UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 553

September Term, 2016

ANTHONY BANKS

v.

STATE OF MARYLAND

Woodward,
Leahy,
Davis, Arrie W.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Davis, J.

Filed: January 26, 2017

Appellant, Anthony Banks, was charged, on or about September 16, 2015, with several criminal offenses related to drugs, *i.e.*, possession of over 1,200 gel caps of heroin, drug paraphernalia and a handgun discovered in a hotel room. Pursuant to a hearing on appellant's Motion to Suppress the evidence before the Circuit Court for Baltimore City (Shar, J.), on April 6, 2016, the court denied appellant's Motion. Appellant was subsequently convicted of possession of a firearm in relation to a drug trafficking crime, pursuant to Md. Code Ann., Crim. Law § 5–621(b)(1) and sentenced to twenty years' imprisonment without parole with all but five years suspended and three years' probation. Appellant filed the instant appeal in which he raises the following issue for our review, which we quote:

> Did the trial court err by refusing to suppress evidence found as a result of the State's illegal search of Mr. Banks' phone?

FACTS AND LEGAL PROCEEDINGS

Factual Background

According to the transcript from the hearing on the Motion to Suppress, on August 6, 2015, we glean the following background information.

Baltimore City police were investigating a drug organization, based on information received from an anonymous source from the community. The community member indicated that individuals were using a "stash area in an alleyway" for the sale of narcotics in the area. A confidential informant provided additional information as to which vacant houses were used for illegal drug transactions.

Police then initiated an investigation from a covert location, where they could

observe the area, and they ultimately arrested Jermaine Naylor after he was observed participating in the sale of narcotics with appellant. At the time of his arrest, Naylor had drugs and a cell phone on his person. After obtaining a search warrant for Naylor's phone, police discovered a contact listed on the cell phone under a nickname and phone number that were both previously confirmed by the confidential informant to be associated with appellant. Police then filed a trap and trace order, pen register,[1] for appellant's cell phone number. Using a "Hailstorm" device,[2] police tracked appellant's phone to Room 302 at the Sleep Inn and Suites Hotel on Fallsway. The police learned that Tunica Owens,[3] who had an open arrest warrant, was renting the hotel room. Upon entering the hotel room, police discovered appellant, in plain view, packing drugs. Police also encountered a woman,

[1] Md. Code Ann., Cts. & Jud. Proc. § 10-4B-01(c). (1)"'Pen register' means a device or process that records and decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted. (2) "Pen register" does not include any device or process used: (i) By a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services provided by the provider or any device used by a provider or customer of a wire communication service for cost accounting or other similar purposes in the ordinary course of its business; or (ii) To obtain the content of a communication.

[2] *See* State v. Andrews, 227 Md. App. 350, 377–78 (2016). "Hailstorm," a brand name for a cell site simulator, "acts like a cell tower, but, unlike a cell tower awaiting incoming signals, the Hailstorm is an active device that can send an electronic signal through the wall of a house and 'draw the phone to the equipment.' Based on the direction and strength of the signal the Hailstorm receives from a cell phone, in response, law enforcement can pinpoint the real-time location of a cell phone (and likely the person to whom it belongs) within less than 20 yards."

[3] Ms. Owens' first name is spelled phonetically in the hearing transcript as "TANEEKA."

whom they believed to be Owens, until the female informed police she was not Owens. Police secured the location and then obtained a search warrant to search the hotel room, subsequently finding additional drugs, paraphernalia and a handgun.

Motion to Suppress Hearing

Relying on *State v. Andrews,* 227 Md. App. 350 (2016), appellant's counsel argued that, without the warrantless use of the Hailstorm device, the police had no idea that appellant was at the hotel. Therefore, any evidence recovered was fruit of the poisonous tree. The defense also argued that, based on *Andrews*, at a trial, the State would not be able to introduce evidence that appellant was in the hotel room because there was no independent source for that information; police were only led to the location based on the search of appellant's phone using the Hailstorm device.

The State's response was that appellant had no standing to raise the issue because he was found in a hotel room rented by another person. The court rejected this argument, reasoning that, under *Andrews*, the reasonable expectation of privacy violated by a Hailstorm search is in the "aggregate and real time location information contained in [the] cell phone."

The State then asserted that there was an intervening cause in this case because, after going to the hotel based on the Hailstorm search, the police discovered that the room was rented by a woman with an open warrant. The officers entered the hotel room, premised on the belief that they were arresting Owens, when they found another woman and appellant engaged in illegal behavior, in plain view. Consequently, they obtained a warrant to search

the room and discovered the contraband and handgun. Accordingly, the State argues that appellant is not entitled to suppression of the evidence because the intervening circumstance of Owens' open arrest warrant sufficiently dissipated the taint from the evidence of the Hailstorm search of appellant's phone.

After hearing arguments by both parties, the court ruled:

> I agree that, at least under the current state of the law in Maryland, that a warrant is required in order to use Hailstorm. If the scenario was that the police used Hailstorm to get to the motel—hotel—found the room, and entered the room as a result of that, or even got a—then obtained a warrant to go into that room, I agree that should be suppressed. Would have to be suppressed under the current law.
>
> However, I do believe there is an intervening factor here. And that is—and according to the way that the statement of probable cause is written, once they're there, and they find out about Ms. Owen[s] and they verify the information about Ms. Owen[s], they, I think it said, 'therefore entered the room,' or something to that affect [sic], that they actually went into the room, they had a legal and legitimate reason to enter the room.
>
> I do understand, and I appreciate, [appellant's] argument that they wouldn't have been there in the first place. But I think that's a bit too tangential. I think that the distinction between that situation and *Andrews* is that, in *Andrews*, there was no intervention. They had no legal justification under the Court of Special Appeals' reading of the Constitution. They had no legal justification for what took place. Here they did.
>
> As I said, I do understand and respect the argument, and I look forward to hearing what others have to say about it. But I'm going to deny the motion.

Following the hearing, appellant entered a plea of not guilty. Appellant was ultimately convicted of possession of a firearm in relation to a drug trafficking crime and sentenced to twenty years' imprisonment without parole with all but five years suspended and three years' probation. The instant appeal followed.

STANDARD OF REVIEW

The Court of Appeals, in *Grant v. State*, 449 Md. 1, 14–15 (2016), recently reiterated the "well-established" standard for appellate review of the circuit court's ruling on a motion to suppress:

> [O]rdinarily, [it] is limited to the information contained in the record of the suppression hearing and not the record of the trial. When there is a denial of a motion to suppress, we are further limited to considering facts in the light most favorable to the State as the prevailing party on the motion. Even so, we review legal questions *de novo*, and where . . . a party has raised a constitutional challenge to a search or seizure, we must make an independent constitutional evaluation by reviewing the relevant law and applying it to the unique facts and circumstances of the case. We will not disturb the [circuit] court's factual findings unless they are clearly erroneous.

(quoting *State v. Wallace*, 372 Md. 137, 144 (2002)).

DISCUSSION

Appellant contends that the evidence at issue is the poisonous fruit of an illegal search under the Fourth Amendment and, therefore, the circuit court erred in denying appellant's Motion to Suppress. Specifically, appellant argues that, during its determination, the circuit court "failed to explicitly consider the flagrancy of the police behavior when ruling on the attenuation of the illegal search." Accordingly, appellant asks that we reverse the circuit court's decision.

The State responds that the trial court, in appropriately applying the attenuation factors, properly determined that suppression of evidence was not warranted in the instant case. The State argues that "there was nothing 'flagrant' about the conduct" of the police and that they "were using [the device] subject to a court order which, prior to March 30,

2016,[4] had always sufficed to authorize the use of the device." The State also argues that excluding the evidence would do "nothing to advance the goals of deterrence," embodied in the exclusionary doctrine, if applied to the instant case. Accordingly, the State requests the affirmance of the circuit court's ruling.

The Fourth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment, "guarantees individuals the right 'to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . .'" *Grant*, 449 Md. at 16 (quoting U.S. CONST. amend. IV).[5] Recently, this Court, in *State v. Andrews*, 227 Md. App. 350 (2016), held that an individual has a reasonable expectation of privacy in the location information procured from his or her cell phone, stating that

> the government may not use a cell phone simulator without a warrant or, alternatively, a specialized order that requires a particularized showing of probable cause, based on sufficient information about the technology involved to allow a court to contour reasonable limitations on the scope and manner of the search, and that provides adequate protections in case any third-party cell phone information might be unintentionally intercepted. To hold otherwise would be to abandon the Fourth Amendment by assuming, without any foundation, that the citizens of Maryland have forfeited their reasonable expectation of privacy in their personal location.

[4] Andrews, 227 Md. App. at 350.

[5] *See also* MD. DEC. OF RIGHTS, Art. 26. "That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted."

Id. at 413.

Typically, evidence obtained in violation of the Fourth Amendment is considered "fruit of the poisonous tree" and cannot be admissible in a court of law. *Wong Sun v. United States*, 371 U.S. 471, 484–85 (1963). However, not all evidence obtained from an illegal search or seizure is automatically fruit of the poisonous tree. The question is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 487–88.

There are "three judicially acknowledged methods by which evidence can be shown to have been purged of the primary taint." The first is "a three-part test to determine whether the primary illegal activity has been sufficiently attenuated." *Myers v. State*, 395 Md. 261, 286 (2006) (citing *Brown v. Illinois*, 422 U.S. 590, 603–04 (1975)). The second and third judicially acknowledged methods are known as "independent source" and "inevitable discovery," respectively. *Segura v. United States*, 468 U.S. 796, 814 (1984); *Nix v. Williams*, 467 U.S. 431, 443–44 (1984).

Appellant, the State and the circuit court all relied upon the three-part attenuation of taint doctrine as it pertained to the motion to suppress. In arguing that there was no independent source for discovery of the evidence, appellant's counsel, at the hearing, argued that the instant case was analogous to *Andrews*, *supra*, where this Court ruled that "there can be no doubt that the only information linking Andrews and 5023 Clifton Avenue was the fruit of the Fourth Amendment violation [*i.e.* the cell phone simulator device]. The

State presents no credible argument that evidence of Andrew's presence in the home was obtained by independent lawful means." *Andrews*, 227 Md. App. at 414–15.

In the instant case, discovery of Owens' open warrant was the basis for police entry into the room, which is a distinction from *Andrews* where the accused's own open warrant was the basis. Nevertheless, the police discovery of Owens' warrant is exclusively the result of the police's illegal search of appellant's cell phone *via* the Hailstorm device. Therefore, Owens' warrant constitutes a link in the causal chain and cannot qualify as a lawful, independent source for discovery of evidence. *See Myers*, 395 Md. at 288 (quoting *Ferguson v. State*, 301 Md. 542, 551 (1984)) ("An intervening circumstance is an event that breaks the causal connection between the unlawful conduct and the derivative evidence.").

Moreover, there is no indication that the heroin, drug paraphernalia and handgun would have inevitably been discovered, notwithstanding the constitutional violation. *Nix*, 467 U.S. at 443. Again, the police discovery of Owens' open arrest warrant was directly linked to the illegal search of appellant's phone *via* the Hailstorm device. Accordingly, we constrain our analysis to the first judicially recognized method, *i.e.*, the three-part test for determining if the taint of the illegal search has been sufficiently attenuated.

Attenuation of Taint Doctrine

The Court of Appeals articulated the Supreme Court's three-part test in *Myers*, *supra*:

The three factors of the attenuation doctrine are: (1) the time elapsed between the

> illegality and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. Under this analysis, the Supreme Court 'attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost.' Subsequent cases have pointed out that the attenuation doctrine has been consistently followed as a way of resolving whether there exists a strong enough causal connection between the primary taint and the challenged evidence to require the exclusion of that information.

395 Md. at 286–87 (citations omitted).

The first factor, *i.e.*, temporal proximity, concerns the issue of "lapsed time." *Ferguson*, 301 Md. at 550. The greater the time lapse between the alleged unlawful police conduct and the derived evidence, the greater the "likelihood that the taint has been purged"; however, the temporal element has been labeled "ambiguous" and "relatively unimportant." *Id.* Although there is no mathematical formula for determining what time lapse is sufficient to attenuate the taint from evidence discovered during the course of a Fourth Amendment violation, the Supreme Court has stated that it must be a "substantial time" lapse, *Steiff*, 136 S. Ct. at 2062. The Court of Appeals has indicated that "time spans ranging from two hours to six hours" are "insufficient" to purge the taint from challenged evidence. *Ferguson*, 301 Md. at 550.

In the case, *sub judice*, appellant does not argue at the motion hearing that there was a lack of substantial time lapse occurring between the use of the Hailstorm device and the discovery of evidence. Nor does the State assert the opposite. The circuit court also makes no express ruling regarding the temporal proximity factor. Absent an express finding of fact by the lower court, we draw inferences "in the light most favorable to the State."

Garcia-Perlera v. State, 197 Md. App. 534, 552 (2011). Nevertheless, it appears from the record that the police discovered the evidence the same day they used the Hailstorm device, within several hours. Accordingly, we hold that the first temporal factor favors appellant, noting that it is the least determinative factor in our analysis.

The second factor in an attenuation of taint analysis is whether there has been an intervening circumstance. As stated, *supra*, "[a]n intervening circumstance is any event that "breaks the causal connection between the unlawful conduct and the derivative evidence." Discovery of an open arrest warrant after a Fourth Amendment violation can constitute a sufficient intervening circumstance. *Cox v. State*, 397 Md. 200, 219–20 (2007). In *Cox*, after conducting an arguably illegal stop (the Court declined to reach the merits of the legality of the stop), police discovered a baggie of marijuana on the ground after learning of the accused's outstanding warrant. The Court held that "the police officer's discovery of an outstanding warrant for Petitioner's arrest and Petitioner's arrest pursuant thereto represents an intervening circumstance sufficient to attenuate the taint. . . ." *Id.* at 204.

The Supreme Court, in *Utah v. Strieff*, 136 S.Ct. 2056, 2062 (2016), recently reiterated that an open warrant can constitute an intervening circumstance, reasoning that

> the warrant was valid, it predated Officer Fackrell's investigation, and it was entirely unconnected with the stop. And once Officer Fackrell discovered the warrant, he had an obligation to arrest Strieff. 'A warrant is a judicial mandate to an officer to conduct a search or make an arrest, and the officer has a sworn duty to carry out its provisions. Officer Fackrell's arrest of Strieff thus was a ministerial act that was independently compelled by the pre-existing warrant.

Id. at 2062–63 (quoting *United States v. Leon*, 468 U.S. 897, 920, n.21 (1984)).

In the instant case, the open arrest warrant for Owens constitutes an intervening circumstance. Appellant does not contest the validity of Owens' warrant or that it pre-dated the police investigation. Accordingly, after discovery of the warrant, police were required to arrest Owens. Believing she occupied the hotel room, which was rented in her name and listed her phone number, the police attempted to arrest her pursuant to the open warrant. Although Owen's warrant may have been discovered because of the illegal search of appellant's phone by the Hailstorm device, the *issuance* of the warrant itself is unconnected with the illegality.

Appellant's argument that the illegal search of appellant's phone occurred prior to the intervening circumstance and, therefore, does not attenuate the taint from the discovered evidence is unpersuasive. The search of appellant's phone is the illegality, the catalyst for the attenuation analysis. The intervening circumstance, *i.e.*, Owen's open warrant, breaks the causal connection between the illegality and the evidence. Accordingly, we hold that the warrant for Owens constitutes an intervening circumstance.

The third and final factor, "the purpose and flagrancy of the official misconduct . . . forms the lynchpin of our attenuation analysis." *Myers*, 395 Md. at 292 (citation omitted). The purpose of the exclusionary rule is to deter police misconduct and "[t]he third factor of the attenuation doctrine reflects that rationale by favoring exclusion only when the police misconduct is most in need of deterrence—that is, when it is purposeful or flagrant." *Strieff*, 136 S. Ct. at 2063.

"When the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs." *Davis v. United States*, 564 U.S. 229, 238 (2011) (citations omitted). This includes when conduct is "systemic or recurrent." *Strieff*, 136 S. Ct. 2056 at 2063.

However, "when the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful, or when their conduct involves only simple, 'isolated' negligence, the 'deterrence rationale loses much of its force,' and exclusion cannot 'pay its way.'" *Davis*, 564 U.S. at 238 (citations omitted).

Furthermore, "[e]vidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule." *Id.* at 234. The rationale is that "the harsh sanction of exclusion should not be applied to deter objectively reasonable law enforcement activity." *Id*. (internal quotation marks omitted).

This Court denied a good-faith exception to police misconduct, in *Andrews, supra*, noting that the police

> submitted an overreaching pen register/ trap & trace application that failed to clearly articulate the intended use, *i.e.*, to track Andrew's cell phone using an active cell site simulator. The ensuing order did not support the use of the Hailstorm device, nor did it, in any way, serve as a *de facto* warrant for the use of the Hailstorm device. . . . Only after receiving that information through the use of the Hailstorm device and arresting Andrews at the premises did the same [Baltimore City Police] officers who submitted the pen register\ trap & trace application then apply for a search warrant. . . . [W]ithout the antecedent Fourth Amendment the nexus between the residence to be searched and the alleged criminal activity could not have been established. . . . In the present case, the antecedent Fourth Amendment violation was the only basis upon which the search warrant application stood, and the fruit of the

> poisoned tree doctrine does, indeed, trump alleged good faith reliance on the part of [the police]."

Andrews, 227 Md. App. at 419.

In the case *sub judice*, appellant contends that "[t]he motion court below made no findings whatsoever as to the flagrancy of the police misconduct, simply ruling that an intervening event had broken the causal chain between the use of the Hailstorm and the discovery of the evidence." Appellant also asserts that "[t]he similar conduct in this case to *Andrews* shows that there was a pattern of behavior that should be deterred" and that any good faith exception should not apply to the instant case. Specifically, appellant alleges that there is recurring government misconduct concerning the use of a nondisclosure agreement and the Hailstorm device: "[I]t is well documented that the [Baltimore Police Department] and State's Attorney's office took steps to affirmatively hide this technology from public and judicial oversight." We disagree.

In ruling on appellant's Motion to Suppress, the circuit court analyzes the police conduct in the context of the intervening circumstance. "If the scenario was that the police used Hailstorm to get to the motel—hotel—found the room, and entered the room as a result of that, or even got a—then obtained a warrant to go into that room, I agree that should be suppressed." As the circuit court explicitly discussed, on the record, the police did not enter the hotel room or obtain a warrant to search appellant or the hotel room based on the Fourth Amendment violation. In contrast, the court noted that the police entered the hotel room because, during the course of their investigation, they discovered Owens'

intervening open warrant. Officers then obtained a search warrant to search the room and appellant based on their personal observations of illegal activity upon entering the room.

As the circuit court states, the scenario in the instant case is an important distinction from *Andrews*. Unlike *Andrews,* the Fourth Amendment violation in the instant case, *i.e.*, the use of the Hailstorm without a warrant, was *not* the only basis for the search warrant that led to the discovery of the contested evidence.

Furthermore, this distinction defeats appellant's argument concerning the denial of the good faith exception as it pertains to the nondisclosure agreement or any alleged recurring government misconduct. We reiterate that, in *Andrews*, there was no break in the nexus between the Fourth Amendment violation and the discovery of evidence. In the instant case, the circuit court specifically stated that, if the nexus remained intact, then suppression would be appropriate. By basing the search warrant that led to the discovery of the evidence on a lawful, open warrant for Owens, the police were not attempting to circumvent the law and base the search warrant on their own misleading conduct, as in *Andrews.*

Accordingly, we hold that the circuit court's Order implicitly finds that the police acted in reasonable reliance upon the Maryland Pen Register statute in using the Hailstorm device, although not permitted without a warrant, under Maryland law, by the time of the motion hearing. Furthermore, we hold that the circuit court implicitly found that the search warrant used to discover the contested evidence, was based on probable cause unconnected to the original Fourth Amendment violation. Therefore, the court was correct in applying

the *Davis* good-faith exception to the instant case.

CONCLUSION

In sum, police conducted an illegal search of appellant's cell phone by using a cell-phone simulator, *i.e.*, Hailstorm, without a warrant, as articulated by this Court in *Andrews, supra*. Nevertheless, the circuit court found there to be sufficient attenuation of the taint from the evidence at issue. Significantly, the court correctly found that an open arrest warrant was a sufficient intervening circumstance and that police acted with reasonable, objective good faith that their conduct was lawful at the time. Therefore, we hold that appellant was not entitled to the suppression of evidence.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED.

COSTS TO BE PAID BY APPELLANT.