

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2671

September Term, 2013

BRYAN HARRIS

v.

STATE OF MARYLAND

Meredith,
Friedman,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: August 11, 2015

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

A jury in the Circuit Court for Baltimore City convicted Bryan Harris, appellant, of heroin possession. Appellant, who was sentenced to three years, presents the following issue for our review:

Did the trial court err in refusing to allow defense counsel to cross-examine Detective Rosier with respect to the specific location from which he made the detailed observations implicating Appellant?

Because the trial court did not err in restricting cross-examination regarding the exact location from which the detective conducted his surveillance, we shall affirm appellant's conviction.

FACTS AND LEGAL PROCEEDINGS

The charges against appellant stemmed from covert police surveillance of a Citgo gas station near Poplar Grove and Edmondson Avenue in Baltimore City, where Baltimore City Police Detective Steven Rosier observed appellant conducting what he believed was a hand-to-hand drug transaction.

Det. Rosier, an expert in the recognition of street-level distribution, testified that on October 24, 2012, he was working in the Sector 1 area of the Southwest District with Det. Mark Neptune and Officer Chapman. Around 10:15 that morning, he was near Poplar Grove and Edmondson Avenue, observing a Citgo gas station known to him as "an open-air narcotics shop" for heroin. He saw appellant standing on the sidewalk, looking nervous. A man approached appellant and spoke to him for less than thirty seconds before handing appellant bill-form currency. Appellant walked to an area behind the gas station, where he retrieved a small object from a white bag. With the object concealed in his hand, appellant walked back up Edmondson Avenue and handed it to the man.

Believing that he had just observed a drug transaction, Det. Rosier called his team members to pick him up and assist in arresting appellant. Det. Neptune and Ofc. Chapman arrived within two minutes, and twenty seconds later, they pulled up next to appellant, who was still in the same position on the Edmondson Avenue sidewalk. While appellant was detained, Rosier walked behind the gas station and retrieved a plastic bag containing seven clear gelatin capsules, which were later identified as heroin.

The State charged appellant with possession and possession with intent to distribute heroin. The jury convicted appellant of possession but did not reach a verdict on the other count.

DISCUSSION

Appellant contends that “the trial court erred in refusing to allow defense counsel to cross-examine Detective Rosier with respect to the specific location from which he made the detailed observations implicating appellant,” because the State did not establish a prima facie case for application of the qualified privilege against disclosure of covert locations used for police surveillance. We disagree.

The Qualified Privilege Against Disclosure of a Police Surveillance Location

“The Confrontation Clause of the Sixth Amendment of the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee a criminal defendant the right to confront the witnesses against him.” *Martinez v. State*, 416 Md. 418, 428 (2010). The right to cross-examination, however, “may reasonably be limited” in a manner that does not deprive the accused of a fair trial. *Church v. State*, 408 Md. 650, 664 (2009).

In this regard, the Court of Appeals has recognized “a qualified privilege for the State to refuse to disclose the location of an ongoing place of surveillance.” *Id.* at 668. This “surveillance location privilege . . . permits [the] non-disclosure of a police officer’s watch post when certain policy considerations favor keeping the location a secret when weighed against a defendant’s Sixth Amendment right to confront witnesses against him.” *Id.* The limited privilege “provide[s] a protection that is essential to successful law enforcement investigations, because . . . ‘secret locations are helpful only if they remain undisclosed. Revealing the hidden location . . . may jeopardize the safety of officers or citizens and discourage further public cooperation with the police.’” *Id.* at 667 (quoting *Johnson v. State*, 148 Md. App. 364, 370 (2002)).

To establish the qualified privilege, the State has “a limited initial burden” to show either “that the police are continuing to use the surveillance location or that any individual needs protection because of his or her association with the location.” *Id.* at 671. When that threshold burden is met, the court must balance the accused’s proffered Sixth Amendment need for the exact surveillance location, against the public interests served by non-disclosure. *Id.* at 668-69. The qualified privilege thus “takes into account the privacy concerns of private citizens, the tools necessary for police officers to conduct routine surveillance, and the importance of a defendant’s right to cross-examine witnesses and paint an accurate factual picture of the circumstances under which he or she was observed.” *Id.* at 669. *See also Johnson*, 148 Md. App. at 368 (“Disclosure depends upon the particular circumstances of each case and is determined by balancing the public’s interest in

non-disclosure against a defendant's interest in cross-examination and accurate fact finding.”).

The Record

Appellant was convicted based on the testimony of Detective Steven Rosier about his observations from a covert police surveillance location. On direct examination, the detective testified that, without the aid of binoculars, he observed appellant's demeanor, saw appellant accept currency by hand, and watched as appellant removed a small object from a white bag and hand it to a buyer. At approximately 10:15 a.m. that morning, the detective was in an elevated spot at covert surveillance location when he saw appellant standing in front of a Citgo station located on Edmondson Avenue, near the intersection with Poplar Grove. Appellant was “visibly nervous,” looking “around,” “back and forth” down Edmondson Avenue.

While observing appellant, Det. Rosier saw a man in a distinctive jacket approach appellant and hand him what appeared to be currency. Appellant then went behind the Citgo station and removed a small object out of a white bag stored in a stack of pallets used for bread deliveries. Appellant returned to the man and gave him the small object; the man then left.

The detective believed he witnessed a drug transaction. He called the other members of his team, Officer Chapman and Det. Mark Neptune, who picked him up and proceeded to the Citgo station, where they detained appellant. Det. Rosier located the white bag where he had seen it and determined that it contained suspected heroin.

During the State’s direct examination, Det. Rosier revealed that his covert observation post was in area of “Poplar Grove and Edmondson Avenue,” and more specifically in the 2800 block of Edmondson Avenue. The position was elevated above the street, with an unobstructed view of the Citgo station and its surrounding area. Officer Chapman and Det. Neptune were stationed in an unmarked police car “just north” of Det. Rosier’s location. They picked up Det. Rosier “on the first street north of Edmondson, off of Poplar Grove,” which was “right across the street and around the corner” from where appellant was “still standing” when the officers arrived to detain him. Det. Rosier only lost sight of appellant for the twenty seconds it took for them to arrive at appellant’s location on Edmondson Avenue.

On cross-examination, defense counsel asked Det. Rosier “where exactly was [his] covert location?” The following bench conference ensued:

[PROSECUTOR]: And, Your Honor, at this point in time the State would make its Motion in Limine to preclude the disclosure of the covert location.

THE COURT: Why?

[PROSECUTOR]: Your Honor, in light of the fact that the officer – I have asked, and I can certainly get into further detail if Your Honor would like to voir dire the Officer, but this specific –

THE COURT: You can proffer.

[PROSECUTOR]: **The location is still in use by the police department.**

THE COURT: It's still being actively used. Yes sir?

ORAL ARGUMENT BY [DEFENSE COUNSEL]

Your Honor this – he's got my client on Edmondson Avenue and then going into a – behind this store. . . .

It's very difficult to see what's going on, in the gas station, on Edmondson Avenue and behind the store from anywhere at the street level. You know, it's –

THE COURT: He testified that he was elevated. He didn't say he was at street level.

[DEFENSE COUNSEL]: Well, then, if he was on a rooftop, it would be awfully hard to see –

THE COURT: Or wherever.

[DEFENSE COUNSEL]: – a white bag, without binoculars. I can't effectively cross examine him, if I don't know where he is. . . .

It's like the Church case, Your Honor, I believe that I'm entitled –

THE COURT: Yeah, I've read the Church case, **but it's an ongoing used location. I'm going to limit your ability to inquire. You can inquire as to what he saw, but you can't go into the specific physical location of his clandestine observation point.**

So, I'm going to sustain the objection.

(Emphasis added.)

When defense counsel continued the cross-examination, Det. Rosier testified that he believed the location was still in use by the Southwest Police Department, although he no

longer worker “over there anymore.” Counsel then inquired about characteristics of the surveillance location.

[DEFENSE COUNSEL]: Is the covert location on public property?

[PROSECUTOR]: Objection, Your Honor.

THE COURT: I’ll allow it. Just be very careful, [defense counsel].

[DEFENSE COUNSEL]: Yes, Your Honor. . . .

Is it on public property?

[DET. ROSIER]: No.

[DEFENSE COUNSEL]: You said earlier that you were in an elevated position? What was the height of your elevated position above Edmondson Avenue?

[DET. ROSIER]: I don’t really know the exact height. If I was to estimate it, I would say over 20 feet. Elevated from ground level at Edmondson Av – if you’re calling ground level Edmondson Avenue, over 20 feet.

[DEFENSE COUNSEL]: Okay. You were able to observe from this position the Citgo gas station and the pumps, etcetera, what was going on around the gas station?

[DET. ROSIER]: Yes.

[DEFENSE COUNSEL]: And the area where the pallets were, where you found the narcotics, was behind that gas station, correct?

[DET. ROSIER]: Yes. . . .

[DEFENSE COUNSEL]: And since it's the morning it would have been in the shadows?

[DET. ROSIER]: I'm not quite sure it would be in the shadows. It was broad daylight. I know it was sunny. I remember that.

* * * *

[DEFENSE COUNSEL]: Referring to State's Exhibit 1 [i.e., a photo of the area]. . . . Is this from – from what you know of the area is this taken from street level?

[DET. ROSIER]: It looks like slightly above street-level. If not, like, possibly car level driving past. Something like that. I believe that's how those satellite pages are taken, through a car.

[DEFENSE COUNSEL]: Is this the same perspective you had?

[DET. ROSIER]: Not at the same level, no.

[DEFENSE COUNSEL]: So your level would be higher?

[DET. ROSIER]: Yes, sir.

[DEFENSE COUNSEL]: So if you had taken a picture of these activities it would have looked just like that, only from a slightly higher angle, correct?

[DET. ROSIER]: It's not the same exact angle, but yes, it's elevated. But that is that same area that I was able to observe.

[DEFENSE COUNSEL]: Were you using binoculars? . . .

[DET. ROSIER]: Yes, but it wasn't necessarily relevant to this.

At the time I was observing your Defendant, I was not using them.

In addition, defense counsel was permitted to elicit that the detective was outside and near enough to appellant that he took precautions against being heard.

[DEFENSE COUNSEL]: While you were waiting for them to come pick you up, did you get on your police radio and say that you saw a transaction and the clothing description of the people involved?

[DET. ROSIER]: No. I actually had my radio off at the time. From where I was, I was trying to be sneaky, and sometimes the radio, they hear it. It kind of gi[v]es away your position. . . .

[DEFENSE COUNSEL]: Well you said you were about 20 feet above street level at an undisclosed location. Were you indoors or outdoors?

[PROSECUTOR]: Objection, Your Honor.

THE COURT: He can answer.

[DET. ROSIER]: At the time I was outdoors.

* * * *

[DEFENSE COUNSEL]: Now it's not the clearest thing [State's Exhibit No. 1] in the world there, but there are buildings on the north side of 2800 Block of Edmondson Avenue, correct?

[DET. ROSIER]: Yes, there's buildings on both sides of Edmondson Avenue.

[DEFENSE COUNSEL]: And all the buildings are, would you agree, have greater than 20 foot elevations?

[DET. ROSIER]: I believe this big one, obviously, yes, and the ones next to it are smaller. I would say yes, it's approximately 20 feet or greater. Yes.

In addition to the information elicited during this cross-examination, defense counsel later asked Det. Neptune about Det. Rosier's location:

[DEFENSE COUNSEL]: Without telling me what building [Det. Rosier] may have come from, if he came from a building, where – on the road did you pick him up, where was he when you picked him up?

[DET. NEPTUNE]: It was the first street which is north of Edmondson. I don't recall if it's Aruna or Harlem. It's the first street north of Edmondson.

[DEFENSE COUNSEL]: Running parallel to Edmondson?

[DET. NEPTUNE]: Yes, sir.

[DEFENSE COUNSEL]: It's not Poplar Grove?

[DET. NEPTUNE]: No, sir.

[DEFENSE COUNSEL]: And the road you're referring to would be a couple of blocks east of Poplar Grove?

[DET. NEPTUNE]: No, sir. It's 2800 block of whichever street it was. So it's literally, if you're on the 2800 block of Edmondson and you look north, if you threw a ball overtop the buildings there, the first road, it would have been that one.

Appellant's Challenge

Appellant argues that the trial court erred by sustaining the State's objection to the disclosure of Det. Rosier's exact location, because the State failed to "demonstrate 'a threshold interest in protecting against' disclosure of the specific details regarding the covert location." Appellant did not preserve this challenge. When the prosecutor offered to voir

dire Det. Rosier, the trial court invited the State to proffer instead, and the prosecutor informed the court that the surveillance location was still in use. Defense counsel did not insist on voir dire; nor did he challenge the substance of the State's proffer. Because the unopposed proffer satisfied the State's limited initial burden under *Church*, and defense counsel did not establish a particularized need to know the exact location of the cover surveillance post, the trial court did not err in precluding its disclosure.

We are not persuaded that this restriction on cross-examination deprived appellant of a meaningful opportunity to challenge Det. Rosier's ability to observe appellant. As the excerpts show, defense counsel was permitted to elicit a considerable amount of information about the detective's vantage point. *See Johnson*, 148 Md. App. at 371. Specifically, defense counsel established that Det. Rosier was outdoors, 20 feet above ground, on private property, near one or more higher buildings, close enough to appellant that he did not need binoculars to see the transaction and that police radio communication might have been overheard, somewhere within twenty seconds of the Edmondson Avenue location where appellant was detained. On this record, we cannot say that appellant was denied his Sixth Amendment right to cross-examination.

**JUDGMENT AFFIRMED. COSTS TO
BE PAID BY APPELLANT.**