Circuit Court for Baltimore City
Case No. 112201012/13

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1582

September Term, 2016

SHAWN STEVENSON

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Graeff,
Rodowsky, Lawrence F.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Rodowsky, J.

Filed: January 5, 2018

*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.

Appellant, Shawn Stevenson, was convicted on September 13, 2013, by a jury, sitting in the Circuit Court for Baltimore City, of murder in the first degree, sexual offense in the first degree, and related weapons offenses. On September 20, 2013, appellant moved for a new trial, which the court denied on October 30, 2013, before sentencing him to two concurrent life sentences. Appellant appealed, challenging several of the circuit court's evidentiary rulings as well as the sufficiency of the evidence. We affirmed. *Stevenson v. State*, 222 Md. App. 118, 152, *cert. denied*, 443 Md. 737 (2015).[1] This Court decided *State v. Andrews*, 227 Md. App. 350 (2016), hereinafter described, on March 30, 2016. On May 4, 2016, appellant filed a Motion for New Trial Based on Newly Discovered Evidence. Following a hearing, the court denied that motion. Appellant noted this appeal of that denial, presenting a single question for our review:

> "Does the failure to disclose the warrantless use of E911 [Enhanced 911] location tracking justify a new trial under Maryland Rule 4-331(c) and *Brady v. Maryland*, 373 U.S. 83 (1963)?"

Implicit in this question is the issue of whether the State, in fact, "fail[ed] to disclose the warrantless use of E911 location tracking."

We hold that the evidence in this case was not "newly discovered" under Rule 4-331(c). Nor was it "withheld" under *Brady*. Finding no error, we affirm the circuit court's ruling.

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[1]The circuit court received the mandate of the Court of Appeals on July 30, 2015.

Factual Background

The victim, Noi Sipayboun, had been appellant's long-time girlfriend, cohabitant, and the mother of his two minor children, ages eight and ten at the time of appellant's trial. Though Ms. Sipayboun and appellant cohabitated for thirteen years, Ms. Sipayboun's sister, Sonmai Sipayboun (Sister), testified that Ms. Sipayboun had begun an intimate relationship with another man—James Potter. Appellant, aware of the relationship, became physically abusive toward Ms. Sipayboun. In addition to Sister's having witnessed appellant perform multiple acts of violence on the victim, she testified that Ms. Sipayboun had informed her that appellant had tried to force her to have sexual intercourse with him. This abuse prompted Ms. Sipayboun to begin to relocate, during the week preceding her death, to 5406 Hillburn Avenue, a residence in which she and appellant had resided before moving to 4425 Powell Avenue in Baltimore City. She had planned to finalize the move of her children, Sister, and herself on April 23, 2012, the date of her murder.

On April 23, 2012, Ms. Sipayboun and appellant argued after appellant had taken her passport and the children's birth certificates. At around noon that day, Ms. Sipayboun called Sister, informing her that "Shawn had called her up and told her that she had to get all her stuff out of Hillburn because the house was under contract and we couldn't move in there." After placing several unanswered calls to Ms. Sipayboun at around 2:15 p.m., Sister drove to the Hillburn residence, hoping to find her. Upon entering the residence, Sister called out to Ms. Sipayboun, but she did not answer. Sister proceeded to the basement bathroom, where she found Ms. Sipayboun's naked body. Medical examination revealed that Ms. Sipayboun had sustained three stab wounds, thirteen cutting wounds, three broken

bones, multiple bruises, and injuries to her neck consistent with strangulation. She also suffered "injuries to the vagina and … anus which ... consisted of multiple bruises and tears and scratches."

After retrieving her cellular phone from her vehicle, Sister called 911 at 2:42 p.m. At 2:43 p.m., Sister received a telephone call from appellant. According to Sister, after "screaming at him telling him that I hate him," she "hung up the phone on him." Sister then elicited the assistance of a neighbor, who called 911 because "[Sister] said they were taking too long."

The police arrived and Sister was taken to homicide headquarters, where, she testified, the officers "were waiting for my niece and nephew and they were trying to get in touch with Shawn." Sister provided the police with appellant's cellular telephone number. Around 6:00 p.m., while still at homicide headquarters, Sister had a recorded telephone conversation with appellant, during which she informed him that Ms. Sipayboun had died after being cut and urged him to meet with the police.

Appellant's brother, Hilbert Stevenson (Brother), testified that he received a telephone call from appellant at approximately 3:00 p.m. Sensing that appellant was upset, Brother arranged to meet him at Maranatha Apostolic Church (the Church) at 701 East 25th Street. Accompanied by his nineteen-year-old daughter (Niece), Brother drove to the Church and met with appellant and Assistant Pastor Larry Brown. Appellant, upon leaving the Church and entering Brother's pickup truck, engaged in the 6:00 p.m. conversation with Sister that is the focus of this appeal. Fifteen minutes later, Detective John Jendrek

observed the truck at Kirk Avenue and 25th Street. When he approached, appellant identified himself as Shawn Stevenson and was arrested.

How it came about that the police were looking for appellant in the vicinity of Kirk Avenue and 25th Street was the subject of the hearing on the new trial motion.

The Motion for a New Trial

In response to the Office of Public Defender's request under the Maryland Public Information Act (PIA) to the Baltimore City Police Department (BCPD), appellant received, *inter alia*, (i) an exigent circumstances request form, (ii) an Advanced Technology Team After Action Report, and (iii) an AT&T mobile locator e-mail (collectively, the Documents). In his motion, appellant contended (i) that the State withheld evidence that the BCPD tracked appellant's real-time location using E911 technology[2] and a cell site simulator,[3] (ii) that such evidence was not discoverable through the exercise of due diligence, and (iii) that, in light of *State v. Andrews*, 227 Md. App. 350 (2016) (holding that the State's warrantless use of a cell site simulator to track a cell phone

[2]The term "E911" derives from the Federal Communication Commission's Enhanced 9-1-1 regulations under which cellular service providers are required to be able to identify, to within 50 to 300 meters, the longitude and latitude of a cellular telephone caller and to furnish that information within six minutes of a valid request from a public safety answering point. *In re Application of United States for an Order Authorizing Disclosure of Location Info. of a Specified Wireless Tel.*, 849 F. Supp. 2d 526, 532 (D. Md. 2011). "[T]he provider may generate such location data at any time by sending a signal directing the built-in satellite receiver in a particular cellular telephone to calculate its location and transmit the location data back to the service provider. This process, known as 'pinging,' is undetectable to the cellular telephone user." *Id*. at 534.

[3]A cell site simulator is a device that "'acts like a cell tower, and waits to receive a signal bearing the target …' International Mobil Subscriber Identity." *Andrews*, 227 Md. App. at 377.

user in real time violated that user's reasonable privacy expectation that the cell phone would not be so used), certain incriminating evidence introduced against appellant would have been susceptible to a motion to suppress.

At the motions hearing, appellant called two witnesses—Detective Jendrek, a member of the BCPD's Advanced Technology Team, which had been tasked with tracking appellant's phone, and Latoya Frances Williams, one of the attorneys retained to represent appellant at trial.

Detective Jendrek testified that the Advanced Technical Team submitted an exigent request form to AT&T at 4:48 p.m. In response to receiving that form, AT&T permitted the police to use its E911 data by "send[ing] you [the police] an email as to the approximate location of the cellular device." E911 e-mails, Detective Jendrek testified, provide longitudinal and latitudinal coordinates, identifying a radius within which the phone is located. At 5:36 p.m., AT&T sent the first such e-mail, providing a 51 meter radius. At approximately 5:50 p.m., AT&T submitted a second e-mail, providing a 538 meter radius. Detective Jendrek further testified that, although he attempted to employ a cell site simulator to narrow the radius in which the phone was located, it never connected to appellant's phone.[4] It was not, according to Detective Jendrek, the cell site simulator which

[4]According to the record, cell site simulators are rendered ineffective when a user is actively using his or her phone. When, for example, placing or receiving either a call or text message, the cell site simulator "gives the location of the cell cite that it registered on the network with, not the location of the phone." As the motions court noted, in this case it seems that the cell site simulator was ineffective because, at the behest of the police, Sister had called and was speaking on the phone with appellant while Detective Jendrek attempted to engage the cell site simulator.

led him to appellant; rather, his attention was drawn to the pickup truck in which appellant sat because "the pickup truck was blocking the entrance to an MTA [Maryland Transit Administration] lot."

At the hearing, Attorney Williams denied having been informed or having prior knowledge of either the real-time E911 tracking of appellant's phone or the attempted use of the cell site simulator. She further testified that had she been so informed, she "most certainly" would have filed a motion to suppress both "[the] stop and any fruits of that stop."

Additional facts will be stated, as required, for the discussion of particular issues.

Discussion

At issue in this case is an allegedly unconstitutional search, the evidence of which, appellant asserts, was withheld by the State and is newly discovered by appellant. In the wake of this Court's holding in *State v. Andrews*, 227 Md. App. 350 (2016), appellant seeks to revive what we conclude to be an otherwise unpreserved constitutional challenge by alleging a *Brady*[5] violation and invoking Maryland Rule 4-331(c). The State, in response, directs us to repeated references by the State to the BCPD's having warrantlessly tracked appellant's phone in real time.

Interpreting Rule 4-331(c) Judgments

Maryland Rule 4-331(c) provides, in pertinent part, that

> "**(c) Newly Discovered Evidence.** The court may grant a new trial or other appropriate relief on the ground of newly discovered evidence which

[5]*Brady v. Maryland*, 373 U.S. 83 (1963).

> could not have been discovered by due diligence in time to move for a new trial pursuant to section (a) of this Rule:
>
> "(1) on motion filed within one year after the later of (A) the date the court imposed sentence or (B) the date the court received a mandate issued by the final appellate court to consider a direct appeal from the judgment or a belated appeal permitted as post conviction relief."

Appellant argues that, because the motions court addressed the E911 evidence's persuasiveness, it impliedly found that that evidence was both material and previously undiscoverable. In making this argument, appellant both misapplies a fundamental principle of appellate practice and misconstrues an isolated quotation from *Campbell v. State*, 373 Md. 637, 669 (2003).

First, appellant inverts the presumption that trial courts know and properly apply the law. On appeal, the appellant *bears* the burden of overcoming this presumption. Here, however, appellant seeks to apply this principle to *relieve himself* of the burden of proving the materiality and prior undiscoverability of the evidence at issue. The mere fact that a court, when denying a motion, is silent on a threshold issue does not mean, in and of itself, that any unaddressed threshold issues were found favorably to the movant.

Appellant also relies on a cherry-picked quotation from *Campbell*. Citing *Argyrou v. State*, 349 Md. 587, 602 (1998), which, in turn, quoted *Love v. State*, 95 Md. App. 420, 432 (1993), the *Campbell* Court opined: "Whether the evidence is material and whether the evidence could have been discovered by due diligence are threshold questions that must be resolved before the significance of the evidence may be weighed." *Campbell*, 373 Md. at 669. Appellant interprets the Court's language as prescribing a rigid sequential approach to Rule 4-331(c) analyses, which prohibits courts from considering persuasiveness until

after finding that newly discovered evidence is material and was previously undiscoverable despite due diligence. In other words, appellant construes consideration of materiality and undiscoverability as a *procedural predicate* to considering prejudice. When read in context, it is clear that this Court and the Court of Appeals identify materiality and undiscoverability as "definitional predicate[s]," without which "the relief provided by subsection (c) is not available, no matter how compelling the cry of outraged justice may be." *Love*, 95 Md. App. at 432. In order for evidence to constitute "newly discovered evidence" within the meaning of Rule 4-331(c), such evidence must be material and counsel must have been unable to discover that evidence through due diligence. Absent one of these definitional predicates, the relief afforded by Rule 4-331(c) is unavailable.

Qualification As Newly Discovered Evidence

"[A]s used in Maryland Rule 4-331(c), 'due diligence' contemplates that the defendant act reasonably and in good faith to obtain the evidence, in light of the totality of the circumstances and the facts known to him or her." *Argyrou*, 349 Md. at 605. Where an appellant has "'knowledge of circumstances which ought to have put a person of ordinary prudence on inquiry[, he is charged] with notice of all facts which such an investigation would in all probability have disclosed if it had been properly pursued …'" *Id*. at 603 (quoting *Poffenberger v. Risser*, 290 Md. 631, 637 (1981)). "[I]f he neglects to make such inquiry, he will be held guilty of bad faith and must suffer from his neglect." *Id*.

In ruling on appellant's motion, the court found, in pertinent part, "[i]t … was testified to in direct and cross-examination *during the course of the trial* … that …

information was received as to the location of Defendant's phone during the course of the day and attempts to try to locate him during the course of the day" (emphasis added). Indeed, the record includes several references to cell phone tracking—both historic *and* real-time.

First, the State referred to tracking appellant's cell phone in an exhibit to its opposition to appellant's motion *in limine*.

The State made known that:

- the police were "able to take information regarding both the Defendant's phone and the victim's phone, by way of phone number through their respective carriers and begin tracing the movements of the phones";

- "Detective John Jendrek, based upon his training and expertise in the area of cellular phone technology, was able to utilize the information provided by the cell phone carriers and begin tracking the phones starting from earlier in the day of April 23, 2012";

- "Detective John Jendrek then continued to trace the phones call history throughout the day, and into the evening hours"; and

- "Defendant's phone was still being traced and at approximately 6:15 p.m., on April 23, 2012 the defendant was located …."

Then, during its opening statement, the State said:

> "Linda Sipayboun will tell you she talked to her sister that day and knew she had a cell phone and she relayed that information to Detective Ragland. *Detective Ragland*, at that point, ladies and gentlemen, *contacted the advanced technology team* with the Baltimore City Police Department *and asked them to try to obtain the carrier information for the phone for the Defendant* and the victim *to try to locate the Defendant*.
>
> "*Detective John Jendrek* from the Baltimore City Police Department was a part of that advanced technological team. He *contacted the wireless carriers. He got specific information from them and he began his investigation. He located the Defendant at 615 on Kirk Avenue* outside of an

MTA bus station in a car with his brother, Hilbert Stevenson, and his niece, LaShawn Stevenson."

(Emphasis added).

During the State's direct examination of Detective Jendrek, the latter likewise acknowledged having tracked appellant in real time pursuant to the exigent circumstances request.

"Q And what, if anything, did you do based on the information you had regarding the person of interest?

"A Once we got the phone number from Detective Ragland, an exigent circumstantial [sic] request was put in to AT&T for the call detail records and location alerts for Mr. Stevenson's phone.

"Q And what phone number were you provided for the person of interest; if you recall?

"A It would be 443-845-3634.

"Q And what is an exigent request?

"A An exigent request is a request made by law enforcement to the provider without a court order because it's a matter of life and death.

"Q And … what provider, if you recall, … did you go to?

"A [F]or that … particular phone number, it was an AT&T phone. And so we talked to the provider for AT&T.

"Q And what, if anything, did you request when you contacted AT&T when you contacted them?

"A Again, *we requested the call detail records for that phone and location alerts as to real time location alerts as to where that phone was currently located*.

"Q And if I could back up just a minute, what date was this that this request was made by Detective Ragland?

"A On April 23rd.

"Q And if you recall, what time did the request come in to ATT?

"A To the best of my knowledge, it was around 3:30 -- 4:00 o'clock, I'm not -- I'm not sure the exact time.

….

"Q Detective Jendrek, what is real time?

"A That would be the geolocation of the actual handset itself.

….

"Q What is geolocation?

"A Where you're located."

(Emphasis added).

Appellant was on notice of the existence of the Documents. Accordingly, the Documents were not "newly discovered evidence" under Rule 4-331(c).

Appellant asserts that the "exigency request" to AT&T for E911 tracking is newly discovered evidence. Such evidence, however, must be "more than 'merely cumulative or impeaching.'" *Campbell*, 373 Md. at 669 (quoting *Argyrou*, 349 Md. at 602). Here, Detective Jendrek's testimony regarding the real-time E911 tracking of appellant's phone renders cumulative any documentary evidence of that tracking. Appellant also trivializes the cumulative nature of the record, contending that "the State … made passing, ambiguous references on two occasions among a maelstrom of focus on historical cell site data." While the motion *in limine* and the hearing thereon may well have focused on the BCPD's use of historic cell site data, that "maelstrom of focus" detracts neither from the substance

nor from the clarity of Detective Jendrek's testimony regarding the real-time tracking of appellant's phone.

Given that the Documents are neither newly discovered nor material, the circuit court did not abuse its discretion in denying appellant post-conviction relief under Rule 4-331(c).

Required Effect of Newly Discovered Evidence

Assuming that the Documents are newly discovered evidence and that they are material, in order for a new trial to be warranted the movant must demonstrate that "[t]he newly discovered evidence may well have produced a different result, that is, there was a substantial or significant possibility that the verdict of the trier of fact would have been affected." *Yorke v. State*, 315 Md. 578, 588 (1989). Here, appellant contends that production of the Documents would have led to suppression of the photographs of appellant's injured hands, taken at the time of his arrest, and that, absent those photographs from the State's case, he would have been acquitted.

Appellant notes that, in the opinion affirming his conviction, we said that the photograph "had substantial probative value." *Stevenson*, 222 Md. App. at 143. That statement appears in a rejection of appellant's contention that the photographs should have been excluded under Maryland Rule 5-403, providing, in part, that relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Our statement evaluated the degree of alleged unfair prejudice but tells us little about the persuasiveness of the photographs in the State's case as a whole. In our opinion we reviewed the evidence.

> "There was, as the State contends, strong circumstantial evidence establishing Mr. Stevenson's motive to murder Ms. Sipayboun. The State presented evidence that Mr. Stevenson was the beneficiary of a significant life insurance policy insuring her life, and at the time she was killed, Ms. Sipayboun was in the process of moving out of their home over tension in their relationship, which had been caused by her intimate relationship with Mr. Potter. The trial included evidence that on the day Ms. Sipayboun was killed, Mr. Stevenson called her and demanded she move her belongings out of the house to which she had moved. And as we discussed above, Sister and Mr. Potter offered testimony demonstrating that Mr. Stevenson had physically abused Ms. Sipayboun in the weeks immediately preceding Ms. Sipayboun's death.
>
> "Strong circumstantial evidence also connected Mr. Stevenson to the crimes. Detective Ragland testified that there was no damage to the doors of Ms. Sipayboun's house, which suggested that she was killed by someone familiar. Detective Jendrek's testimony established that Mr. Stevenson was in close proximity to the scene of the crime when Ms. Sipayboun was killed, which contradicted Mr. Stevenson's claim that he was in the area of Golden Ring Mall at the time. Detective Jendrek also connected Mr. Stevenson's cell phone to North Point Road in Dundalk, where Ms. Sipayboun's abandoned cell phone was found later on. And Mr. Stevenson's contemporaneous (and otherwise unexplained) hand injury also suggested that he could have been involved in Ms. Sipayboun's violent death. There was more than enough here for a jury reasonably to conclude that Mr. Stevenson killed and sexually assaulted Ms. Sipayboun."

Stevenson, 222 Md. App. at 152.

Any value that the defense might have had in arguing the absence of photographs of appellant's hands is greatly diminished, on a relative scale, by the arguments available to the defense that "there were no eyewitnesses to the murder, no witness putting him at the scene of the crime, and no forensic evidence connecting him to the crime." *Id*. at 151.

There was no abuse of discretion in the trial court's not having found that the absence of the photographs met the *Yorke* standard.

The Purported *Brady* Violation

A *Brady* violation occurs where (i) the State either willfully or inadvertently suppresses evidence (ii) "'favorable to the accused, either because it is exculpatory, or because it is impeaching,'" and (iii) appellant was prejudiced by its suppression. *Yearby v. State*, 414 Md. 708, 717 (2010) (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). "[T]he burdens of production and persuasion regarding a *Brady* violation fall on the defendant." *Id.* at 720.

Evidence is *not* "suppressed" under *Brady* where "'the information allegedly suppressed was available to the defendant through reasonable and diligent investigation.'" *Id.* at 723 (quoting *Ware v. State*, 348 Md. 19, 39 (1997)). For the same reasons why appellant could have discovered by due diligence evidence of the real-time tracking of appellant's phone within ten days of the verdict, such evidence was not "suppressed" under *Brady*.

The Documents were not material, nor was their suppression prejudicial. In a *Brady* analysis, "[t]he prejudice prong is closely related to the question of materiality." *Id.* at 717 (citing *Banks v. Dretke*, 540 U.S. 668, 698-99 (2004)). The test for materiality under *Brady* is nearly identical to that for persuasiveness under Rule 4-331(c). "[E]vidence is material if there is a '*substantial possibility* that, had the [evidence] been revealed to [defense] counsel, the result of [the] trial would have been different.'" *Id.* at 719 (footnote omitted) (quoting *State v. Thomas*, 325 Md. 160, 190 (1992)). For the reasons discussed *supra*,

there was not a substantial possibility of succeeding, had appellant moved under *Brady* to suppress the photographs.[6]

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED.

COSTS TO BE PAID BY THE APPELLANT.

[6]Resolution of this case does not require us to determine whether E911 real-time tracking constitutes a Fourth Amendment search.