for appellant filed a motion for a new trial pursuant to Md. Rule 4-331(b), (c), and *Brady v. Maryland*, 373 U.S. 83 (1963). The errors were as

⁴ The prosecutor used Detective Rotell's testimony in her closing argument, to establish that: (1) Mr. Pope and appellant met Mr. Boone at Bumper to Bumper, then got a ride to another location "where it's wooded"; (2) At this location, Mr. Pope heard appellant shoot Mr. Boone and then saw appellant drag Mr. Boone's body out of the car, at which point Mr. Pope and appellant moved Mr. Boone's body into the woods; and (3) Appellant then went to Mr. Boone's house, "Pendragon," in the Owings Mills area ("Goodnow Road" is Mr. Boone's mother's house and is the address on Mr. Boone's driver's license, but he actually lived at "Pendragon"), then went back to the crime scene, and finally went to a gas station to burn Mr. Boone's Lexus.

follows: (1) the State withheld exculpatory evidence from the defense, including both the May 2013 statement to Baltimore County detectives and Mr. Pope's alleged plea deal regarding federal charges; (2) Detective Kershaw's testimony in front of the grand jury that led to appellant's indictment was not accurate; and (3) appellant was deprived of his right to effective assistance of counsel at trial.

The first error involved a statement that Mr. Pope gave to Baltimore County Detectives on May 2013. On January 6, 2017, defense counsel learned about the statement. The statement was provided by the United States Attorney to the Federal Public Defender's Office in connection with upcoming trials of appellant for robberies and associated murders. The interview primarily involved bank robberies and associated murders with which appellant and Mr. Pope had been charged. During the interview, however, Mr. Pope made some statements about Mr. Boone's murder. Mr. Pope said that, after appellant came back from Atlanta, he had 20 pounds of marijuana, and Mr. Pope "did hook him up with my homeboy and then, this is how I got caught up in everything, tied up in everything because he apparently killed my homeboy," who he clarified was Mr. Boone. Appellant promised to give Mr. Pope \$100 for every pound of marijuana that Mr. Boone bought. Mr. Pope said he "hook[ed] them up" at Bumper to Bumper, where he was "stay[ing] in a room upstairs" from the shop. The next day, Mr. Pope heard on Facebook that Mr. Boone was dead, and he heard from his other friends that the police suspected him because Mr. Pope was the last person that Mr. Boone talked to on the phone. He stated that he later saw appellant with Mr. Boone's silver Lexus, but at the time, he did not realize that the Lexus

was Mr. Boone's vehicle. He did not know what happened to the vehicle because appellant "parked it somewhere," but he was not sure where. The police told him later that "it caught on fire or something like that." Mr. Pope stated: "[H]ad I known [appellant] was going to do that to my homeboy, had I know[n] he didn't really have no weed, but just showed me a baggy to rob my homeboy, I would've never hooked him up with my homeboy." He stated that he had never been to Mr. Boone's house, and he did not know whether appellant had ever been there. He denied any involvement in Mr. Boone's murder.

Defense counsel argued that the prosecutor knew or should have known about the statement. Counsel asserted that the failure to disclose this statement was a *Brady* violation because Mr. Pope was the only witness that testified that appellant murdered Mr. Boone, and the May 2013 statement was "an additional, inconsistent version of Warren Boone's murder."⁵

Second, with regard to Detective Kershaw's grand jury testimony, Detective Kershaw represented to the grand jury that he "obtained court orders for his witness[']s] phone so he could make sure his story was what he said it was," and Mr. Pope's cellphone

⁵ Additionally, both appellant and Mr. Pope faced charges for a robbery of PNC Bank that took place in Baltimore County. Mr. Pope entered a guilty plea in the Baltimore County Circuit Court, and appellant alleged that Mr. Pope cooperated against appellant with the United States Attorney, and as such, never faced federal charges for the robbery. The State argued that no such agreement took place, and the United States Attorney's Office could still prosecute Mr. Pope federally for the robbery charges. In appellant's supplemental motion filed after *Cornish I*, appellant noted that the statute of limitations had run on the federal robbery charges, and "[a]s such, it [could] now be said that, as a result of his cooperation with law enforcement, he avoided federal prosecution." Appellant does not present this argument on appeal.

locations followed the bus route that Mr. Pope purported to take. The cellphone maps created pursuant to Detective Kershaw's investigation, however, did not reflect that Mr. Pope took this bus route. Appellant argued that, according to discovery, the cellphone "record[s] for this matter were procured by November 16th, 2012, and mapped accordingly." The grand jury took place on December 29, 2015. "Therefore, even a simple, cursory review of this data would have revealed that Mr. Pope's story was, if not patently false, certainly uncorroborated."

Finally, counsel argued that appellant's trial counsel's performance was ineffective.⁶ First, she failed to adequately prepare for Mr. Pope, the main witness, who provided a new story the morning of the trial. Second, she failed to impeach Mr. Pope with his prior inconsistent statements and his arrangement with the police to testify in this case. Finally, she failed to adequately investigate appellant's case. Trial counsel submitted an affidavit stating that her performance was deficient, and her failure to adequately prepare for the trial prejudiced his defense.

In its response, the State argued that it "only became aware of Mr. Pope's May 2013 statement" because of appellant's motion for a new trial. Mr. Pope made these statements to federal agents about a robbery that had nothing to do with Mr. Boone's murder, and the State and federal agents "were not acting as a team" in this matter. Even if the State should have provided the May 2013 statement, failure to do so was not a *Brady* violation. The May 2013 statement was consistent with Mr. Pope's two other statements, and as such,

⁶ At this point, appellant had obtained new counsel to represent him.

appellant's counsel "could have and did impeach Mr. Pope on the inconsistencies of those two statements to his trial testimony."

With regard to appellant's argument that Detective Kershaw knowingly presented false testimony to the grand jury, the State alleged that, in December 2012, Detective Kershaw requested that Detective John Jendrek of the Advanced Technical Team determine whether Mr. Pope's description of his bus route was accurate. Detective Jendrek advised Detective Kershaw, without providing a GPS map, that, based on his review of Mr. Pope's cellphone records, Mr. Pope's account was truthful. On May 24, 2016, Detective Jendrek's cellphone maps were disclosed to appellant, but there was no map for Mr. Pope's phone records because "one was never done." In October 2016, Detective Jendrek was no longer assigned to the Advanced Technical Team, and Detective Rotell prepared the GPS maps for trial, which showed that Mr. Pope's phone records placed him at the scene of the murder. On October 3, and 6, 2016, these maps were provided to appellant, and this was the first time the State and Detective Kershaw were aware of the true nature of Mr. Pope's phone records. "Therefore, [Detective] Kershaw did not lie to the grand jury when he testified on December 29, 2015 because up until October 2016, [Detective] Kershaw believed what [Detective] Jendrek had told him regarding [] Mr. Pope's cellular records."

With regard to appellant's ineffective assistance of counsel claim, the State argued that this claim should be in a petition for post-conviction relief, rather than a motion for a new trial. The State requested that the court deny relief on this ground.

Further supplementing his motion for a new trial, appellant stated that he had newly discovered evidence that Detective Kershaw threatened Mr. Pope with charges before Mr. Pope changed his testimony. In an affidavit submitted with the motion, William Kanwisher, an investigator with the Federal Public Defender, stated that he interviewed Mr. Pope on December 9, 2016, and Mr. Pope told him that Detective Kershaw and another detective picked him up at 4:30 a.m. to drive him to the courthouse for appellant's trial. After driving five minutes, Detective Kershaw pulled the vehicle over and showed Mr. Pope the cellphone data showing that he was present at the scene of the murder. Mr. Pope admitted that he was at the scene, and Detective Kershaw then called the prosecutor and discussed immunity. Detective Kershaw threatened to charge Mr. Pope if he did not testify, and Mr. Pope received "formal immunity at the bench, before trial."

The State did not directly address appellant's claim that Mr. Pope's immunity was suppressed, but it countered that "The State of Maryland and the United States government are separate sovereignties and can prosecute an individual for the same offense. There was no agreement between the State's Attorney's Office for Baltimore City and the United States Attorney's Office to not prosecute Mr. Pope for his testimony in this case."

On November 9, 2021, the court held the hearing on appellant's motion for a new trial.⁷ Andrew Szekely, appellant's attorney for the federal charges, testified that he was familiar with Mr. Pope because he was, "depending on your perspective, potentially an

⁷ The hearing was delayed multiple times due, in part, to the COVID-19 pandemic, and in part, to issues with transporting appellant, who was serving a life sentence in Georgia, to the hearing.

accomplice or co-defendant” in those charges. On January 6, 2017, Mr. Szekely and his co-counsel received, as part of discovery from the United States Attorney’s Office, a recording of the statement Mr. Pope made to Baltimore County Detectives Hanlon and Morano on May 20, 2013. After receiving permission to do so from the U.S. Attorney’s Office, Mr. Szekely shared this information with appellant’s counsel in this case after appellant’s trial and also allowed appellant’s counsel to speak with William Kanwisher, an investigator with the office, who interviewed Mr. Pope.

Mr. Kanwisher, a retired investigator for the Federal Public Defender, testified that he was assigned to appellant’s federal case and interviewed Mr. Pope at the Roxbury Correctional Institution as a potential witness in appellant’s case. On October 21, 2016, Mr. Pope told Mr. Kanwisher that he did not want to testify in any case involving appellant in either state or federal court. Mr. Pope said that he was the intermediary between appellant and Mr. Boone to facilitate a drug deal, and he requested that Mr. Kanwisher not tell appellant where he was or that they had spoken. Mr. Kanwisher attended appellant’s trial in this case, and he told appellant’s trial counsel that he was surprised when she told him that Mr. Pope was going to testify because Mr. Pope had told him that he would refuse. He strongly advised appellant’s trial counsel to seek a postponement after she received word that Mr. Pope changed his testimony the morning of trial.

In December 2016, the month after appellant’s trial, Mr. Kanwisher visited Mr. Pope again and asked him why he had changed his mind and testified. Mr. Pope stated that, on the morning of trial, Detective Kershaw drove Mr. Pope away from his correctional

facility and told Mr. Pope that cellphone records placed Mr. Pope in the area of the homicide. Detective Kershaw told Mr. Pope that he could be charged, but the detectives later arranged an immunity deal for Mr. Pope, so he testified. Mr. Pope told Mr. Kanwisher that he testified to avoid charges, and not because it was the right thing to do, as he had testified at trial.

Appellant's trial counsel testified that, at the time of appellant's trial, she had been working as a public defender for approximately 20 years. She filed an omnibus motion in February 2016, requesting all information regarding appellant shortly after she began representing him. On November 15, 2012, she received a long statement given by Mr. Pope during a police interview, and she received a second statement later on in her preparation of the case. She was not aware, until during post-trial filings more than ten days after the verdict, that Mr. Pope had made a third statement in May 2013. Had she known about the May 2013 statement, she would have been able to compare and contrast the May 2013 statement with his November 2012 statement, as well as Mr. Pope's trial testimony. She stated that the November 2012 statement and the May 2013 statement were materially different from one another.

With regard to Mr. Pope changing his testimony, appellant's trial counsel stated that his testimony "was a 180 from anything that he had ever said before." The prosecutor told appellant's trial counsel and the judge that the State was granting Mr. Pope immunity for the murder of Mr. Boone. She spoke with appellant about seeking a postponement, but appellant "deferred to [her] as his counsel," and she decided not to seek the postponement.

She said that her decision amounted to ineffective assistance of counsel, because she “was unable to effectively cross-examine Mr. Pope in the courtroom that day.” Because she had not anticipated an entirely different story, her cross-examination “did not sufficiently go into the variation from his story at trial as compared to what he told Detective Kershaw in the middle of November right after the murder.” Counsel stated that “it was error on my part to go forward that day.”

On November 23, 2021, the court issued its order denying appellant’s motion for a new trial. With regard to the May 2013 statement, the court noted that the State conceded that it could not have been discovered by due diligence prior to trial, so the court evaluated whether there was a substantial possibility that the jury’s verdict would have been affected. The court found that, although the May 2013 statement differed from Mr. Pope’s two other statements to the police, the statement was “merely cumulative impeachment evidence because it [did] not materially differ from the November 2012 and April 2013 statements already in [t]rial [c]ounsel’s possession.” Although the May 2013 statement “would have served some purpose and may have chipped away at Mr. Pope’s overall credibility, [] it [did] not reach the critical mass to evolve beyond merely impeaching evidence,” and it could not be “characterized as being anything other than cumulative.” The court rejected appellant’s argument that any information with regard to Mr. Pope’s statements was crucial because the “State’s case-in-chief was essentially built on the testimony of a single witness,” noting that “the State’s case-in-chief was based in large part on the cellular analysis and mapping performed by Detective [] Rotell.”

With regard to Mr. Pope's "bombshell" statements made to Mr. Kanwisher on the day of trial, the court found that counsel was aware of the statement before the trial began, counsel did not request a postponement, and she cross-examined appellant about the inconsistencies between his trial testimony and his other statements. The December 9, 2016 statement that Mr. Pope made to Mr. Kanwisher explained the circumstances of that change, and could not have been discovered through due diligence. The court then addressed the significance of the evidence, noting counsel's argument that she could have used this statement to impeach Mr. Pope's credibility, and given the State's reliance on Mr. Pope as a witness, his motivation for testifying was important. The court rejected the argument that appellant's conviction relied simply on Mr. Pope's testimony, noting that the State introduced "significant cellular record evidence," which "not only placed [appellant] at the scene of the murder," but also corroborated Mr. Pope's testimony. The court stated that, given the corroboration of the cellphone records, the court could not find that the December 2016 statement was "anything more than impeachment evidence." Moreover, during recross examination, trial counsel elicited testimony from Mr. Pope that indicated that he was receiving complete immunity in exchange for his testimony. Thus, there was not "a significant or substantial possibility that it would have affected the verdict of the jury." Accordingly, it did not establish newly discovered evidence creating "prejudice such that that statement would warrant a new trial."

The court next rejected appellant's *Brady* argument. With respect to the May 2013 statement, appellant failed to show that disclosing it "would have been likely to change the

verdict” because, just as in the other prior statements, Mr. Pope still denied any involvement, making the May 2013 statement just another inconsistent version. Moreover, appellant did not meet his burden to demonstrate that the contents of the May 2013 statement, “received by Baltimore County authorities, was ever imputed to the State.” With regard to the December 2016 statement that Mr. Pope testified to avoid charges, trial counsel was aware that the State agreed not to bring charges against Mr. Pope in exchange for his testimony, and the jury was made aware as well through his recross examination. The court noted, as it did previously, that, considering the cellphone tracking presented at trial, appellant failed to show how providing these statements would have affected the trial.⁸

With regard to Detective Kershaw’s grand jury testimony about Mr. Pope’s cellphone records, the court found that appellant did not provide “any evidence to rebut the State’s assertion that the State was unaware of Mr. Pope’s presence at the scene of the murder until Mr. Pope’s cellular data was mapped in October 2016.” Detective Kershaw’s statement was further bolstered by Mr. Pope’s revealing new testimony on the morning of the trial, because, had Detective Kershaw been aware of the cellphone mapping prior to trial, he likely would have confronted Mr. Pope with this evidence before the morning of trial.

⁸ We note that the transcript citations relied on by the trial court referenced evidence regarding the phones of Mr. Boone and Mr. Pope, not appellant.

Finally, although the court noted that appellant’s ineffective assistance of counsel claim was better suited for post-conviction relief proceedings, it decided to address the claim. The court found that trial counsel’s performance “was objectively reasonable and that her decisions in connection with [appellant’s] allegations might be considered trial strategy.” The record showed that counsel did impeach Mr. Pope, based on inconsistencies in his statements. The court further found that appellant failed to show that her performance was deficient.

This appeal followed.

STANDARD OF REVIEW

“We review a trial court’s denial of a motion for new trial based on newly discovered evidence for abuse of discretion.” *Canales-Yanez v. State*, 472 Md. 132, 156 (2021). We have explained the standard of review, as follows:

Trial courts are vested with “wide latitude in considering a motion for new trial and may consider a number of factors, including credibility, in deciding it; thus, the court has the authority to weigh the evidence and to consider the credibility of witnesses in deciding a motion for new trial.” . . . A trial judge’s discretion, although broad, is not boundless, and abuse of that discretion occurs when it is exercised “in an arbitrary or capricious manner or when he or she acts beyond the letter or reason of law.” . . . “It may be said that the breadth of a trial judge’s discretion to grant or deny a new trial is not fixed and immutable, it will expand or contract depending upon the nature of the factors being considered, and the extent to which its exercise depends upon the opportunity the trial judge had to feel the pulse of the trial, and to rely on his or her own impressions in determining questions of fairness and justice.”

(internal citations omitted). *Mack v. State*, 166 Md. App. 670, 683-84, *cert. denied*, 392 Md. 725 (2006) (parallel citations omitted). *Accord Hunt v. State*, 474 Md. 89, 103-04 (2021).

DISCUSSION

Appellant contends that the court erred in denying his motion for a new trial on multiple grounds. As explained below, we agree that, based on evidence given to an investigator on December 9, 2016, after appellant’s trial, a new trial was warranted.

Md. Rule 4-331(c) provides that “[t]he court may grant a new trial or other appropriate relief on the ground of newly discovered evidence which could not have been discovered by due diligence” within ten days after the verdict. The Court of Appeals has explained, as follows:

In order to prevail on her motion, petitioner had the burden to demonstrate that (1) the statement from [the co-defendant] was in fact, newly discovered evidence—evidence that could not have been discovered by due diligence in time to have presented it in connection with her first motion for new trial, and (2) that the newly discovered evidence ‘may well have produced a different result, that is, there was a substantial or significant possibility that the verdict of the trier of fact would have been affected.’ *Yorke v. State*, 315 Md. 578, 588 (1989). The first prong is essentially a factual one

The second prong is a judgmental one, weighing the effect of the evidence.

Baker v. State, 367 Md. 648, 695 (quoting *Jackson v. State*, 358 Md. 612, 626 (2000)), *cert. denied*, 535 U.S. 1050 (2002).

Mr. Kanwisher testified that he interviewed Mr. Pope in October 2016, prior to appellant’s trial, and Mr. Pope stated that he did not want to testify against appellant in state or federal court. At the trial, although Mr. Pope previously had denied any

involvement in the crimes with which appellant was charged at trial, he changed his story and said that he was there when appellant shot the victim and burned his car. He testified that he first told the story of his involvement that morning, stating that he could not recall how the subject came up, and he decided to tell the police because it was the “[r]ight thing to do.” He denied that the detectives said anything about reducing the sentence he was already serving, and when the prosecutor asked if she offered him “anything in regards to [his] testimony” that morning, he said no. On recross-examination, Mr. Pope agreed that he had been offered complete immunity from charges based on his testimony.

Mr. Kanwisher attended appellant’s trial. At the motion for a new trial, he testified that he was surprised to hear Mr. Pope testify against appellant, based on his prior conversation with appellant regarding his willingness to testify. In December 2016, Mr. Kanwisher visited Mr. Pope again and asked him why he had changed his mind and testified. According to Mr. Kanwisher’s affidavit, which was admitted into evidence, Mr. Pope stated that Detective Kershaw told him that he knew that Mr. Pope was present for the murder, and unless he testified against appellant, Detective Kershaw would charge him. If Mr. Pope agreed to testify, however, he would be granted immunity. Detective Kershaw then “called the assistant state’s attorney and worked out an immunity deal, and after that immunity deal was offered and expected, Mr. Pope ultimately testified at the trial.”

The circuit court, in rejecting the claim that, if this evidence had been known and presented, there was a substantial possibility that the verdict would have been different, discounted the significance of Mr. Pope’s testimony, noting that the State introduced

significant cellphone data, which the court said placed appellant at the scene of the murder and corroborated Mr. Pope's testimony. The court also noted that defense counsel at trial had elicited testimony that Mr. Pope was receiving complete immunity in exchange for his testimony.

Our review of the record leads us to conclude that the circuit court abused its discretion in finding that there was not a substantial possibility that the verdict would have been different if the new evidence had been presented. Initially, the evidence to which the court cited as showing that appellant was at the scene of the murder referred to the location of the victim and Mr. Pope, not appellant. Moreover, Mr. Pope's testimony was key to the State's case. The impact of the new evidence, that Mr. Pope changed his testimony after being confronted with evidence showing that he was at the scene of the crime, threatened with being charged if he did not testify against appellant, and told that he would be given immunity if he did testify, was significantly different from the testimony that the jury heard, i.e., that he changed his story because it was the "[r]ight thing to do." The new evidence, indicating that Mr. Pope changed his story, not because it was the right thing to do, but to avoid being charged himself, was significant evidence regarding the credibility of the only witness that directly put appellant at the scene of the crime. A new trial is warranted.

**JUDGMENTS OF THE CIRCUIT COURT
FOR BALTIMORE CITY REVERSED.
COSTS TO BE PAID BY MAYOR AND
CITY COUNCIL OF BALTIMORE.**