UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2467

September Term, 2015

STATE OF MARYLAND

v.

ARNOLD VENABLE

Krauser, C.J.,
Berger,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: October 12, 2016

Appellee, Arnold Venable, Jr., was charged by way of indictment in the Circuit Court for Baltimore City with illegally possessing marijuana, cocaine, ammunition, and several firearms. Prior to trial, appellee moved to dismiss the indictment[1] on the basis that the original signed search warrant could not be located. On December 2, 2015, the circuit court granted the motion to dismiss the indictment. Appellant noted this timely appeal and presents us with one question:

> Did the circuit court abuse its discretion by dismissing the case based on the State's non-production of the original search and seizure warrant?

For the reasons herein discussed, we hold that the circuit court abused its discretion in dismissing the indictment under the circumstances of this case.

BACKGROUND

The Arrest of Appellee

Because the charges in this case were dismissed prior to trial, we have only the police officer's account of the circumstances of appellee's arrest, and the subsequent search of his home. Although those facts are largely irrelevant to our resolution of this appeal, we recount them for the sake of completeness. Appellee does not accept or reject those facts in his briefs before this Court, except that he contends that they are "merely assertions in a warrant affidavit[.]" According to appellee: "Whether there ever was a valid original search warrant signed by Judge Nicole Pastore Klein is a matter of dispute; the Honorable Melissa Phinn found the matter open to genuine question."

[1] A copy of the motion to dismiss the indictment does not appear in the record on appeal.

According to the affidavit in support of the search warrant, the police were given an anonymous tip that described appellee in some detail, and related that appellee was in possession of several firearms inside a residence at 1934 Washington Street. After the police ran a background check on appellee and learned that he was disqualified from possessing firearms because of a prior felony robbery conviction, they went to the residence. They were let inside by a man named Lorenzo Chavis who had answered the door. While speaking to Chavis, the police noticed a man inside the residence matching the description that the tipster had given them. When asked by police to identify himself, appellee identified himself as Arnold Dexter Venable, which was confirmed by his Maryland identification card. At this point, the police contacted the "Hot Desk" and learned that appellee had an open arrest warrant in Baltimore County. He was thereafter placed under arrest. While handcuffing him, the police noticed a shotgun leaning up against a wall.

The Search Warrant

According to the State, based on the foregoing information, the police applied for and obtained a search warrant to search the residence. Upon searching the residence, the police recovered a shotgun, two 9mm pistols, ammunition for the weapons, several baggies of marijuana, and a "brick" of cocaine. Appellee was subsequently charged with the illegal possession of those items.

Prior to trial, appellee filed a motion to suppress evidence which was denied by the circuit court after holding a hearing.[2] Sometime later, appellee applied to inspect and copy the original warrant and related papers pursuant to Md. Rule 4-601,[3] which the circuit court granted. When appellee went in search of the original copy of the signed warrant, he was told that it could not be found. He then moved to suppress the evidence on the basis that, because an original copy of the warrant could not be found, there was

[2] It is not clear from the record what exactly was litigated in that suppression motion except that it centered around the effect of an allegedly inaccurate statement contained in the warrant application on the overall validity of the warrant. The transcript of the suppression hearing is not part of the record before us.

[3] Md. Rule 4-601(g) provides:

> *Executed Warrant--Filing With Clerk*. The judge to whom an executed search warrant is returned shall attach to the warrant the return, the verified inventory, and all other papers in connection with the issuance, execution, and return, including the copies retained by the issuing judge, and shall file them with the clerk of the court for the county in which the property was seized. The papers filed with the clerk shall be sealed and shall be opened for inspection only upon order of the court. The clerk shall maintain a confidential index of the search warrants.

Md. Rule 4-601(i) provides:

> *Inspection of Warrant, Inventory, and Other Papers.*
>
> (1) The following persons may file an application under this section:
>
> (A) a person from whom or from whose premises property is taken under a search warrant;
>
> ***
>
> (3) … upon an application filed under subsection (i)(1) of this Rule, the court shall order that the warrant, inventory, and other related papers filed with the clerk be made available to the person or that person's attorney for inspection and copying.

(1) a genuine question that the copy provided by the State was authentic, and (2) a genuine question "as to the contents and existence of an original warrant."

The Dismissal of the Indictment

On November 12, 2015, the court held a brief hearing on appellee's second motion to suppress evidence. During that hearing, the State represented to the court that the original copy of the warrant was in the clerk's office and that it had made a copy of it and given the copy to appellee. Thereafter, appellee's counsel explained that he had learned from appellee's former counsel that the clerk's office was not in possession of the original signed warrant. The State then responded that, since the time when appellee's former counsel had looked for the original warrant, the State had "followed up" and found it. In an attempt to resolve the matter, the court granted a postponement so that the State could produce the original signed warrant for appellee to inspect and copy.

On December 2, 2015, the court held a follow-up hearing. Appellee filed a motion to dismiss the indictment that morning on the basis that the State had failed to produce the original search warrant and, the State, by representing to the court that the original warrant was in the clerk's office when it in fact was not, had made material misrepresentations to the court.[4]

[4] As previously mentioned, the motion to dismiss does not appear in the record on appeal. Nevertheless, in the State's Brief in this court, it is quoted, in pertinent part, as follows:

> 1. That the case was called before the Honorable Melissa Phinn on November 12, 2015, at which time the Court ordered the State to provide the original search warrant.

(continued)

In response, the State contended that dismissal of the charges was an inappropriate remedy. Moreover, the State argued that, under the Best Evidence Rule, a photocopy of the warrant was acceptable. The State then explained its efforts, following the November 12, 2015 hearing, to locate the original search warrant, including checking with the circuit court clerk's office, two District Court locations, and the chambers of the judge who signed the warrant. The State also noted that the original search warrant was not maintained by the State, and therefore it was not the State's obligation to produce the document and, accordingly, that there was no wrongdoing by the State to justify dismissal.

On the subject of the State's alleged misrepresentation to the court about the existence of the original warrant, after a lengthy discussion, it emerged that the warrant disclosed to the defense in discovery was a photocopy, made by a law clerk, of the warrant kept in the circuit court clerk's office. When the prosecutor later personally examined the warrant in the clerk's office, she concluded from its appearance that it was a photocopy. At that point, the court asserted that the State had previously spoken with

(continued)

> 2. That at that time, the State misrepresented to the Court that it had the original search warrant.
>
> 3. That the State has advised Counsel that there is no original search warrant available.
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> 4. That Counsel on behalf of his client submits that the failure of the State to comply with the Order of the Honorable Melissa Phinn on November 12, 2015, as well as the misrepresentation of fact to this Honorable Court requires that the charges against the Defendant be dismissed.

reckless disregard for the truth, stating that, "I guess you [the prosecutor were] just speaking about things at that time and you don't know whether it's true or not true, because you told me the original was in the Clerk's Office[.]"

In the middle of the hearing, it was pointed out by appellee that there was another problem with the copy of the warrant that was produced. The warrant return was not signed by either the police officer or the court. Appellee argued that the unverified warrant return "lays a greater question to the validity of the copy of the copy."

The court expressed some additional dissatisfaction with the State, and called into question the validity of the warrant and the return. Thereafter, the State expressed that the testimony of the judge who signed the warrant[5] was needed to "clear up" whether or not the copy of the warrant they had was a copy of the warrant the judge signed. The court interrupted the State and after some more discussion about the warrant, called for a 15 minute recess, and ordered the prosecutor to retrieve the copy of the warrant in the clerk's office that she allegedly made her copy from.

About an hour and half later, when the proceedings resumed, the record makes it plain that the court became increasingly frustrated with the State. The following excerpt is pertinent:

> THE COURT: All right. … [prosecutor], where have you been?
>
> THE STATE: Your honor, I – the Court instructed for us to go and get the –

[5] It is clear from the transcript of the hearing that the police officer who applied for the warrant was in court and available to testify about it.

THE COURT: Not "us," – you.

THE STATE: Or instructed me to get the warrant. I spoke with the officer in the case and pretty much backtracked from where she dropped off the return to. The return – and I'll just proffer to the Court that the return was dropped off to Judge Scurti who signed and forwarded to Judge Pastore Klein's chambers. From Judge Pastore Klein's chambers it would have been forwarded to the districts.

But in that time I learned that it's not in Judge Pastore Klein's chambers – I'm sorry – in Judge Scurti's chambers, and Judge Pastore –

THE COURT: Now, just listen. Just stop. You told me – not just today. You told me this the other day, on November 12th, I believe it was.

THE STATE: 12th, yes.

THE COURT: Okay. That first you say the original did exist and that's what you copied from. Today you came in and said you copied from a copy.

THE STATE: Yes.

THE COURT: And that copy was in the Circuit Court, which would be downstairs, with Frank Husband is the one that handles the warrants – be downstairs in that area where he sits. I told you to go get that. I didn't tell you to go backtracking anything about any return.

You've been gone an hour-and-a-half. Doing nothing about what we're supposed to be doing, because your argument is the best evidence rule. And the best evidence rule – really what they used to call the original document rule – you can make a copy of the original. But you're saying you didn't make a copy of the original, you made a copy of a copy.

I wanted to see it. You have yet to produce it.

THE STATE: And, Your Honor, when I went I downstairs to Mr. Husbands he indicated that there would be a court order that would be needed from your office to –

THE COURT: Listen. I called down there around 12:15-ish, because I'm like what's going on. You'd never been there. And then when we called back he said, oh, she's here now.

THE STATE: That's true, Your Honor.

THE COURT: Okay. So, an hour-and-a-half, you've been somewhere not doing what you were supposed to do. So that leaves the Court to believe that you never went down to Frank Husbands, or anyone else in that area that handles the warrants, to make a copy of whatever you've got here.

Ultimately, the court granted the motion to dismiss the indictment, finding that the appellee had raised a genuine question about the authenticity of the warrant, and questioning the credibility of the State based on the court's perception that the State had mislead the court about the warrant. Regarding the court's perception of the State's credibility, among other things, the court said: "I am really sorry, but I am really beginning not to believe you. I mean, I've heard so many different misrepresentations from you this morning about this warrant that I really am doubting what you're saying." The court concluded its discussion as follows:

> But the problem with what's going on here is that because you've been gone so long and you never went where I told you to go an hour-and-a-half ago, and you're still trying to tell me now what you never said earlier, oh, I made a copy of a copy of the copy, a week ago. I mean, it just all sounds like it's just not truthful.
>
> The Court believes that this warrant was never filed in the District Court, and I think you just got it from this officer and you copied it, and you gave it to the Defense. And I don't know whether it's the situation where, you know, sometimes, you know, you start doing these warrants and then you decide, well maybe there's not really a [sic] probable cause and maybe the judge didn't get all of the copies back. I have no idea, and that's the problem. And that's the problem why we have the rule because copies can be manipulated. And that's the reason for the rule of why the original, if possible, should be presented.

> Now, if there is argument that, you know, perhaps, you know, it was lost and you did all that. But because of all the double talking you've been giving me and your actions, I don't tend to believe what you're saying.
>
> So, for those reasons, the Motion to Dismiss is granted.

The Contentions on Appeal

On appeal, the State contends that the circuit court abused its discretion in dismissing the indictment. The State argues *seriatim* that (1) dismissal of the indictment was an improper remedy because, even if appellee had shown the evidence was unlawfully obtained (which, according to the State, he did not), at most, appellee was entitled to suppression of the evidence; (2) there was no basis to suppress the evidence simply because the original warrant could not be found as (a) the copy of the signed warrant that was produced was sufficient, and (b) the inability to locate the original amounted to a mere Rule violation and not a Fourth Amendment violation requiring suppression; and (3) the court's disbelief of the Assistant State's Attorney was not a proper basis for dismissal.

Appellee responds that the circuit court's primary motivation in dismissing the case was not based on the missing original copy of the warrant. Rather, appellee asserts that the circuit court dismissed the case because of the State's misconduct. Appellee also argues that the State failed to call as a witness persons with actual knowledge of the

original warrant such as, the police officer who applied for it, the judge who issued it, and the clerk responsible for filing it.[6]

DISCUSSION

Remedy

We agree with the State's contention that, even if there were some sort of error with respect to the warrant, dismissing the indictment was not the proper remedy. The correct remedy for a violation of a defendant's Fourth Amendment rights is suppression of the illegally obtained evidence, not dismissal of the indictment. *See Everhart v. State*, 274 Md. 459, 486 (1975); *see also State v. Bailey*, 289 Md. 143, 149 - 50 (1980) ("a defendant is not entitled to dismissal simply because the prosecution acquired incriminating evidence in violation of law, even if tainted evidence was presented to the grand jury.").

When a circuit court rules on a motion to dismiss an indictment, the 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

[6] As noted above, the State expressed a desire to call as a witness the judge who issued the warrant. In addition, it is plain from the record that the police officer who applied for the warrant was in court and presumably available to testify. It seems to us that the State was not given the opportunity to call those witnesses. At the conclusion of the hearing, after the court made its ruling, the State began to say "Your Honor, the State would just like to place its argument on the record and note its –." At that point, the court interrupted the State and said: "I heard your argument and the record has already been made. Your argument is on the record. Thank you." The hearing then ended.

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).

Therefore, we need not address the underlying warrant issue because, even assuming that there had been some sort of error with respect to the warrant, the appropriate remedy would have been suppression of any illegally obtained evidence, not dismissal of the indictment.[7]

Prosecutorial Misconduct

As an initial matter, there is some question whether the circuit court had the authority to dismiss the indictment in this case based on the conduct of the Assistant State's Attorney absent a controlling rule, statute or constitutional provision authorizing such a dismissal. *See Wynn v. State*, 388 Md. 423 (2005) (holding that the circuit court lacks the inherent power to dismiss an indictment based on the violation of a scheduling order); *State v. Deleon*, 143 Md. App. 645, 666 (2002) ("We are not aware of any Maryland statutes, Rules of Procedure, or common law authority that expressly imposes a specific duty upon the prosecutor that serves as a basis for dismissing an indictment."); but see *Gonzales v. State*, 322 Md. 62 (1991) (assuming, without deciding, that the court

[7] Had we addressed the underlying issue with the warrant we would have found it to be without merit. It is clear from the record that the State had a copy of a warrant that had been signed by a judge. The appellee makes no serious contention otherwise. In fact, in his brief in the Court, appellee devotes no effort to the warrant aspect of this case. Moreover, any error with respect to the warrant in this case stemmed from the violation of a rule of procedure which does not call for suppression of the evidence. Last, the inability to locate the original signed warrant was not the fault of the State's Attorney.

had the power to dismiss an indictment for prosecutorial misconduct). We too will assume, without deciding, that the circuit court possessed the inherent authority to dismiss the indictment.

To the extent that the circuit court dismissed the indictment in this case because the court was dissatisfied with the Assistant State's Attorney, we believe that, under the circumstances of this case, the circuit court abused its discretion. "The exercise of discretion is not abused if it is 'done according to the rules of reason and justice, not according to private opinion; according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular[.]'" *Gonzales*, 322 Md. at 72, (quoting *Wilhelm v. State*, 272 Md. 404, 438 (1974)). "Discretion is abused 'if exercised in a harsh, unjust, capricious and arbitrary way.'" *Gonzales*, 322 Md. at 72, (quoting *Mathias v. State*, 284 Md. 22, 27 (1978)).

Both the Court of Appeals and this Court have reversed circuit court orders dismissing indictments based on alleged misconduct of State's Attorneys. *See e.g*. *Gonzales, supra* (finding an abuse of discretion when the circuit court dismissed an indictment to teach an unprepared Assistant State's Attorney "a lesson"). In *State v. Hunter*, 10 Md. App. 300 (1970), we said that, "to dismiss a valid indictment of a grand jury prior to trial as a means to evidence the court's dissatisfaction with the prosecutor's pretrial performance, and particularly his failure to properly summon State witnesses, is simply not an appropriate sanction to be applied in such circumstances." *Id*. at 305. "Even assuming that a prosecutor's actions constitute misconduct deserving of sanctions,

it is highly doubtful that dismissal of an indictment would be proper." *Deleon*, 143 Md. App. at 662, n.4.

It is abundantly clear from the record before us that the circuit court became increasingly frustrated with the Assistant State's Attorney's conduct during the December 12, 2015 hearing. To the extent that the circuit court based its decision to dismiss the indictment on that conduct, we believe that the circuit court was acting not on the basis of law, but on the basis of personal feelings toward the Assistant State's Attorney and therefore the dismissal of the indictment was not proper.

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