Circuit Court for Baltimore City
Case Nos. 117317021-22 & 117240018-19

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

CONSOLIDATED CASES
No. 2201
September Term, 2018

TRAVIS DAMON BURROUGHS
v.
STATE OF MARYLAND

No. 2185
September Term, 2018

KEITH D. HAYES
v.
STATE OF MARYLAND

Shaw Geter,
Fader, C.J.,
Adkins, Sally D.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.
Concurring Opinion by Adkins, J.

Filed: May 14, 2020

This is a consolidated appeal from the Circuit Court for Baltimore City. Appellants, Travis Burroughs and Keith Hayes, challenge their convictions for sexually assaulting two minors, J.P. and T.W.

Burroughs and Hayes present the following questions for our review, which we have rephrased and consolidated:[1]

1. Did the trial court err in denying motions to suppress DNA and photo-array evidence?

2. Was the evidence sufficient to sustain the convictions?

Hayes presents an additional question for our review:[2]

3. Should the case be remanded for resentencing?

For reasons to follow, we remand for further proceedings.

[1] Burroughs originally presented the following questions for our review:

1. Because Appellant's DNA sample and record qualified for expungement, should they have been used at all, at trial?
2. Was it error to deny the motion to suppress the DNA, buccal swabs and photographic array?
3. Should the photographic identification and buccal swabs have been suppressed?
4. Was the evidence insufficient to sustain the conviction?

[2] Hayes originally presented the following questions for our review:

1. Was it error to deny the motion to suppress the DNA evidence?
2. Should the photographic identifications have been suppressed?
3. Should the conspiracy counts merge for sentencing purposes?
4. Was the evidence sufficient to sustain the conviction?

BACKGROUND

On March 14, 2017, two minors J.P. and T.W., were approached by appellant, Keith Hayes, while standing outside of Harbor City Café in Baltimore City. Hayes asked the two minors what they were doing, to which they replied "nothing." He then stated, "come with me." J.P. replied "no," but eventually agreed to go along because T.W. was "pulling" her and urging her to go.

Hayes first brought the minors to a lingerie store, where he purchased candy underwear for T.W. The minors then went with Hayes to a local 7-Eleven, where he purchased them snacks. Thereafter, the minors accompanied Hayes to a Radisson Hotel. J.P. testified that as they traveled to the hotel, Hayes offered to get T.W.'s hair and nails done, to buy her shoes, and to give her $40.[3] Further, J.P. testified that Hayes touched T.W.'s butt and breast and that T.W. touched Hayes' penis.

While at the hotel, the victims met Travis Burroughs, known to T.W. as "Redz." Burroughs called a cab, which took appellants and the victims to an abandoned house in the Park Heights area, that Hayes claimed was his home. Appellants then offered the victims marijuana and alcohol, which enticed them to continue "hanging out" with them. Eventually, the victims fell asleep on a bed on the first floor of the home. When they awoke, appellants held knives to their throats and threatened to kill them if they did not have sex with them. Appellants took turns raping the victims. J.P. testified that she asked

[3] T.W. testified that Hayes offered $40 to both her and J.P. in exchange for sex, which both victims declined.

the men to stop and to "get off of [her]" but they would not and continued to rape her for hours. She also testified that Burroughs raped T.W. through anal penetration as well as vaginal, and that both women were forced to perform oral sex on both men.

J.P. testified that after Hayes finished raping the victims he "pulled money out of his pocket and threw it at [J.P.] and told her "don't say anything." After Hayes left the home, Burroughs tied the victims up with Christmas lights and tried to give them Benadryl to put them to sleep. He then took the victims' phones and locked them in a closet upstairs. Burroughs left the house after threatening to kill the victims if they were not there when he returned. Once Burroughs left, the victims untied themselves and escaped to a neighbor's house. The neighbor called the police and the young women were taken to Mercy Hospital.

While at the hospital, both victims were examined by SAFE nurses. J.P. had ligature marks around her wrists, severe tenderness and pain on her inner thigh, and injury to her vaginal tissue. T.W. had bruises on her inner thigh, abrasions on her ankles and wrists, and an abrasion on her labia minora.

A routine search of Baltimore's Local DNA Index System (LDIS) resulted in "high stringency matches" between the DNA evidence samples obtained in connection with the rapes of J.P. and T.W. and DNA evidence samples obtained in connection with rapes committed in July 2014 and August 2016. Since the sample from the 2014 rape had been previously attributed to appellants, their photographs were placed in a photo array shown to the victims. Both victims identified Burroughs and Hayes as their rapists. Hayes and Burroughs were then charged in connection with the rape of J.P and T.W.

On May 23, 2018, before trial commenced, appellants filed separate but similar motions to suppress DNA and photo array identification evidence. In the motions, appellants similarly argued the DNA sample associated with the 2014 rape should have been expunged pursuant to Public Safety Article of the Maryland Annotated Code Section 2-511, and thus, should not have been used to establish probable cause. In response, the State argued that § 2-511 was inapplicable because "the DNA collected from appellants in connection with the July 2014 rape had been obtained under search warrants, and PS § 2-511 applies only to arrestee and convicted-offender samples." A hearing on the motions was held on June 15, 2018. With respect to appellant, Keith Hayes, the trial court granted the motion to suppress. In a second ruling, the trial court affirmed its ruling as to Hayes and denied the motion to suppress with respect to Burroughs. After a reading of *Varriale v. State*, 218 Md. App. 47 (2014) and COMAR 29.05.01.02(a)(1), the court went on to reconsider its ruling as to the motions and eventually denied the motion to suppress as to Hayes and Burroughs.

Following a jury trial in the Circuit Court for Baltimore City held on June 18–22, 2018, Hayes was convicted of conspiracy to commit second-degree rape of T.W., conspiracy to commit third-degree sexual offense of T.W., second-degree rape of J.P., third-degree sexual offense of J.P., conspiracy to commit third-degree sexual offense of J.P., second-degree assault of J.P., and conspiracy to commit second-degree assault of J.P. As to both T.W. and J.P., Burroughs was convicted second-degree rape, third-degree sexual

offense, second-degree assault, false imprisonment, conspiracy to commit second-degree rape, and conspiracy to commit third-degree sexual offense.

This timely appeal followed.

STANDARD OF REVIEW

We review a denial of a motion to suppress evidence based on the record of the suppression hearing, not the subsequent trial. *State v. Nieves*, 383 Md. 573, 581, 861 A.2d 62 (2004). We view the evidence in the light most favorable to the prevailing party and we "accept the suppression court's first-level factual findings unless clearly erroneous, and give due regard to the court's opportunity to assess the credibility of witnesses." *Gorman v. State*, 168 Md. App. 412, 421, 897 A.2d 242 (2006). We review legal conclusions *de novo*. *Ferris v. State*, 355 Md. 356, 368 (1999). When a case involves a question of statutory interpretation, we review the statute "without deference [to] a trial court's interpretation." *Bellard v. State*, 452 Md. 467, 480 (2017).

DISCUSSION

I.

During the hearing on the motions to suppress evidence, the trial judge heard arguments from both defense attorneys, as well as the prosecutor. Hayes' attorney argued that the evidence should have been suppressed because the DNA attributable to him from incident 146G05413[4] resulted in criminal charges and concluded without a conviction. Pursuant to PS § 2-511(a)(1) the DNA should have been expunged, and thus, not used to

[4] 146G05413 is the incident number associated with the 2014 rape case.

develop the photographic array which subsequently led to the victims identifying Hayes as their rapist. Further, Detective Stinnett should not have included the DNA match as part of the probable cause in a statement used to obtain a warrant to re-collect a DNA sample from Hayes. In response, the State argued that COMAR regulation § 29.05.01.02.A.1, governs § 2-511, and under COMAR the statute applies only to individuals who have been "arrested and charged, or convicted, or both." Since the DNA attributable to appellants from incident 146G05413 was collected pursuant to a valid search and seizure warrant, not pursuant to arrest or criminal charges, § 2-511 does not apply to the DNA sample. The State proffered evidence that the search and seizure warrant was issued on March 17, 2015. However, on appeal to this Court, the State clarified in its brief "[t]he prosecutor's argument about the scope of PS § 2-511 was correct, although he may have been mistaken about the source of the 2014 sample. It appears that the sample was actually 'crime scene DNA evidence' that was later attributed to Burroughs when his DNA was obtained under a warrant."

During the hearing the prosecutor stated:

> That sort of expungement doesn't apply to someone whose DNA was taken and kept in the database as a result of a valid search and seizure warrant. It only applies to arrestees. And that is corroborated in the cases of *Varriale v. State.*
>
> . . . .
>
> And also – so in, in this case, Mr. Hayes' DNA was collected in that prior case that was nol-prossed, but it was collected as a result of a valid search and seizure warrant and then under 2-511 and COMAR, and *Varriale*, it's not subject to, to expungement. While cited by the Defendant, only applies to the people who are simply arrestees.

During the same hearing, Hayes' defense counsel produced an Order of Expungement to the court. To which the prosecutor stated:

> [Prosecutor]: Well, I was, I was handed something just now and in the copy that I have of the Defendant's motion in item four it states that the District Court of Maryland ordered the expungement of all court and police records pertaining to this action on December 11th, 2015 and in the motion that I received there was not any attachment. However, [Hayes' defense counsel] has just provided me with an Order of Expungement and the State was not previously aware of the existence of the – except for the, except for the one sentence in, under number four of the Defendant's motion, the State was not aware of this order.
>
> [The Court]: Well, does that change your argument as to Mr. Hayes?
>
> [Prosecutor]: It might, it actually might very well change the argument.
>
> . . . .
>
> [The Court]: Are you challenging what [Hayes' defense counsel] handed you was a, is authentic?
>
> [Prosecutor]: The State—
>
> [The Court]: Let me see it . . . Well it's got the District Court seal on it.
>
> [Prosecutor]: The State doesn't have a basis to challenge the authenticity of that order. At this time, the only thing that the State could say at this time regarding that order is this is the first time that the State has seen the actual order.

Following the above exchange, the trial judge's initial ruling on Hayes' motion to suppress was as follows:

> Okay. As to the [c]ourt's reading, clearly in the warrant, the CODIS hit was put into the statement of probable cause as to the swabs taken of Mr. Hayes and based on the documentation that [Hayes' defense counsel] has presented to the State and to the [c]ourt this morning, that that particular charge which is the rape charge that the State is talking about and the State can't give me anything else concrete about why his DNA would still have been in that database, so therefore as to the defendant Hayes, the motion as to the DNA is granted.

Next, Burroughs' defense counsel presented arguments regarding his motion to suppress the DNA evidence, specifically arguing that "the same sample that applies to Mr. Hayes was the exact same sample used to get the warrant in [Burroughs'] case." To clarify whether Burroughs' DNA related to incident 146G05413 or another case in which he was previously convicted, the trial judge permitted the State to call Deputy Director of Analytical Sciences in the Crime Laboratory for the Baltimore Police Department, Kenneth Jones. Kenneth Jones testified that the same DNA sample used to match Hayes' DNA in this case, is also the sample used to match Burroughs. During cross examination by defense counsel the following ensued:

[Hayes' Counsel]: And Mr. Jones, do you see the second record in that letter; correct?

[Mr. Jones]: Yes.

[Hayes' Counsel]: That letter is marked by an asterisk?

[Mr. Jones]: The specimen ID is, yes.

[Hayes' Counsel]: And subsequent to that, it explains what that asterisk means; correct?

[Mr. Jones]: Yes.

[Hayes' Counsel]: Could you read what that asterisk means?

[Mr. Jones]: It says that this specimen has bee[n] previously attributed to Keith Hayes.

[Hayes' Counsel]: And there's no such asterisk for the record that precedes the record that I just referenced; correct?

[Mr. Jones]: That's correct.

[Hayes' Counsel]: Why is there no asterisk near that record?

[Mr. Jones]: Because the – I believe it's because under the case where there is the asterisk, that is the case where a sample from Keith Hayes was obtained and tested.

[The Court]: So that's the actual sample that they used?

[Mr. Jones]: That's the case under which the actual sample was obtained.

Referencing the same 146G05413 incident number, Burroughs defense counsel cross-examined Mr. Jones as follows:

[Burroughs' Counsel]: And do you have a letter that corresponds with this particular letter or is similar to that from Ms. Silbaugh?

[Mr. Jones]: For Mr. Burroughs?

[Burroughs' Counsel]: For Mr. Burroughs, yes.

[Mr. Jones]: Yes, we do.

[Burroughs' Counsel]: Okay. May I see that?

[Mr. Jones]: Certainly.

[Burroughs' Counsel]: Now, like Mr. Hayes' case, Ms. Silbaugh, there was a sample on there as well that was marked

with an asterisk that references a specific number; is that correct?

[Mr. Jones]: That's correct.

[Burroughs' Counsel]: And what was that number?

[Mr. Jones]: The specimen ID was 14-6G-O4 – or

[The Court]: Wait a minute, wait a minute, wait a minute, not so fast. 146G05?

[Burroughs' Counsel]: 05413.3S

[The Court]: Okay.

[Burroughs' Counsel]: And that was the tested sample from those two attributable samples in that letter; is that correct?

[Mr. Jones]: So that is the specimen ID of the sample from that case that matches Travis Burroughs'

Mr. Jones also testified that Hayes' DNA sample was obtained as a result of a search and seizure warrant, stating, "I know that Mr. Hayes' sample was received by the laboratory based on search and seizure warrants." Following Mr. Jones' testimony, the trial judge affirmed its earlier ruling, stating, "based on the testimony of Mr. Jones, the [c]ourt's rulings will stand as to Mr. Hayes, the motion as to [suppression of] the DNA is granted. As to Mr. Burroughs, it is denied." Thereafter, the court reconsidered its ruling on the motions, basing its decision on its reading of *Varriale v. State*, 218 Md. App. 47 (2014) and COMAR 29.05.01.02(a)(1), the court stated:

> Based on my reading of Varriale 218 Md. App. 47 and COMAR 29.05.01.02(a)(1), the motion as to the DNA for both Hayes and Burroughs is denied.

On appeal, Burroughs and Hayes each argue that under Maryland Code of Public Safety Section 2-511, the trial court erred in denying their motions to suppress DNA and photographic identification evidence ("the evidence").[5] Conversely, the State argues the trial court properly denied the motions to suppress.

Maryland Code of Public Safety Section 2-511 provides, in pertinent part:

> (a)(1) Except as provided in paragraph (2) of this subsection, any DNA samples and records generated as part of a criminal investigation or prosecution shall be destroyed or expunged automatically from the State DNA data base if:
>
> (i) a criminal action begun against the individual relating to the crime does not result in a conviction of the individual.

This Court interpreted the applicability of § 2-511 in *Varriale v. State*, 218 Md. App. 47 (2014), *aff'd on other grounds*, 444 Md. 400 (2015), *cert. denied*, 36 S. Ct. 898 (2016). In *Varriale*, the appellant was charged with two counts of second-degree burglary, malicious destruction of property, and theft over $1,000, in connection with a burglary that occurred in 2008. The charges against Varriale were a result of DNA evidence from a sample he voluntarily provided in order to eliminate himself as a suspect in an unrelated 2012 rape case. Varriale was convicted of the 2008 burglary and sentenced to four years' imprisonment, with all suspended, except for time served.

On appeal, Varriale argued, *inter alia*, "that Maryland's DNA Collection Act does not permit the retention of a person's DNA if he or she has been cleared of suspicion in the

[5] In addition to the photographic identifications, Burroughs asserts the buccal swabs were obtained "by illegal use of the DNA database" and should have been suppressed as well.

investigation in which the sample was obtained." *Id.* at 55. Varriale based his argument on the expungement provisions of § 2-511. *Id.* at 56–57. Reading the Act as a whole, this Court determined the "legislative history confirms that the DNA Collection Act applies only to persons who have given DNA samples after being charged with or convicted of certain enumerated crimes." To support this conclusion, the Court examined § 2-504(b), stating:

> [this section] of the Act dictates the places where a DNA sample "shall be collected":
>
> > (1) at the time the individual is charged, at a facility specified by the Secretary [of State Police];
> >
> > (2) at the correctional facility where the individual is confined, if the individual is confined in a correctional facility on or after October 1, 2003, or is sentenced to a term of imprisonment on or after October 1, 2003;
> >
> > (3) at a facility specified by the Director [of the State Crime Laboratory], if the individual is on probation or is not sentenced to a term of imprisonment; or
> >
> > (4) at a suitable location in a circuit court following the imposition of sentence.

Varriale, at 58 (citation omitted). The Court went on to explain:

> All of these are places where a person would be found only if he or she had been "charged" with an offense, "confined" for committing an offense, "on probation" for committing an offense, or awaiting "the imposition of sentence." This language, therefore, also confirms that the DNA Collection Act applies only to persons who have given DNA samples after being charged with or convicted of certain enumerated crimes . . . .

Id. at 59.

Moreover, the Court emphasized that "considerable weight" must be given "to an administrative agency's interpretation and application of the statute that the agency administers." *Id.* In doing so, the Court noted "the Maryland Department of State Police, in promulgating regulations under the statute, made them applicable only to persons who have been "arrested and charged or convicted, or both," of various specified crimes. COMAR 29.05.01.02.A(1)." *Id.* Thus, the Court "defer[red] to the agency's deliberate and well-publicized interpretation that the statutory protections do not extend to persons in Varriale's position." *Id.*

Varriale makes clear the process by which DNA is collected is pertinent to an analysis concerning § 2-511. In the case at bar, evidence was proffered to show the 2014 DNA at issue was not collected upon appellants' arrest, or conviction of an underlying crime. However, in the record before us it is unclear whether the 2014 DNA sample was taken from the crime scene.

COMAR 29.05.01.02.A(1) specifies, "[t]his chapter *governs only* the collection, submission, receipt, identification, testing, storage, and disposal of *DNA samples from individuals arrested and charged or convicted, or both*, for various specified crimes and the entry of the samples into the State DNA Data Base System and CODIS." (emphasis added). COMAR specifies further "This chapter *does not govern* evidentiary, suspect, and forensic *samples otherwise legally obtained, whether by search warrant*, court order, consent, or *other method*." COMAR 29.05.01.02.A(1) (emphasis added).

To determine whether the trial court erred in denying appellants' motions to suppress, there must first be a determination as to the source of the DNA. Specifically, how and when it was collected and whether it was collected pursuant to PS § 2-504. In accordance with Maryland Rule 8-604,[6] we are compelled to remand with instructions to the trial court to make findings of fact regarding the source of the 2014 DNA sample.

II.

Both Burroughs and Hayes further contend the evidence is insufficient to support their convictions. Specifically, appellants argue that there was inconsistent witness testimony made during trial and that the victims told the police varying versions of the incident that occurred on March 14, 2017.[7]

[6] Maryland Rule 8-604(d)(1) provides:

> *Generally*. If the Court concludes that the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings, the Court may remand the case to a lower court. In the order remanding a case, the appellate court shall state the purpose for the remand. The order of remand and the opinion upon which the order is based are conclusive as to the points decided. Upon remand, the lower court shall conduct any further proceedings necessary to determine the action in accordance with the opinion and order of the appellate court. Md. Rule 8-604(d)(1).

[7] In appellants' briefs, the victim's inconsistent statements are described as follows:

> [T]he young women told police that a man named 'Redz' had grabbed each of them by the arm and dragged them onto a bus, took them to the house on Woodland Avenue and raped them.
>
> In a second version, the young women told police they were riding the No. 36 bus, when two strangers pulled out knives, and made them get off the bus

When determining whether sufficient evidence exists to support a conviction on appeal, "we will consider the evidence adduced at trial sufficient if, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Coleman*, 423 Md. 666, 672 (2011) (quoting *Facon v. State*, 375 Md. 435, 454 (2003)). When a sufficiency challenge is made, our concern is not whether the "verdict is in accord with what appears to us to be the weight of the evidence," rather, our concern is "only with whether the verdict [was] supported with sufficient evidence—that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." *State v. Albrecht*, 336 Md. 475, 479 (1994); see also *Bible v. State*, 411 Md. 138, 156 (2009).

In the case at bar, appellants rely on *Kucharczyk v. State*, 235 Md. 334, 337, 201 A.2d 683 (1964) to support their sufficiency of evidence claims. In *Kucharczyk*, the prosecution's witness, a 16-year-old boy with an I.Q. of 56, whom a defense psychologist deemed incompetent to testify, gave inconsistent testimony about whether the alleged crime had occurred. *Id.* at 336–37. The Court of Appeals reversed Kucharzyk's conviction

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and walk to Woodland Avenue, where they fell asleep. When the women awoke, the men put their knives to their throats and raped them.

In a third version of the incident, the young women had told police that two men had offered to pay for their hair and nails to be done, and gave "each" of them $20. When they arrived at the house on Woodland, they were raped.

on the grounds of insufficient evidence, holding that, "where a witness testifies to a critical fact and then gives directly contradictory testimony regarding the same critical fact, the fact finder should not be allowed to speculate and select one or the opposite version." *Id.* at 337–38.

This Court and the Court of Appeals have emphasized that "[t]he doctrine set forth in Kucharczyk is extremely limited in scope." *Smith v. State*, 302 Md. 175, 182 (1985). In a recent opinion, *Rothe v. State*, this Court examined *Kucharczyk's* limited application:

> It is here that we encounter, as legions of cases have encountered over the past 55 years, the massive disconnect between the case of *Kucharczyk v. State*, with its microscopically narrow holding that has never been repeated, and the so-called *Kucharczyk* Doctrine, a bloated attack on the legal sufficiency of evidence generally and based ostensibly on the *Kucharczyk* case. In the actual case, the State's entire case of guilt had consisted of the uncorroborated testimony of a single witness whose testimony was rent by unresolved contradictions about the very happening of the crime itself. The issue was not credibility *per se*. It was rather the utter absence of any plausible assertion that the crime had even taken place.
>
> In the years since 1964, however, the defense bar has created a wildly exaggerated *Kucharczyk* Doctrine that has taken on a mythic life of its own. The doctrinal mantra is that any significant attack on the credibility of a State's witness will serve to exclude that witness's testimony from evidence and thereby erode the legal sufficiency of the State's case by diminishing it to nothing.

242 Md. App. 272, 276 (2019). The Court concluded its analysis of *Kucharczyk* stating, "[t]he simple message of this opinion is that the so-called *Kucharczyk* Doctrine, if it ever lived, is dead . . . Damaged credibility is not necessarily inherent incredibility. That is all that needs to be said." *Id.* at 285.

Here, the inconsistencies in the victims' statements were made to the police prior to trial, as opposed to internal inconsistencies made during trial testimony like in *Kucharczyk*.

See *Bailey v. State*, 16 Md. App. 83, 95, (1972) (noting "*Kucharczyk* does not apply simply because a witness's trial testimony is contradicted by other statements which the witness has given out of court or, indeed, in some other trial."). Further, the victims were cross-examined regarding their statements made to the police and other witnesses were called to testify to the inconsistencies at trial. Therefore, "[t]he jury was well aware of the prior inconsistent statement[s] of the [victims], and thus, the jury "was faced with judging [the victims'] credibility in the light of such inconsistency." *Wilson v. State*, 261 Md. 551, 558 (1971). Determining the credibility of witnesses and the weight to give such testimony is ultimately a question for the jury. *Conyers v. State*, 354 Md. 132, 153 (1999). We hold, viewing the evidence in the light most favorable to the State, there was sufficient evidence from which the jury could find the elements of the crime beyond a reasonable doubt. Thus, there was sufficient evidence to sustain the convictions.

III.

Hayes was sentenced to 20 years' imprisonment on Count 4, conspiracy to commit second-degree rape, and 10 years on Count 9, conspiracy to commit third-degree sexual assault, to run concurrent to Count 4, and 20 years on Count 3 to run consecutive to Count 9. Hayes contends that he was "convicted and separately sentenced for two conspiracies: conspiracy to commit second-degree rape; and conspiracy to commit third-degree sexual offense," both of which, he argues, "should merged for sentencing purposes."

A criminal conspiracy is "the combination of two or more persons, who by some concerted action seek to accomplish some unlawful purpose, or some lawful purpose by unlawful means." *Savage v. State*, 212 Md. App 1, 12 (2013). In *Savage*, this Court noted:

> The unit of prosecution for conspiracy is the agreement or combination, rather than each of its criminal objectives. A single agreement . . . constitutes one conspiracy, and "multiple agreements . . . constitute multiple conspiracies. In other words, the conviction of a defendant for more than one conspiracy turns on whether there exists more than one unlawful agreement.

Id. at 13 (internal quotations and citations omitted). "The State has the burden to prove the agreement or agreements underlying a conspiracy prosecution." *Id.* If the State "seeks to establish multiple conspiracies, it 'has the burden of proving a separate agreement for each conspiracy.'" *Id.*

Here, the State concedes that Count 4, conspiracy to commit second-degree rape, and Count 9, conspiracy to commit third-degree sexual assault, should merge for sentencing purposes. However, because Count 3 is to run consecutive to Count 9, simply merging Count 9 into Count 4 would disrupt the overall sentencing package.

Maryland Code, Courts and Judicial Proceedings, § 12-702 provides that on remand "[the lower court] may not impose a sentence more severe than the sentence previously imposed for the offense." In *Twigg v. State*, the Court of Appeals held this statute applies "not simply [to] one count in a multi-count charging document, but rather [to] the entirety of the sentencing package that takes into account each of the individual crimes of which the defendant was found guilty." 477 Md. 1, 26–27. The Court explained that "[a]fter an appellate court unwraps the [sentencing] package and removes one or more charges from

its confines, the sentencing judge, herself, is in the best position to assess the effect of the withdrawal and to redefine the package's size and shape (if, indeed, redefinition seems appropriate)." *Id.* at 28. The Court noted further, this approach allows the trial judge the ability to "correct the entire initial sentencing package to preserve the originally intended sentencing scheme." *Id.* Thus, we remand for resentencing consistent with this opinion. We note there appears to have been a numerical error in the court's original calculation of the total aggregate sentence. The individual counts add up to a total of 30 years. Thus, on remand the court is limited to a total sentence not to exceed 30 years.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED IN PART AND REMANDED IN PART WITH INSTRUCTIONS; COSTS TO BE SHARED EQUALLY BY APPELLANTS AND MAYOR AND CITY COUNCIL OF BALTIMORE.

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(Senior Judge, Specially Assigned),

JJ.

Concurring Opinion by Adkins, J.

Filed: May 14, 2020

Most respectfully, I concur and join in the judgment only. I agree that remand is required for resentencing. I would, however, affirm as to the suppression issue. Appellants argue that the circuit court erred in denying their motions to suppress DNA evidence because—pursuant to § 2-511—their DNA samples associated with a 2014 rape case should have been expunged. Appellants' argument is strong, and I am not persuaded by the State's assertion that—because the 2014 samples were collected pursuant to a search warrant—they somehow fall beyond the scope of the DNA Collection Act's expungement provisions.[8] It is likely that the State's retention of the 2014 samples violated the Act. Ultimately, however, I believe that the court did not err in denying the motions. The Court of Appeals, in *King v. State*, 434 Md. 472, 495 (2013) ("*King II*"), stated that, "[b]ecause the exclusionary rule is not a remedy the courts apply lightly, and the Legislature made no indication that suppression is the proper remedy for a violation of the DNA Collection Act, we decline to find any suppression remedy here." (Cleaned up.) Because suppression is not a remedy for a violation of the Act, the court did not err in denying the suppression motions.

[8] The State asserted that, "[s]ince the DNA attributable to appellants from [the 2014 rape case] was collected pursuant to a valid search and seizure warrant, not pursuant to arrest or criminal charges, § 2-511 does not apply to the DNA sample." Maj. Op. at 7. This argument is not persuasive. The Legislature did not include a search warrant exemption in the Act, and this Court should not alter privacy rights by reading something into the statute that is not there. Rather, we should be consistent and apply § 2-511 as we did in *Varriale*, to "persons who have given DNA samples after being charged with or convicted of certain enumerated crimes." 217 Md. App. at 58.

DNA contains "a massive amount of deeply personal information," and in DNA collection, "a person's entire genetic makeup and history is forcibly seized and maintained in a government file, subject only to the law's direction that it not be improperly used . . . ." *State v. Raines*, 383 Md. 1, 50 (2004) (Wilner, J., concurring). The Act's direction that DNA may not be improperly used, in this case, was seemingly not followed by the State.[9] I believe that the Act was "hammered out to balance concerns for potential misuse of profiling of the citizenry against the obvious and very significant contribution to law enforcement that the database can make." *See Smith v. State*, 744 N.E.2d 437, 442 (Ind. 2001). If indeed the State is now ignoring the Act's expungement provision because there is no discernable penalty for doing so, it may be time for the Legislature to re-balance the Act.

[9] Section 2-511(f) of the Act prevents the use of DNA that qualifies for expungement:

A record or sample that qualifies for expungement or destruction under this section and is matched concurrent with or subsequent to the date of qualification for expungement:

> (1) may not be utilized for a determination of probable cause regardless of whether it is expunged or destroyed timely; and
>
> (2) is not admissible in any proceeding for any purpose.

Here, the 2014 samples that qualified for expungement were utilized for a determination of probable cause.