Circuit Court for Montgomery County
Case No. 135204

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1536

September Term, 2019

GREGORY LEE LYLES

v.

STATE OF MARYLAND

Graeff,
Nazarian,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: October 21, 2020

Appellant, Gregory Lee Lyles, was indicted in the Circuit Court for Montgomery County, and charged with two counts of possession with intent to distribute cocaine. Following the denial of appellant's motion to suppress evidence, he was convicted by the court (Albright, J.) on both counts. The court sentenced appellant to 20 years' imprisonment with all but six years suspended, to be followed by five years of probation. On appeal from his convictions, appellant presents the following questions for our review:

1. Did the circuit court err in denying [a]ppellant's motion to suppress evidence?

2. Did the circuit court err in denying [a]ppellant the right to counsel of his choice?

3. Did the circuit court err in admitting the opinions of the DNA expert?

Finding no error, we affirm.

FACTS AND PROCEEDINGS

Suppression Hearing

On July 26, 2019, the circuit court held a hearing on appellant's motion to suppress evidence obtained as a result of the execution of a search warrant. Appellant raised three arguments at the suppression hearing in support of his contention that the evidence seized should have been suppressed: (1) the judge who issued the warrant had erroneously applied the "reasonable grounds" standard rather than the "probable cause" standard of proof in issuing the warrant; (2) there was no substantial basis for issuing the warrant; and (3) the good faith exception to the warrant requirement did not apply.

The search warrant application was based on a twelve-page affidavit submitted by Howard County Police Detective First Class Kevin Hussle. The affidavit included a description of the detective's training and experience, including his employment as a Howard County police officer, since 2013, and his then-current assignment to the Howard County Police Vice and Narcotics Division, Narcotics Section.

The affidavit stated that in June of 2017, the detective began investigating appellant and Irfan Martin Iftikhar, based on information that appellant and Iftikhar were actively distributing cocaine in and around Howard County. In June, 2017, the detective received information from a source that appellant, the owner of Final Touch Detailing Services in Laurel, Maryland, was using his business to sell controlled and dangerous substances ("CDS"). The source also stated that appellant drove a light brown Chevy Silverado truck and a black Cadillac Escalade. Detective Hussle obtained a photograph of appellant and his phone number from the social media page for Final Touch Detailing. A check of appellant's criminal history revealed that he had "been charged with multiple CDS related crimes in the past, to include CDS possession with intent to distribute and CDS distribution."

According to the affidavit, the detective also received information from other independent anonymous sources detailing Iftikhar's involvement in the sale of cocaine. The affidavit recounted that Iftikhar's criminal history involved "possession of CDS – not marijuana and DUI."

In his investigation of Iftikhar, the detective observed that Iftikhar's bank accounts revealed an unusual amount of cash deposits, averaging over $2,000 per month, which, the

detective determined, was consistent with CDS distribution. The affidavit also recounted Detective Hussle's use of a confidential informant to make two controlled purchases of cocaine from Iftikhar in September and October, 2018.

On August 29, 2018, Detective Hussle obtained a court order authorizing the installation of a pen register and trap and trace device on Iftikhar's phone number and the use of cellular pings on his cell phone. The affidavit recounted that between August 30, 2018 and October 21, 2018, Iftikhar's and appellant's phones were in contact 111 times, many contacts occurring on the same day.

The tracing of Iftikhar's phone and the tracking of his vehicle indicated that Iftikhar had traveled to an apartment complex located at 13605 Sir Thomas Way in Silver Spring, Maryland. Monitoring showed that after a few minutes, Iftikhar's vehicle departed the area and returned to his residence. Detective Hussle noticed that phone contact between appellant and Iftikhar stopped once Iftikhar arrived at 13605 Sir Thomas Way; indicating a possible meeting between Iftikhar and appellant.

On October 16, 2018, police traveled to 13605 Sir Thomas Way for surveillance, following multiple phone contacts between appellant and Iftikhar. Police observed appellant exit a gold 2002 Chevrolet Silverado in the parking lot of 13605 Sir Thomas Way into the apartment complex.

The detective also obtained a search warrant for the Verizon account associated with appellant's phone number. Phone records showed that on October 20, 2018, following several phone contacts between appellant and Iftikhar, Iftikhar traveled to 13605 Sir Thomas Way. Appellant's phone registered in the area of Sir Thomas Way around the

time of contact between his phone and Iftikhar's phone, at which point, police surveillance identified appellant at 13605 Sir Thomas Way. Records showed that, after a "short stay," appellant's phone left the area of Sir Thomas Way.

Detective Hussle stated in the affidavit that he believed that appellant and Iftikhar met on October 20, 2018 for the purpose of conducting a CDS transaction. According to the affidavit:

> [Detective] Hussle knows through his training, knowledge and experience that individuals involved in the sale of CDS will often utitlize locations not associated with them, to store CDS and to prevent its detection by other individuals and [p]olice. These locations are commonly referred to as "stash houses". Because of these previous location records and observations made involving the Sir Thomas Way address, [Detective] Hussle believes that [appellant] may be using an apartment in the 13605 Sir Thomas Way address as a stash location which he then utilizes to distribute CDS to IFTIKHAR.

On November 1, 2018, detectives were conducting surveillance in connection their investigation of appellant when they observed appellant exit his residence and remove the cover on a black Harley Davidson motorcycle. Police observed appellant putting items in the cargo area of the motorcycle before driving away. Police next observed appellant arrive at 13605 Sir Thomas Way, and open the cargo area of the motorcycle before entering 13605 Sir Thomas Way. Approximately 45 minutes later, police observed appellant exit 13605 Sir Thomas Way carrying a white paper bag. Appellant placed the white paper bag in the cargo area of the motorcycle, before driving away.

Cell phone records showed that, on November 1, 2018, appellant and Iftikhar had communicated prior to police observing appellant's Chevrolet Silverado truck parked in front of 13605 Sir Thomas Way and Iftikhar's vehicle parked in the parking lot of 13605

Sir Thomas Way. Police observed Iftikhar drive out of the parking lot of Sir Thomas Way, following a suspected meeting between appellant and Iftikhar.

On November 2, 2018, detectives observed several contacts between appellant's and Iftikhar's cell phones. Suspecting an imminent meeting between appellant and Iftikhar, Detective Hussle traveled to 13605 Sir Thomas Way, where he observed Iftikhar arrive in the parking lot. A few minutes later, appellant arrived in the parking lot. Iftikhar exited his vehicle and walked to the passenger side window of appellant's vehicle. Detective Hussle then observed Iftikhar "lean in through the open passenger window of [appellant's vehicle] as [appellant] remained in the driver's seat of the vehicle with his door partially open. The detective observed that appellant "appeared to have been manipulating something near his waist area at the time." Iftikhar was then observed leaving appellant's vehicle and returning to his own vehicle and driving out of the parking lot. Police observed appellant exit his vehicle and enter 13605 Sir Thomas Way.

The affidavit stated that police surveillance had identified a black 2011 Mercedes sedan parked near appellant's Chevrolet Silverado in the parking lot of 13605 Sir Thomas Way. Further investigation revealed that the black 2011 Mercedes sedan was registered to Robert Lewis Falls, Jr., with an address of 13605 Sir Thomas Way, Apartment 13. Falls was identified as a former employee of Final Touch Detailing Services. Falls was also identified as a witness to an incident in 2008 involving an abduction of appellant from a location in Prince George's County, Maryland.

During surveillance on November 8, 2018, police observed appellant arrive at 13605 Sir Thomas Way in a black Toyota Camry, and walk to the lower level of the apartment

complex where apartment 13 was located. Detective Hussle observed appellant use a key to open a door in the hallway outside apartment 13, labeled "Storage #2." Appellant entered the storage room and locked the door behind him. Two minutes later, appellant exited the Storage #2 room, and used keys to open apartment 13.

Detective Hussle stated in the affidavit: "[B]ased on this pattern of above described behavior, [appellant] is a CDS source of supply for [Iftikhar] …" and "[appellant] utilizes his Chevrolet Silverado and motorcycle to transport CDS and/or CDS proceeds[.]".

The District Court issued the requested search warrant, stating:

> AND it appearing to me, from the Application and the Affidavit attached to the Application and incorporated in it, that Probable Cause (reasonable grounds) exists to believe that on or in the following described premises, person, and vehicle, to wit … [.]

In denying appellant's motion, the suppression court explained:

> Okay. With regard to the first issue that's before me … the use of the words reasonable grounds within parentheses right after probable cause. The Defense makes the argument that that suggests that the judge who signed that warrant was using the incorrect standard for issuing a warrant. I don't know why those words are there. I will make reference to the actual affidavit where the affiant does use simply the words probable cause.
>
> This is a District Court judge issuing this, and I've got to assume that a District Court judge knows the standard for probable cause. It's not reasonable grounds, so making that assumption, I hear your argument. I don't know why the words are there, [defense counsel], but I believe that [the judge] understood that the warrant could only issue on probable cause, not on reasonable grounds, so I deny the argument.

Following the denial of appellant's motion to suppress, the case proceeded to trial.

DISCUSSION

I.

Denial of Appellant's Suppression Motion

Appellant contends that the suppression court erred in denying his motion to suppress evidence because the text of the warrant showed that the District Court judge had applied an incorrect standard of proof in reviewing the information in the warrant application. Even if the District Court had applied the correct standard, appellant argues that the warrant application did not provide a substantial basis for the issuing judge to conclude that probable cause existed to search the pickup truck or the storage area. Appellant further contends that the good faith exception does not apply in this case to uphold the search and seizure of evidence.

The State counters that the suppression court did not err in determining that, despite the presence of the phrase "reasonable grounds" in the text of the warrant, the District Court utilized the proper standard of "probable cause" in issuing the warrant. The State further contends that there was a substantial basis for the issuing judge to believe that appellant was engaged in criminal conduct and that evidence of criminal activity would be found in the pickup truck and storage unit to justify authorizing the search. The State continues that even if we were to assume, arguendo, that no probable cause existed, the good faith exception applies.

The Fourth Amendment to the United States Constitution, applicable to the States pursuant to the Fourteenth Amendment, provides that "no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to

be searched and the person or things to be seized." U.S. CONST. amend. IV. The Fourth Amendment does not protect "against *all* searches and seizures, but only against unreasonable searches and seizures." *Williamson v. State*, 398 Md. 489, 501-02 (2007) (quoting *United States v. Sharp*, 470 U.S. 675, 682 (1985)) (emphasis in original). "When the State seeks to introduce evidence obtained pursuant to a warrant, 'there is a presumption that the warrant is valid[,]' and 'the burden of proof is allocated to the defendant to rebut that presumption by proving otherwise.'" *Volkomer v. State*, 168 Md. App. 470, 486 (2006) (quoting *Fitzgerald v. State*, 153 Md. App. 601, 625 (2003)).

In this case, the search warrant stated, "Probable Cause (reasonable grounds) exists to believe" that contraband or evidence of criminal activity existed in the places to be searched. Appellant contends that the inclusion of the phrase "reasonable grounds" in parenthesis following "Probable Cause" indicates that the District Court judge applied a "lesser quantum of proof" than probable cause in issuing the warrant. The record contains no information, and provides no clues to explain the wording of the search warrant. We note, however, as did the suppression court, that the affidavit in support of the warrant application referenced the proper standard of probable cause for issuance of the warrant.

We ordinarily presume that a trial court judge knows the law and applies it properly. *State v. Chaney*, 375 Md. 168, 184 (2003) (holding that the appellant failed to provide sufficient evidence to rebut the presumption that the trial judge properly applied the law). While that presumption is rebuttable, "error is never presumed by a reviewing court, and we shall not draw negative inferences from [a] silent record." *Id.* *Accord Attorney Grievance Comm'n of Maryland v. Keiner*, 421 Md. 492, 508 (2011) ("[B]arring explicit

evidence in the record to the contrary, we presume that [a] judge understands and carries out his or her obligation to follow the law.").

Several federal courts have found that drafting errors and typographical mistakes typically do not invalidate a search warrant. *See United States v. Gary*, 528 F.3d 324, 329 (4th Cir. 2008) (finding that a typographical error in the date of the affidavit supporting the application for the warrant was "inadvertent, and at best could be chalked up to negligence on the fault of the officer who prepared the affidavit"); *United States v. Walker*, 534 F.3d 168, 172 (2d Cir. 2008) (explaining that erroneous dates on the warrant and affidavit did not invalidate warrant, as they were minor "scrivener's errors or products of clerical inadvertence"); *United States v. White*, 356 F.3d 865, 869 (8th Cir. 2004) (finding that an incorrect date on the face of the warrant did not render it insufficient or lacking in probable cause).

We agree with the suppression court that the insertion of the phrase "reasonable grounds" in the warrant appears to be the result of a typographical or drafting error, as there was no logical basis for the presence of that phrase in the warrant. When presented with an error on the face of the warrant, the crucial question is whether the affidavit presented a substantial basis for the issuing judge to find that the warrant was supported by probable cause. *See United States v. Blackwood*, 913 F.2d 139, 142 (4th Cir. 1990) ("Because of the fourth amendment's strong preference for searches conducted pursuant to warrants, reviewing courts must resist the temptation to 'invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner.'") (quoting *Illinois v.*

Gates, 462 U.S. 213, 236 (1983) (quoting *United States v. Ventresca*, 380 U.S. 102, 109 (1965)).

A search warrant is presumptively valid when the issuing judge determines, on the basis of the facts set forth in the affidavit, that there is probable cause "that contraband or evidence of a crime will be found in a particular place." *Gates*, 462 U.S. at 238. "[T]he duty of a reviewing court is simply to ensure that the [issuing judge] had a substantial basis for concluding that probable cause existed." *Id.* at 238-39 (citation and internal quotation marks omitted). "As a predicate for the issuance of a search warrant [probable cause] simply means 'a fair probability that contraband or evidence of a crime will be found in a particular place.'" *Holmes v. State*, 368 Md. 506, 519 (2002) (quoting *Gates*, 462 U.S. at 238)). "The evidence necessary to demonstrate a 'substantial basis' is less than that which is required to prove 'probable cause.'" *Moats v. State*, 230 Md. App. 374, 391 (2016).

In determining whether a warrant was supported by probable cause, we do not apply a *de novo* standard of review, but a deferential one. *State v. Jenkins*, 178 Md. App. 156, 163 (2008). In conducting our review, we recognize the "tightly confined standard that constrains a suppression hearing judge when reviewing the earlier decision of another judge to issue a search and seizure warrant based on that first judge's finding of probable cause." *State v. Johnson*, 208 Md. App. 573, 577 (2012).

Appellant contends that the information in the affidavit failed to provide a substantial basis to support the conclusion that he was engaged in criminal conduct. At the suppression hearing, defense counsel argued that the affidavit provided "limited facts suggesting that [appellant] was involved in criminal activity that would justify the search."

Defense counsel challenged the reliability of the information provided by "anonymous sources," who reported that appellant was involved in the sale of cocaine in June 2017, over a year before the warrant was issued. Defense counsel also challenged the reliability of the statement that appellant had prior "charges" for CDS possession and distribution, where no corresponding dates or dispositions were provided. Defense counsel further argued that the affidavit was lacking because police did not observe appellant with drugs or witness any drug transactions involving appellant, nor was appellant involved in any controlled buys of CDS.

The affidavit in this case was supported by various types of information to justify issuance of the warrant. In the course of his investigation, Detective Hussle corroborated information initially provided from anonymous sources that Iftikhar and appellant were engaged in the distribution of CDS. The affidavit described controlled purchases of cocaine from Iftikhar in September and October 2018. The affidavit also recounted information obtained from surveillance of appellant and Iftikhar, and the monitoring of appellant's and Iftikhar's communications and activities, up until the application for the warrant. Surveillance showed appellant and Iftikhar traveling to an apartment complex at 13605 Sir Thomas Way, where they remained only for a few minutes before leaving and returning home. Detective Hussle's monitoring showed that appellant's and Iftikhar's communications aligned with dates on which the men traveled to the apartment complex. Over the course of a two-month span leading up to the application for the warrant, the affidavit recounted 111 contacts between appellant and Iftikhar.

The affidavit further described Detective Hussle's observations of an interaction between appellant and Iftikhar in the parking lot of the apartment complex at 13605 Sir Thomas Way, where Iftikhar approached appellant's pickup truck and leaned in through the window while appellant appeared to be manipulating something near his waist area. Detective Hussle also observed appellant use keys to access a storage room in the 13605 Sir Thomas Way apartment complex, where he did not reside. Based on his training and experience, Detective Hussle inferred from his observations that appellant was engaged in the distribution of CDS.

We disagree with appellant's assertions that the affidavit cannot be relied upon because it lacked: information regarding the reliability of Detective Hussle's "sources," the disposition of the criminal charges referenced in the affidavit, and any evidence that appellant had engaged in a drug transaction. The Supreme Court has explained that the determination of whether probable cause exists to support a search warrant must be considered using "all of the circumstances set forth in the affidavit." *Gates*, 462 U.S. at 238. Here, Detective Hussle established a reasonable belief that appellant was distributing CDS based upon his own observations, not uncorroborated allegations of an anonymous source. *See Potts v. State*, 300 Md. 567, 575 (1984) ("Under the *Gates* test, … the police are not required to corroborate every piece of information supplied by the informant. Where, as here, the affidavit taken as a whole creates a fair inference that a particular unsubstantiated assertion is probably correct, probable cause may be found to exist").

Appellant further contends that there was not a sufficient nexus between the areas searched and suspected criminal activity to justify a search. Though "there must be a nexus

between criminal activity and the place to be searched," *Agurs v. State*, 415 Md. 62, 84 (2010), establishment of a nexus does not require direct evidence of the existence of contraband. *Holmes*, 368 Md. at 522. "[R]ather, probable cause may be inferred from the type of crime, the nature of the items sought, the opportunity for concealment, and reasonable inferences about where the defendant may hide incriminating items." *Id.*

The District Court judge could reasonably infer from the affidavit that drugs and other evidence of CDS distribution would likely be found in appellant's pickup truck and the storage unit at 13605 Sir Thomas Way. The affidavit recounted Detective Hussle's observations that appellant typically drove the pickup truck to and from 13605 Sir Thomas Way, and he met with Iftikhar in the parking lot of 13605 Sir Thomas Way without leaving the truck. Detective Hussle explained in the affidavit that based on his training and experience, drug traffickers commonly utilize vehicles to transport drugs and large amounts of currency, and "individuals involved in the sale of CDS will often utilize locations not associated with them, to store CDS and to prevent its detection by other individuals and [p]olice. These locations are commonly referred to as 'stash houses.'" The detective's descriptions of the habits of CDS distributors, his recounted observations of appellant traveling to and from 13605 Sir Thomas Way in the pickup truck, and use of keys to access the storage unit at the 13605 Sir Thomas Way, provided a substantial basis for the District Court judge to find that there was a nexus between the suspected criminal activities described in the warrant and the pickup truck and the storage unit.

Assuming *arguendo* that we determined that the issuing judge did not have a substantial basis for issuing the search warrant, we would find that the good faith exception

to the warrant requirement applies in this case and affirm the denial of the suppression motion. Appellant contends that the good faith exception to the warrant requirement is not appropriate in this case because "no reasonable police officer could rely on this [warrant.]" Because the suppression court found that there was a substantial basis for probable cause, it did not address good faith.

Evidence seized under a warrant, subsequently determined to be defective, may be admissible if the officers executing the warrant acted in objective good faith and with reasonable reliance on the warrant. *United States v. Leon*, 468 U.S. 897, 920-21 (1984). There are certain exceptions to the good faith rule, which apply in the following situations:

> (1) if the magistrate, in issuing a warrant, 'was misled by information in an affidavit that the affiant knew was false or would have known was false except for a reckless disregard of the truth,' or (2) 'in cases where the issuing magistrate wholly abandoned his judicial role so that no reasonably well trained officer should rely on the warrant,' or (3) in cases in which an officer would not 'manifest objective good faith in relying on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,' or (4) in cases where 'a warrant may be so facially deficient – *i.e.*, in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume the warrant to be valid.'

Marshall v. State, 415 Md. 399, 408 (2010) (quoting *Connelly v. State*, 322 Md. 719, 729 (1991)) (quoting *Leon*, 468 U.S. at 926).

Appellant argues that the third excluded category applies in this case, arguing that the police could not have reasonably believed that appellant was involved in drug activity or that there was a sufficient nexus between his drug dealing activities and the pickup truck and storage unit. "A warrant may be considered 'so lacking in indicia of probable cause' if the applicant files merely a 'bare bones' affidavit, one which contains only 'wholly

conclusory statements' and presents essentially no evidence outside of such conclusory statements." *Id.* at 409 (quoting *Patterson v. State*, 401 Md. 76, 107-08 (2007)).

In this case, the affidavit in support of the search warrant application was not "bare bones" or "conclusory." The affidavit was based upon the affiant's first-hand observations of appellant's ongoing communications with Iftikhar, a confirmed drug dealer, and their coinciding brief trips to 13605 Sir Thomas Way, as well as appellant's access of the storage unit. We conclude that the affidavit was not "so lacking in indicia of probable cause" as to render the officers' reliance on the warrant entirely unreasonable, such that the good faith exception would not apply.

II.

Denial of Appellant's Request for a Postponement

Appellant contends that the trial court deprived him of his constitutional right to counsel of his choosing by denying his request for a postponement, where his case had not previously been postponed beyond the *Hicks* date and he was financially able to retain an attorney of his choice.

On the morning of trial, defense counsel advised the court that appellant was seeking a postponement to retain Tilman Dunbar, private counsel. Defense counsel informed the court that Mr. Dunbar would not be ready to start trial that day, and that appellant was requesting additional time for Mr. Dunbar to prepare for trial.

The State opposed appellant's request for a postponement, noting that the case had been postponed on two prior occasions, and the *Hicks*[1] date was three days away. As required by Md. Rule 4-215(e), the trial court provided appellant the opportunity to state his reasons for seeking to discharge his counsel. Appellant explained that he did not believe that his attorney was ready for trial, or that his attorney had his "best interest at heart." Appellant further explained that his counsel was unprepared for the suppression hearing, failed to make arguments he had requested, and failed to correct the court's misstatement of facts in the record. Defense counsel informed the trial court that appellant had, in fact, instructed him to request a *Franks*[2] hearing, though counsel made no such request to the court. Appellant advised the court that he did not wish to represent himself, and offered to waive the *Hicks* date to obtain a continuance.

The trial court denied appellant's request for a postponement, stating:

> I am not convinced that your reason for discharging [defense counsel] is a meritorious one, and so I am going to find preliminarily that your reason for discharging him would be a non-meritorious reason.
>
> So what that means is that you may discharge [defense counsel] if you wish, but I am not going to give you additional time to secure another attorney. So the choices ultimately are to either proceed today with [defense counsel] representing you or to represent yourself, but I'm not going to grant a continuance. We're up against Hicks.

[1] The State's failure to bring a criminal case to trial within 180 days of a defendant's first appearance in circuit court can result in the dismissal of charges. *See State v. Hicks*, 285 Md. 310 (1979).

[2] In *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978), the Supreme Court established a process by which a defendant could challenge the veracity of statements in an affidavit supporting an application for a search warrant ("*Franks* hearing").

> The case has already been continued twice. The State is prepared to move forward, and I agree with [defense counsel] that he cannot nor could I imagine that he would be able to represent that Mr. Dunbar would be ready to represent you today in this trial at 1:30. So I'm not going to continue it for that purpose. I'm not going to give you a chance to continue the case and get Mr. Dunbar in the case later.
>
> So the choices are either go forward with [defense counsel] today or discharge [defense counsel] because you feel uncomfortable with him and proceed to represent yourself today. So what would you like to do? Would you like to have another minute to speak to [defense counsel] or what would you like to do?

Appellant remained represented by defense counsel at trial.

The Sixth Amendment provides that "the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. The Supreme Court has recognized that the right to the assistance of counsel includes the right of a defendant to select his or her own counsel provided he or she is financially able to do so. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006) (citations omitted). The right to counsel of one's choice, however, "does not translate into an absolute right to counsel of the defendant's choosing." *Moore v. State*, 390 Md. 343, 377 (2005) (citations omitted); *accord State v. Goldsberry*, 419 Md. 100, 118 (2011). "Courts have consistently held that the right to counsel does not give an accused the unfettered right to discharge current counsel and demand different counsel shortly before or at trial." *Fowlkes v. State*, 311 Md. 586, 605 (1988). *See Gonzalez-Lopez*, 548 U.S. at 152 (recognizing "a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness, and against the demands of its calendar") (internal citations omitted).

We review a trial court's denial of a defendant's request for representation by counsel of one's choice for an abuse of discretion. *See Alexis v. State*, 437 Md. 457, 477 (2014). To constitute an abuse of discretion, the decision "has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Evans v. State*, 396 Md. 256, 277 (2006) (citations and internal quotation marks omitted).

In the present case, the trial court considered appellant's request for a continuance in light of his concerns about the quality of the representation provided by his counsel. We note that the majority of appellant's concerns related to his disagreement with defense counsel's strategy at the suppression hearing one month earlier, and his belief that defense counsel did not have appellant's "best interests at heart." Generally, "[a] disagreement regarding legal strategy is not … a meritorious reason to discharge counsel." *Cousins v. State*, 231 Md. App. 417, 443, *cert. denied*, 453 Md. 13 (2017); *see also Bey v. State*, 228 Md. App. 521, 534 (2016) (holding that trial court's denial of request to discharge counsel due to a disagreement about cross-examining the victim was not an abuse of discretion).

The trial court also considered the effect of a delay of trial on judicial efficiency. Appellant's trial had twice been postponed, and trial was set to begin three days before the expiration of the *Hicks* date. Moreover, it was uncertain how long of a continuance appellant would need in order for Mr. Dunbar to prepare for trial, as there were "800 pages of discovery and 10 witnesses," and appellant had not yet engaged Mr. Dunbar to represent him. *See Fowlkes*, 311 Md. at 605 ("[A] defendant may not manipulate [a right to retain counsel of one's choice] so as to frustrate the orderly administration of criminal justice.");

State v. Campbell, 385 Md. 616, 635 (2005) ("requests to discharge [counsel] should not be used as 'eleventh hour' tactics to delay the trial") (citation omitted).

We conclude that the trial court's denial of appellant's last-minute request for a continuance to allow him to discharge his counsel and retain new counsel was well within the court's discretion and did not violate his constitutional right to counsel of his choice. *See Alexis v. State*, 437 Md. at 483 (recognizing that "the trial judge is in a unique position to 'sense the nuances' of the situation" in determining whether the Sixth Amendment right to choice of counsel has been violated) (citations omitted).

III.

Admissibility of the Opinion of the DNA Expert

At trial, the State introduced evidence of items seized during the execution of the search warrant on November 16, 2018, including 129.86 grams of cocaine, packaged in individual bags of varying size and weights, seized from the Chevrolet pickup truck. Evidence showed that the truck was registered to Final Touch Detailing Services, and appellant was identified as the president of Final Touch Detailing Services.

In Storage Room #2, Storage Unit #99, located in the apartment building of 13605 Sir Thomas Way in Silver Spring, police seized a triple beam scale and two safes, containing a total of 204.04 grams of cocaine. The safes also contained two digital scales, batteries, a spoon, a scoop with a handle, empty Ziploc baggies, and a bottle of inositol (a cutting agent).

The digital scales, bottle of inositol, two Ziploc bags, and a plastic bag discovered in the storage room were swabbed for the presence of DNA. On January 9, 2019, pursuant

to a search warrant, Detective Hussle obtained a buccal swab from appellant for DNA testing. A DNA profile was obtained from the buccal swab taken from appellant and compared with DNA profiles of items recovered from the safe in the storage room.

Chandra Christenson, a DNA analyst for the Montgomery County Crime Laboratory Forensic Biology Section, was accepted by the court, without objection, as an expert in forensic biology and DNA testing and analysis. Ms. Christenson testified that she used a multi-step process to perform DNA testing on certain items in evidence. She began by obtaining the buccal swabs from the Central Evidence Unit and taking them into her custody. After sampling each of the evidence samples, she then opened the "known sample from the person of interest," and placed a small amount of that sample in another tube in a separate area for DNA analysis. She explained that the testing process included "DNA extraction, quantification and amplification and then analysis[,]" which resulted in "a DNA profile in the form of electropherograms which can be interpreted and then compared to known DNA profiles."

Once Ms. Christenson obtained a partial mixed DNA profile of at least two contributors indicative of a major male contributor, including appellant, she performed a statistical analysis to determine the significance of the partial mixed DNA profile by measuring the frequency of that particular profile in the population. In calculating this frequency, she used the FBI database, containing analysis of samples of "hundreds of people." The database determined "the likelihood of someone having a particular allele [cell] at each location which establishes the rarity of each single allele[.]" Ms. Christenson entered the allele cells from the samples she tested into the "validated statistical program

managed by the FBI called Pop Stats which compares the rarity of each [cell] and multiplies them by each other[.]" And "because each DNA [cell] is an independent event," the process then calculates "the statistical rarity of a particular DNA profile."

Ms. Christenson concluded that appellant was the major contributor to DNA profiles obtained from the following items in evidence: a partial mixed DNA profile obtained from a swab from digital scale JBS-600S; a mixed DNA profile obtained from a swab from a digital scale 300-z; a mixed DNA profile obtained from a swab from an inositol bottle; and a mixed DNA profile obtained from a swab from Ziploc Bag "B." Ms. Christenson further testified as to the probability of randomly selecting an unrelated individual with a DNA profile matching the major DNA profile obtained from each of the following swabs: as to the digital scale JDS-600S, the probability was approximately 1 in 130 million; as to the digital scale 300-z, the probability was approximately 1 in 6.6 septillion; as to the inositol bottle, the probability was 1 in 13 nonillion; and as to the Ziploc bag "B," the probability was 1 in 4.4 octillion.

The State inquired as to Ms. Christenson's conclusions as follows:

> [PROSECUTOR]: I'm showing you State's Exhibit 24, a three-page document. Do you recognize State's 24?
>
> [MS. CHRISTENSON]: Yes.
>
> [PROSECUTOR]: And what is State's 24?
>
> [MS. CHRISTENSON]: This is my forensic biology report signed by me.
>
> [PROSECUTOR]: And does it include a complete list of all the items you tested?
>
> [MS. CHRISTENSON]: Yes, it does.

[PROSECUTOR]: So does page 1, the items you tested on page 1, it says evidence submitted, does that correspond to the physical evidence that's in this box, State's 25 through 31?

[MS. CHRISTENSON]: Yes, it does.

[PROSECUTOR]: The opinions and conclusions you just testified to, do you hold those opinions within a reasonable degree of scientific certainty?

[MS. CHRISTENSON]: That phrasing is no longer recommended for use in courts.

[PROSECUTOR]: Okay. And what is recommended, to your knowledge?

[MS. CHRISTENSON]: That my opinions and conclusions were made through my training, knowledge and experience. The phrase reasonable degree of scientific certainty doesn't really mean anything anymore, so it's being discouraged for use. That phrasing is no longer recommended for use in courts.

[PROSECUTOR]: In terms of the relevant scientific field of forensic biology, is that term no longer used?

[MS. CHRISTENSON]: Right.

[PROSECUTOR]: At this time, the State would offer State's Exhibit 24, Your Honor.

[DEFENSE COUNSEL]: Objection, Your Honor. It's cumulative. She's already testified, and frankly, based on the witness' statement, in terms of the weight of her opinion, I would ask that it all be stricken because science is one thing and law is another, and we use a different standard in the law whether science likes it or not. I would ask that her testimony be stricken.

[PROSECUTOR]: I object.

[DEFENSE COUNSEL]: I mean we've gone decades if not longer. I understand science may change quicker than law, but law is law. We're in two different fields, and the general standard for anything medical, anything scientific is for that particular level that this witness wants to reject and has rejected.

> [THE COURT]: [Aren't] those words though, just sort of legal shorthand for the concepts that the witness is talking about? In other words, isn't there case law that says that and I believe the key word is that there is no talismanic significance to that phrase that you were talking about?
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> [DEFENSE COUNSEL]: Without further research, I would say that talismanic language is important. I mean for a marriage to be valid, there must be certain talismans that are performed. For an oath to be valid before a witness can take the stand, there are certain talismans that have to be set. For an opinion, a scientific opinion to come in, I would argue that there needs to be a certain talisman that has to be adhered to, and clearly it is not.
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> [PROSECUTOR]: The State is not aware of any specific legal authority to that effect. … I believe that the leading case or at least the – off the top of my head, the case that I think would be most applicable is the Frye case, and I think Maryland adopts the Frye standard rather than the Daubert standard.
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> In neither case are the words reasonable degree of medical or scientific certainty [] magic words. Your Honor used the words talismanic words. I think that's in the case law. It's not a requirement. The State's position is exactly what the question Your Honor posed to the Defense that its shorthand, and it's not a set in stone requirement.
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> [DEFENSE COUNSEL]: I believe Frye and the other case, Daubert deals with qualification of expert opinions, not how an expert gives an opinion.
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> THE COURT: Bear with me a moment. I'm going to overrule the objection.
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> [DEFENSE COUNSEL]: Your Honor, the cow may be out of the barn, but I also object because this evidence that she is testifying to was found on items that we were moving to suppress at the suppression hearing. On those grounds also.
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> THE COURT: To the extent, the objection is based on the rulings of the suppression court, the objection is overruled on that basis. With regard to the cumulative nature of the report, I understand it's cumulative, but this is a bench trial and I will not attach extra weight to it, given the fact that I've heard it twice, so that objection is overruled.

Following the denial of appellant's motion for judgment of acquittal, defense counsel asked the court to revisit the issue of whether Ms. Christenson was required to

render her conclusions "to a reasonable degree of scientific certainty." After considering counsels' arguments, the court denied appellant's motion to strike Ms. Christenson's testimony.

"[T]he admissibility of expert testimony is a matter largely within the discretion of the trial court, and its action in admitting or excluding such testimony will seldom constitute ground for reversal." *Roy v. Dackman*, 445 Md. 23, 38-39 (2015) (quoting *Bryant v. State*, 393 Md. 196, 203 (2006) (internal quotation marks omitted). A trial court's decision to admit or exclude expert testimony will not be reversed "absent an error of law, a serious mistake, or clear abuse of discretion." *Gross v. State*, 229 Md. App. 24, 32 (2016) (internal quotation marks and citation omitted).

We have explained that expert opinions must "be established within a reasonable degree of probability … to make sure that the expert's opinion is more than speculation or conjecture." *Reiss v. Am. Radiology Servs.*, 241 Md. App. 316, 334 (2019), *aff'd*, __ Md. __ (2020), (quoting *Karl v. Davis*, 100 Md. App. 42, 52 (1994)). With respect to medical expert testimony, we have recognized that "[t]here is no appellate court opinion in Maryland that has held that the mantra 'within a reasonable degree of medical probability' is absolutely required before each and every medical expert opinion." *Karl v. Davis*, 100 Md. App. 42, 52 (1994).

Appellant relies on *State v. Norton*, 443 Md. 517 (2015) and *Reiss*, *supra*, in support of his argument that Ms. Christenson was required to render her opinions to a reasonable degree of scientific certainty. Neither of these authorities, however, stand for the proposition advanced by appellant. The issue in *Norton* was whether an expert opinion

contained in a forensic DNA case report, which stated the analysist's conclusion "within a reasonable degree of scientific certainty," was testimonial for purposes of the Confrontation Clause of the Sixth Amendment. 443 Md. at 519-20. The Court of Appeals held that the report was testimonial, and therefore inadmissible, absent testimony and cross examination of the analyst, noting that the significance of the phrase "within a reasonable degree of scientific certainty," in that case amounted to a certification of the result that established the foundation of the testimony. *Id*. at 548-49.

In *Reiss*, a medical malpractice action, the defendants sought to defend against the plaintiff's claim of negligence with evidence of a non-party's medical negligence. 241 Md. App. at 333. In support of their defense, the defendants introduced no expert testimony as to the applicable standard of care in the diagnosis and treatment of plaintiff's condition, and no evidence showing that the standard of care was breached by the non-party defendants. *Id*. at 336. We determined that the defendants could not raise the defense of non-party negligence without "suitable expert testimony, to a reasonable degree of probability, that the non-party breached the standard of care." *Id*. at 342.

Neither *Norton* nor *Reiss* addressed the specific question raised in this case: whether an expert's opinion is admissible notwithstanding the expert's refusal to render the opinion "to a reasonable degree of scientific certainty." Though courts have observed that "[i]f an expert witness cannot, will not or does not render his opinion to a reasonable degree of probability within the field of his expertise, the opinion *may* be excluded from the evidence[,]" *Hines v. State*, 58 Md. App. 637, 670 (1984) (emphasis added), we are aware of no decision holding that an opinion *must* be excluded if not qualified to a reasonable

degree of scientific certainty. *See also* Joseph F. Murphy, Jr., Maryland Evidence Handbook, §1404 at 649 (4th ed. 2010) ("failure to include th[e] talismanic language [to a reasonable degree of medical probability] should not make the expert's opinion inadmissible"). Appellant cites no controlling authority to the contrary.

Here, the trial court determined that the statistical analysis Ms. Christenson utilized to determine the statistical rarity of the partial mixed DNA profile she had obtained from the evidence was sufficiently non-speculative to be admissible. Based on our review of the record, we conclude that the trial court did not abuse its discretion in admitting Ms. Christenson's testimony.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.