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Case Number 91,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DIAMONTE TAYLOR,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 91, 2020
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

On May 18, 2016, Wilmington Police obtained an arrest warrant for the appellant, Diamonte Taylor, charging him with Assault First Degree, Reckless Endangerment First Degree (two counts), Possession of a Firearm or Ammunition by a Person Prohibited ("PFBPP/PABPP") (three counts), and Possession of a Firearm During the Commission of a Felony ("PFDCF") (three counts).[1] Police arrested Taylor on June 1, 2016.[2]

On June 6, 2016, a New Castle County grand jury returned an indictment charging Taylor and co-defendant Zaahir Smith jointly with Robbery First Degree, PFDCF (two counts), Aggravated Menacing, and Conspiracy Second Degree, in addition to the originally charged offenses against Taylor.[3] On June 20, 2016, the grand jury returned a superseding indictment, charging Taylor with three co-defendants, Smith, Latasha Pierce, and Kevon Harris-Dickerson.[4] The re-indictment added charges against Taylor of Gang Participation with twelve underlying offenses, Murder First Degree, PFDCF (two additional counts), Conspiracy First Degree, and

[1] B1-7.

[2] B1-7.

[3] Taylor's PFBPP/PABPP offenses were separately charged in the indictment. The indictment also included separate charges against Smith. *See* A0002 at DI 1; A0023-30.

[4] A0003 at DI 4; A0031-46.

Aggravated Menacing.[5] On August 15, 2016, the grand jury returned another superseding indictment, adding two additional underlying offenses to the Gang Participation charge.[6]

On September 5, 2017, Taylor moved to sever various charges related to separate incidents and to sever his case from the other defendants' cases.[7] On October 5, 2017, Taylor moved to suppress his June 1, 2016 custodial statement to police.[8]

On November 13, 2017, the grand jury re-indicted for the third and final time, adding three additional underlying offenses by another gang member, who had pleaded guilty and been sentenced, to the Gang Participation charge.[9]

On January 22, 2018, Taylor moved to suppress evidence from the search of his cell phone.[10] The State filed its response to both suppression motions on February 12, 2018.[11] The Superior Court held a hearing on February 16, 2018 to address the various defense motions to sever and motions to suppress.[12] The

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[5] *See* A0031-46.

[6] *See* A0003 at DI 14.

[7] A0007 at DI 30; A0070-108.

[8] A0008 at DI 32; A0109-23.

[9] A0009 at DI 41; A0124-A0142. *See* A0010 at DI 46.

[10] A0011 at DI 53; A0230-65.

[11] A0012 at DI 57; A0266-81.

[12] A0012-13 at DI 58; A0282-303.

Superior Court granted severance for Latasha Pierce's trial, but denied severance of the other co-defendants. The court granted Taylor and his co-defendants severance as to the person prohibited charges, but denied severance of the other charges.[13] Because the State agreed not to admit Taylor's statement into evidence during its case-in-chief, the court denied Taylor's motion to suppress the statement as moot.[14] The court denied Taylor's motion to suppress evidence based on the search of Taylor's cell phones.[15]

On February 21, 2018, Taylor joined his co-defendants' motions *in limine* regarding the foundational requirements to admit social media evidence and to exclude expert witness testimony regarding the social media evidence.[16] On February 28, 2018, Taylor also moved *in limine* to preclude the State's ballistic expert from testifying after the State had notified the defense that the original ballistics expert, Carl Rone, would not be called to testify, as well as to exclude any evidence Rone had handled.[17] At an office conference held February 28, 2018, the Superior Court deferred consideration of the motion regarding social media evidence

[13] A0012-13 at DI 58; A0013 at DI 59; A0013-14 at DI 61.

[14] A0013 at DI 59; A0013-14 at DI 61.

[15] A0013 at DI 59; A0013-14 at DI 61.

[16] A0014 at DI 62.

[17] A0348-430.

until trial, denied the motion regarding the ballistics expert, and denied the motion to exclude evidence handled by Rone.[18]

On March 8, 2018, Taylor filed, under seal, a renewed motion to sever his case from his co-defendants.[19] The Superior Court granted the motion at an office conference the next day based on Harris-Dickerson's guilty plea and his anticipated testimony at trial.[20]

Jury selection for Taylor's trial began on March 12, 2018, and the ten-day trial began on March 19, 2016.[21] The jury found Taylor guilty of Murder First Degree, Gang Participation, Reckless Endangerment (two counts), PFDCF (two counts), Aggravated Menacing (two counts), and Assault First Degree; the jury acquitted Taylor of Robbery First Degree and Attempted Robbery First Degree and their associated charges of PFDCF.[22] The State entered a *nolle prosequi* for charges of Conspiracy First Degree and Conspiracy Second Degree, as well as the severed PFBPP charge.[23]

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[18] A0015 at DI 65; A0307-47.

[19] A0015 at DI 70.

[20] A0016 at DI 71; A0444-521.

[21] A0016 at DI 72; A0017 at DI 77.

[22] A0017 at DI 77; A1310-12.

[23] A0017 at DI 77; A1313.

On August 2, 2019, Taylor moved for a new trial based on an alleged *Brady*[24] violation by the State related to Carl Rone's misconduct.[25] The State filed a response on August 6, 2019,[26] to which Taylor replied on August 9, 2019.[27] On August 23, 2019, the Superior Court conducted a hearing on the motion.[28] And, on November 26, 2019, the Superior Court denied the motion in a written order.[29]

On January 31, 2020, the Superior Court sentenced Taylor, effective July 24, 2018, to a mandatory life sentence for Murder First Degree and, for the remaining charges, to eleven years at Level V incarceration and another six years of incarceration suspended for decreasing levels of probation.[30]

Taylor timely filed this appeal and an opening brief. This is the State's answering brief.

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

[25] A0019 at DI 98; A1329-438.

[26] A0019 at DI 99; A1439-48.

[27] A0019 at DI 100; A1449-62.

[28] A0019 at DI 102; A1526-62.

[29] A0019-20 at DI 104; *State v. Taylor*, 2019 WL 6353355, at *4 (Del. Super. Ct. Nov. 26, 2019).

[30] A0020 at DI 105; A1591-96.

SUMMARY OF THE ARGUMENT

I. Appellant's arguments I and II are denied. The Superior Court did not abuse its discretion when it denied Taylor's motion to suppress evidence discovered after police executed a search warrant for his phone. The warrant set forth probable cause to search the phone during the time frame of the charged offenses. The trial court addressed any perceived failure to include discrete temporal parameters by applying a timeframe consistent with the police investigation of Taylor. The search warrant application and affidavit of probable cause asserted sufficient facts for a neutral judicial officer to find a fair probability that evidence relating to the charges of assault and murder would be found in the listed areas of Taylor's phones during a finite investigatory time frame expressed in the affidavit.

II. Appellant's argument III is denied. The trial court did not abuse its discretion by denying Taylor's motion for a mistrial. The court correctly found that the State's late disclosure of an inconsistent and inculpatory witness statement did not unfairly prejudice Taylor. The witness's identification of Taylor as the individual running down the street with a gun was not new information. Taylor's counsel had been provided with the transcript of the witness's original statement that included her daughter's statement that she had seen "Diamonte" and that the witness had put a name to the individual's face by seeing Facebook photos. In response to questioning by Taylor's counsel, the same witness inaccurately testified that she had

seen a photo lineup. This misstatement was corrected by the testimony of Detective Kirlin the next trial day, and Taylor declined the trial judge's offer to strike the inaccurate testimony and give a curative instruction. There was no manifest necessity for the trial judge to declare a mistrial.

STATEMENT OF FACTS

On January 23, 2015, teenager Jordan Ellerbe was shot and killed in a drive-by shooting in Wilmington, Delaware.[31] Ellerbe was an associate of a gang known as "Shoot to Kill" or "STK."[32] Ellerbe's shooting touched off a "beef" between STK and a rival gang known as "Only My Brothers" or "OMB."[33] In May 2016, a series of street crimes involving guns occurred in Wilmington and outside the city limits in New Castle County. Wilmington Police Department ("WPD") investigators concluded that the crimes were likely gang related. The crimes culminated in the brazen daytime shooting and murder of Brandon Wingo as he walked home from his high school with a group of students on Clifford Brown Walk in Wilmington. WPD investigations revealed that suspects in several of the violent crimes, including Wingo's homicide, included Zaahir Smith[34] and Diamonte Taylor,[35] members of the STK gang.[36]

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[31] A0543.

[32] A0543; A0550.

[33] A0544.

[34] Smith is also known as Rango, Grimey Savage, or Grimey STK. A0564.

[35] Taylor is also known as Nice or D-Nice. A0565.

[36] A0561; A1199.

I. The Shoot To Kill Gang

William Moran, a Crime Gun Intelligence Coordinator with the Bureau of Alcohol, Tobacco, Firearms and Explosives assigned to the WPD Realtime Crime Center, explained that, as an intelligence analyst, he compiled and assessed gang and gun violence data.[37] Moran explained that his focus revealed gang involvement in many violent crimes in the City of Wilmington.[38] Moran began receiving information about the STK gang in January 2015, around the time of the Ellerbe drive-by homicide.[39] The rivalry between STK and OMB[40] could be seen in social media postings.[41] Through social media postings, Moran identified Taylor, Zaahir Smith, Kevon Harris-Dickerson,[42] Elijah Crawford, and others, as members of the STK gang.[43] STK gang members referred to each other by nicknames, and communicated through hand gestures, and often displayed gang-related tattoos.[44] Harris-Dickerson testified that he, Taylor, and Smith were all members of STK.[45]

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[37] A0541-42.

[38] A0542.

[39] A0543.

[40] OMB was previously known as Yolo. A0544.

[41] A0544.

[42] Harris-Dickerson is also known as Scrap. A0552.

[43] A0551-55; A0561-70; A0580-81.

[44] A0543; *see* A0579; A0580-81.

[45] A1195; A1199-1200.

II. May 5, 2016 - Armed Robbery

On May 5, 2016, Jonathan Rivera and Gerard McDonald went to meet a friend, Ninti Johnson, at the Harbor Club Apartment Complex in Newark, Delaware.[46] When they arrived, Ninti was not there, but her brother, known to them as Hotep, and his friend were there.[47] Hotep asked McDonald for a ride to a nearby Exxon Gas Station; McDonald agreed.[48] Hotep sat behind the driver (Rivera) and his friend sat behind the passenger (McDonald).[49] Upon returning to the complex, Hotep directed Rivera to park toward the rear of the complex, at which point Hotep displayed a revolver and told McDonald and Rivera to "run everything."[50] Rivera turned over his MacBook Pro laptop, gold watch, black leather wallet, and his white iPhone 5.[51] Hotep and his friend exited the vehicle and fled on foot.[52] Rivera and McDonald left the complex and drove to a nearby Chick-Fil-A, where they called police from the parking lot.[53]

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[46] A0637; A0649.

[47] A0639; A0649-50.

[48] A0639; A0650.

[49] A0639; A0650.

[50] A0640; *see also* A0650; A0651.

[51] A0641; A0650.

[52] A0642; A0650.

[53] A0642; A0651.

New Castle County police lifted latent fingerprints from the rear passenger side of the car, above the gas tank, which were determined to match Taylor's fingerprints.[54] McDonald identified Smith as Hotep from a photo line-up and identified Taylor from another photo line-up as Smith's friend "Nice" with a "302" tattoo around his eye.[55] Rivera did not identify any of his assailants from the photo line-up, but identified Hotep in a Facebook picture.[56] A subsequent search of Ninti's apartment yielded a .38 revolver, a box of Remington .38 caliber ammunition, credit cards in the name of Jonathan Rivera, and a VISA debit card in the name of Zaahir Smith.[57] Smith's fingerprint was found on the ammunition box.[58] Inmate Andrew Brecht testified that Smith bragged about the robbery while in prison.[59]

III. May 16, 2016 - Shooting of Shango Miller

On May 16, 2016, WPD officers responded to a complaint of shots fired with one person down on Lombard Street.[60] They found Shango Miller, a member of OMB, on the steps of a row home on North Lombard Street.[61] Miller's aunt, Lamora

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[54] A0669-70.

[55] A0652; A0661; *see also* A0560; State's Exhibit 40.

[56] A0643.

[57] A0663.

[58] A0669.

[59] A1194-95.

[60] A0701.

[61] A0703.

Whye, holding her infant son, was in the home's doorway.[62] Miller had been playing with the young child by making faces through the screen door.[63] As Whye and the child were moving back in the house, Miller exclaimed, "Grandmom, I got shot."[64] Whye brought Miller into the house and laid him on floor in case the shooters returned.[65] Surveillance video showed two persons, one wearing a gray and black hat with an emblem on the bill and a jacket with a red stripe, walk by the area prior to the shooting, then run from where the shooting happened.[66] Harris-Dickerson identified Smith wearing the Armani Exchange hat and jacket captured in the video.[67] He also identified Taylor as the man with Smith and testified that Taylor was the shooter.[68]

Miller suffered a gunshot wound in the groin area,[69] and remained in the hospital until May 31, 2016.[70] While being treated at Christiana Hospital, Miller told a forensic nurse examiner: "I was outside smoking at my grandmother's house.

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[62] A0703; A07.

[63] A0712.

[64] A0712.

[65] A0704; A0712.

[66] A0706; A0708; A0711.

[67] A1205. Smith was wearing the hat when he was arrested on May 30, 2016. A1031; State's Exhibit 278.

[68] A1205.

[69] A0704; A0727.

[70] A0728.

These two kids walked by the house. They didn't say anything. They walked by the house again. I heard one shot. They were close, about arm's length. I ran inside to my grandmom's house."[71]

Police investigators determined that the spent casing recovered from the scene of Miller's shooting was a Herter's 9mm casing.[72]

IV. May 18, 2016 - Robbery/Shooting of Temijiun Overby

On May 18, 2016, a WPD detective responded to a complaint of a robbery shooting in the 1600 block of Thatcher Street.[73] The detective found Temijiun Overby on the 900 block of East 17th Street, suffering from a gunshot wound to his right forearm and other injuries.[74] Overby was taken to the hospital.[75] Police found two Herter's 9mm spent shell casings in the 1600 block of Thatcher Street and a blood trail on East 17th Street.[76] Police also retrieved video showing Overby and some friends walk down Thatcher Street, go into a store, and then return towards 17th Street, while two persons walked up behind Overby and his friends – one

[71] A0730.

[72] A0987.

[73] A0696.

[74] A0967.

[75] A0696.

[76] A0697-99.

walked up to the group and the other remained about 20-30 feet behind.[77] Video also captured the two persons fleeing in the same direction after the incident.[78]

Harris-Dickerson pleaded guilty to robbery first degree by aiding Smith, who, by displaying a firearm, threatened force upon Overby.[79] He testified that Smith shot Overby with a 9mm pistol.[80] Video shows Smith in the Armani Exchange hat.[81] Latasha Pierce drove Harris-Dickerson and Smith to the store, where they spotted Overby and his friends walking across the roadway.[82] The two men discussed robbing the men and Harris-Dickerson gave the Canik 9mm gun Pierce had previously purchased to Smith.[83] Smith and Harris-Dickerson left for a few minutes and then came back to the car, complaining that the guys did not have a lot of money on them.[84]

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[77] A0700.

[78] A0701.

[79] A1196.

[80] A1201.

[81] A1204.

[82] A1058.

[83] A1055; A1058.

[84] A1058-59.

V. May 19, 2016 - Murder of Brandon Wingo

On May 19, 2016, Brandon Wingo, a high school freshman, walked home from school with a group of girls.[85] Wingo and the girl to whom he was talking lagged behind the others.[86] As they walked down Clifford Brown Walk, a person wearing a black coat turned the corner, pulled a hoodie up and walked up the same side of the street towards the group.[87] Wingo saw the person coming toward them and said, "There goes the opp."[88] Wingo's schoolmates all noticed the shooter heading toward them because it was odd to see someone in a coat and hoodie on such a warm day.[89] The person walked past the girls in the front of the group while reaching into his pocket.[90] He yelled something just before pulling a gun out of his pocket.[91] All the girls, except the one talking with Wingo, started running as three shots rang out.[92] Wingo also ran, while his companion froze and started screaming.[93]

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[85] A0782-83.

[86] A0783.

[87] A0784.

[88] A0805.

[89] A0784; A0796; A0801; A0805.

[90] A0785.

[91] A0785.

[92] A0785.

[93] A0802; A0806.

Wingo fell to the ground between two parked cars.[94] Wingo died from a gunshot wound to the top of his head; he had also been shot in the buttocks.[95]

Treasure Evans, who had also walked home along Clifford Brown Walk, reached her grandmother's house across the street from where the others were walking.[96] Minutes before the shooting, she saw a light blue car drive by with Taylor in the front passenger seat.[97] Evans recognized Taylor because she had attended middle school with him.[98] Taylor wore all black and a hoodie.[99] Evans then witnessed Wingo running, falling, and being shot.[100] The shooter was wearing all black.[101]

In a police interview soon after the murder, Evans, although saying that she could not see the shooter's face because of the hoodie, said "I said it was Diamonte. ... Because that's who I seen in the car, and it's the same person who shot

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[94] A0785-86; A0802.

[95] A1022-23.

[96] A0811.

[97] A0812.

[98] A0812.

[99] A0813.

[100] A0844.

[101] A0846.

Brandon."[102] She stated that she "assumed" it was him.[103] Later in the same interview, Evans acknowledged that she recognized the shooter was Diamonte and she knew who it was.[104] At another point, she said "I see him shooting. . . . Diamonte."[105] Evans eventually identified Taylor from a photo line-up as "[t]he person I seen in the car and shot Brandon."[106]

Nadana Sullivan, Evans' mother, also saw the shooter holding a gun as he ran down the street after killing Wingo.[107] She saw him turn down Shearman Street.[108] Sullivan testified that she saw the shooter, but that she could not put a name to the face.[109] She learned the shooter's name from children who had shown her photos.[110] Sullivan saw Taylor three days prior to Wingo's murder on the corner of Shearman and Clifford Brown Walk with another guy – "They were fiddling around with a gun."[111]

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[102] A0898. The video of the interview was played for the jury at trial. A0817.

[103] A0899.

[104] A0904-05.

[105] A0908.

[106] A0918.

[107] A0821.

[108] A0822.

[109] A0826.

[110] A0826.

[111] A0826.

Earlier on the day of Wingo's murder, Harris-Dickerson, Smith, and Taylor discussed Wingo's disrespectful Facebook posting about a recently deceased STK member.[112] They decided that if Wingo or another OMB member were seen, they were going to get shot.[113] They knew that Wingo had to come by Clifford Brown Walk or Lombard Street.[114]

That afternoon, Latasha Pierce had to be at work by 3:00 p.m., so Harris-Dickerson drove her to work in her Ford Fusion.[115] Taylor was also in the car.[116] Pierce overheard Harris-Dickerson say to Taylor that "school is letting out, so we don't shoot when school's letting out."[117] After dropping Pierce off at work, Harris-Dickerson and Taylor drove down Clifford Brown Walk and saw Wingo walking with some other students.[118] Taylor wanted to shoot Wingo from the car, but Harris-Dickerson said no.[119] Instead, Harris-Dickerson stopped the car, and Taylor grabbed a winter coat and a gun before getting out of the car.[120] Harris-Dickerson heard

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[112] A1204.

[113] A1204.

[114] A1204.

[115] A1059.

[116] A1059.

[117] A1059.

[118] A1203.

[119] A1203.

[120] A1203.

gunshots by the time he reached Lombard and Geyur Street.[121] He parked the car on Shearman Street and went into the residence where he lived with Pierce.[122] Taylor arrived at the residence and informed Harris-Dickerson that he shot Wingo.[123] Smith was also there at the time.[124] The three men left the house, got in the Ford Fusion, and drove down Clifford Brown Walk, where they saw Wingo lying between some cars.[125] Taylor laughed.[126]

Harris-Dickerson continued driving to Chester, Pennsylvania.[127] After considering their situation, they drove back to Delaware and retrieved Pierce from her place of work and spent the night at a motel in New Castle.[128] Then they all drove to North Carolina for several days, after which they returned to Wilmington.[129] Taylor and Smith retained possession of the 9mm gun.[130]

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[121] A1203.

[122] A1203; A1206.

[123] A1203.

[124] A1203

[125] A1206.

[126] A1206.

[127] A1206.

[128] A1206.

[129] A1206-07.

[130] A1207.

WPD officers retrieved Herter's spent shell casings from the Wingo murder scene, and the medical examiner recovered a projectile during autopsy.[131] Video surveillance captured Wingo and his companions walking along Clifford Brown Walk[132] and Wingo's shooter running from the scene.[133] Ballistics evidence revealed that the same firearm had been used in the shootings of Wingo, Miller and Overby.[134] WPD officers also collected evidence from 508 Shearman Street and the Ford Fusion, including two black coats, a gun case, a box of Herter's 9mm ammunition, and fingerprints.[135] Both Harris-Dickerson's and Taylor's palm prints were on the Ford Fusion.[136]

VI. May 30, 2016 - Aggravated Menacing of Tiheed Roane and Shawn Garrett

On May 30, 2016, Brandon Wingo's first cousin, Shawn Garrett, and his best friend, Tiheed Roane, walked over the 11th Street bridge.[137] As they crossed the bridge, Garrett mentioned that a car had passed them more than once.[138] Garrett told

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[131] A0779-80; A1023.

[132] A0739.

[133] A0741.

[134] A0999.

[135] A1025-28.

[136] A1030.

[137] A0829; A0964.

[138] A0965.

Roane to run, which he did.[139] Roane looked to see why he was running and saw people hopping out of the car; one of them pulled out a gun.[140] When interviewed, Roane told police that Grimey exited the car and pointed a gun in their direction; D-Nice was in the passenger seat pointing at him making a shooting motion.[141]

That same day, a WPD uniformed officer responded to a 911 call of a person with a gun in the area of 27th and North Tatnall Streets.[142] The suspect was described as a "black male wearing a gray baseball cap, black T-shirt and blue jeans."[143] The officer noticed someone fitting that description; when the officer made eye contact, the suspect grabbed his waistband and began walking away.[144] The officer ordered the suspect to stop, which he did.[145] The officer told him to put his hands in the air, which allowed her to see a firearm in his waistband that slid down into his pants.[146] The suspect was arrested and identified as Smith, and the loaded revolver was seized

[139] A0965.

[140] A0965.

[141] A0974.

[142] A0948.

[143] A0948.

[144] A0948.

[145] A0948.

[146] A0948-49.

from his pantleg.[147] Garrett identified Smith ("Grimey") and Taylor ("D-Nice") from a photo lineup.[148]

[147] A0949-50.

[148] A0830.

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING TAYLOR'S MOTION TO SUPPRESS EVIDENCE.[149]

Question Presented

Whether the trial court abused its discretion by denying Taylor's motion to suppress evidence seized from his cell phone pursuant to a warrant that provided the issuing magistrate probable cause to believe evidence of murder and related offenses would be on the phones.[150]

Standard and Scope of Review

This Court reviews a trial court's denial of a motion to suppress for an abuse of discretion.[151] "Where the facts are not disputed and only a constitutional claim of probable cause is at issue, we will review the Superior Court's application of the law of probable cause *de novo*."[152] "Appellate review of the sufficiency of an affidavit in support of a search warrant, however, is not *de novo*."[153] "A determination of probable cause by the issuing magistrate will be paid great deference by a reviewing

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[149] Argument I addresses Arguments I and II in Taylor's Opening Brief.

[150] *See* A0303.

[151] *Cooper v. State*, 228 A.3d 399, 404 (Del. 2020), *reh'g and reargument denied* (May 6, 2020).

[152] *Id.* (quoting *Sisson v. State*, 903 A.2d 288, 296 (Del. 2006) (*en banc*)).

[153] *Id*.

court and will not be invalidated by a hypertechnical, rather than a common sense, interpretation of the warrant affidavit."[154]

Merits

Taylor argues that the search warrant authorizing investigators to search his cell phones failed to comport with the requirements of the Fourth and Fourteenth Amendments to the United States Constitution.[155] First, Taylor asserts that the warrant failed to provide the requisite nexus between the alleged crime committed and the cellphones to be searched.[156] Second, Taylor asserts that the Superior Court erred by admitting data and messages from Taylor's cell phone.[157] Taylor's claims are unavailing.

United States Marshals arrested Taylor, a suspect in multiple violent crimes, including the May 19, 2016 murder of Brandon Wingo, on June 1, 2016. At the time of his arrest, Taylor possessed two cell phones - a white Motorola and a white Samsung. On June 10, 2016, WPD Detective MacKenzie Kirlin applied for, and was granted, a warrant authorizing a search of Taylor's cell phones.[158]

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[154] *Id.* (quoting *Jensen v. State*, 482 A.2d 105, 111 (Del. 1984)).

[155] Taylor has waived any claim under the Delaware Constitution by failing to brief the issue. *See Ortiz v. State*, 869 A.2d 285, 290-91 & n.4 (Del. 2005) (delineating the proper form for raising a State Constitutional claim).

[156] Op. Br. at 14.

[157] Op. Br. at 30.

[158] A0254-60.

Kirlin's affidavit[159] provided the following facts establishing a fair probability that evidence of a crime would be found in the data found in Taylor's cell phones:

- The victim of a shooting on Lombard Street in Wilmington on May 16, 2016 identified the shooter as "D-Nice," a member of "STK," a rival gang of Yolo. ¶6.
- Det. Bucksner and Intelligence Det. Flaherty know a Diamonte Taylor with a tattoo on the back of his right hand to have a nickname of "D-Nice." ¶7.
- A victim positively identified Taylor from a photo lineup. ¶11.
- Video surveillance shows a black male with dark markings on the back of his right hand fleeing the scene of the shooting with what appears to be a gun in his hand. ¶5.
- Three days later, Wingo was shot and killed on Clifford Brown Walk. ¶8.
- The victim of the May 16th shooting, a member of OMB/Yolo gang, acknowledged an ongoing feud with STK and that D-Nice is an STK member. ¶¶13, 14.

[159] A0256-60.

- Independent sources corroborated a violent feud between STK and OMB and confirmed that D-Nice is an STK member. ¶¶13, 15.
- Wingo is known to be a friend and member of OMB/Yola. ¶16.
- Ballistic evidence confirmed a match between the firearm used to murder Wingo and the firearm used to shoot the Lombard Street victim. ¶17.
- The investigation revealed that the 508 Shearman Street[160] residence was frequented by STK members. ¶19.
- On June 1, 2016, Taylor was observed exiting 508 Shearman Street and entering a black Envoy driven by Corliss Pierce. ¶19.
- U.S. Marshals conducted a vehicle stop of the Envoy and arrested Taylor pursuant to a warrant. ¶19.
- Marshals conducted a search incident to arrest and located a white Samsung cellphone and a white Motorola cellphone in Taylor's front pocket. ¶20.
- A search of the Envoy pursuant to a warrant revealed two additional cellphones, one of which belonged to Latasha Pierce, a resident of 508 Shearman Street and sister of Corliss Pierce. ¶¶21-22.

[160] The affidavit refers to the street name "Sherman" throughout, but this appears to simply be a misspelling of "Shearman."

- Latasha Pierce is in a relationship with Kevon Harris-Dickerson, an identified STK member, who also resides at 508 Shearman Street and who frequently uses her cellphone. ¶22.
- Taylor and Zaahir Smith have both been to 508 Shearman Street. ¶22.
- There have been numerous recent social media postings referencing the two listed shootings and the ongoing gang feud. ¶23.
- Through training, knowledge, and experience, the officer is aware that persons involved in criminal acts will use devices such as cellphones to further facilitate their criminal acts and/or communicate with co-conspirators. ¶24.

After linking the phones to Taylor and his unlawful conduct, the warrant application listed the places to be searched within the cellphones:

> to include but not limited to registry entries, pictures, photographs, images, audio/visual recordings, multi-media messages, web browsing activities, electronic documents, location information, text messaging, writings, user names, subscriber identifiers, buddy names, screen names, calendar information, call logs, electronic mail, telephone numbers, any similar information/data indicia of communication, and any other information/data pertinent to this investigation within said scope which represent evidence of Murder 1st degree and related offense(s).[161]

The Superior Court judge, after a hearing, found:

[161] A0259.

The analysis that's conducted in this is the totality of the circumstances ... to see whether there was sufficient information to form the reasonable leap that evidence of the crime [] being sought would be found on the cellphones. I think that determination requires, one, whether there was a logical nexus, probable cause requires the logical nexus between the items being sought and the place to be searched. Here I find that the facts presented within the four corners of the affidavit are sufficient to make that finding.

There were two incidents that were identified in the warrant, it was very specific as to time .... There was the gang rivalry motive [] noted. The affidavit details the officer's reasons why the evidence of the shootings would be contained in the cellphones. The cellphones were on the defendant's person. And then there was an inference, or at least the interview with the co-defendant provided an inference that Mr. Harris[-]Dickerson was communicating with defendant on that cellphone.

I understand that there's been some reference to typographical, maybe some typographical errors that were on Paragraph 23, but when you look at it – the totality of the circumstances and you look at the affidavit and both Paragraphs 23 and 25 clearly identify at the time of arrest that here he was in possession of two cellphones that were identified – just as in Starkey, here they were identified by make and model, or I should say color and model.

I don't think that the warrant here was vague. It specifically limited the officer's search to the cellphones and to certain types of data, media and was pertinent to this investigation, very similar to Starkey.

I find the differences in the Wheeler case ..., the scope of that particular case a warrant was related to witness tampering, that language was too generalized. And here I find that the warrant here does limit the search to a relevant time frame. ... [T]he State's response was that the – whatever incriminating text messages and photos were found were within the narrow scope of the digital search that was requested in the affidavit.

> The warrant – I did articulate the time frame, the evidence that is sought to be presented in this case is limited to the search of the cellphone that was identified there. I find this case is very distinguishable from Wheeler and that it does limit the search to a narrow time frame, the search and that is the evidence that will be requested to be presented in this case.
>
> It does not ask for the same – it's not as limitless as Wheeler was. And I think here the cellphone search was limited to certain data, media and files that, again, were pertinent to the investigation.
>
> I think the Magistrate had what she needed to form the reasonable belief ... to look at the total[ity] of the circumstances, and so when I review the four corners of the warrant it's my conclusion that the warrant was sufficient. And that based on that warrant that contained enough information to deem it appropriate so that the motion to suppress on this issue is denied.[162]

The Superior Court judge evaluated the four corners of the warrant to search Taylor's phones and did not abuse her discretion by denying Taylor's motion to suppress.

A. The affidavit of probable cause, considered under the totality of the circumstances, established probable cause to support the issuance of the search warrant.

Where police have conducted a search pursuant to a warrant, the defendant bears the burden of persuasion to show by a preponderance of the evidence that the warrant was not supported by probable cause.[163] This Court has consistently held

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[162] A0302-03.

[163] *See State v. Sisson*, 883 A.2d 868, 875 (Del. Super. Ct. 2005), *aff'd*, 903 A.2d 288 (Del. 2006); *cf. McAllister v. State*, 807 A.2d 1119, 1123 (Del. 2002); *Hunter v.*

that the requirements for the issuance of a search warrant, codified at 11 *Del. C.* §§ 2306 and 2307, set forth a "four-corners" test for probable cause.[164] Pursuant to that standard, sufficient facts must appear on the face of the affidavit so that an appellate court can verify the existence of probable cause.[165] Consequently, the affidavit in support of a search warrant must, within its four corners, set forth sufficient facts for a neutral judicial officer to form a reasonable belief that an offense has been committed and that seizable property will be found in a particular place or on a particular person.[166] Such is the case here.

In *Illinois v. Gates*,[167] the United States Supreme Court set forth a "totality-of-the-circumstances" approach for courts to determine whether probable cause exists to support the issuance of a search warrant. "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place."[168] This

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State, 783 A.2d 558, 560 (Del. 2001) (State bears burden of proof on a motion to suppress evidence seized without a warrant).

[164] *Dorsey v. State*, 761 A.2d 807, 811 (Del. 2000).

[165] *Id*.

[166] *Id*.

[167] 462 U.S. 213, 230-31 (1983).

[168] *Id*. at 238.

Court has consistently applied *Gates*, requiring that an affidavit in support of a search warrant set forth sufficient facts from which a judicial officer can form a reasonable belief that an offense has been committed and that the property sought would be found in the particular place.[169]

A determination of probable cause requires a logical nexus between the items sought and the place to be searched.[170] This nexus may be inferred from the factual allegations of the affidavit, including "the type of crime, the nature of the items sought, and the extent of an opportunity for concealment and normal inferences as to where a criminal would hide [evidence of a crime]."[171] Thus, a judicial officer may find probable cause when, considering the totality of the circumstances, "there is a *fair probability* that contraband or evidence of a crime will be found in a particular place."[172]

In *State v. Albert*, the Superior Court found that the facts in the affidavits underlying the warrants were sufficient to provide a nexus between the crimes and

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[169] *E.g.*, *Fink v. State*, 817 A.2d 781, 787 (Del. 2003); *Dorsey v. State*, 761 A.2d 807, 811 (Del. 2000); *Gardner v. State*, 567 A.2d 404, 409 (Del. 1989).

[170] *Dorsey*, 761 A.2d at 811.

[171] *State v. Ivins*, 2004 WL 1172351, at *4 (Del. Super. Ct. May 21, 2004) (alteration in original); *see Sisson*, 903 A.2d at 296.

[172] *Sisson*, 903 A.2d at 296 (emphasis added); *Jensen*, 482 A.2d at 112 ("The test for probable cause is much less rigorous than that governing the admission of evidence at trial and requires only that a probability, not a prima facie showing, of criminal activity be established.").

the defendant's cell phone because the affidavits stated that defendant and another individual were involved in selling heroin and that the officer knew that criminals used cellphones to communicate.[173] In *Albert*, the court relied in part on a federal case where the U.S. District Court for the Eastern District of Michigan clarified the narrow instance when a generalized statement by an officer would be sufficient to create a nexus between the alleged crime and the defendant's cell phone:

> [A] number of courts have found that an affidavit establishes probable cause to search a cell phone when it describes evidence of criminal activity involving multiple participants and includes the statement of a law enforcement officer, based on his training and experience, that cell phones are likely to contain evidence of communications and coordination among these multiple participants.[174]

In a more recent case, the same district court noted that:

> [A] magistrate judge might reasonably *infer* that a group committing a crime is likely to use cell phones to communicate. Although a magistrate judge may infer a nexus based on "the type of crime being investigated, the nature of things to be seized, the extent of an opportunity to conceal the evidence elsewhere and the normal inferences that may be drawn as to likely hiding places,", the inferential chain cannot be too long or too weak[.][175]

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[173] 2015 WL 7823393, at *4 (Del. Super. Ct. Dec. 3, 2015).

[174] *Id.* (quoting *United States v. Gholston*, 993 F. Supp. 2d 704, 720 (E.D. Mich. 2014)).

[175] *United States v. Olaya*, 2017 WL 1967500, at *6 (E.D. Mich. Apr. 19, 2017) (quoting *United States v. Williams*, 544 F.3d 683, 687 (6th Cir. 2008) and citing *United States v. Laughton*, 409 F.3d 744, 750 (6th Cir. 2005) (finding probable cause plainly lacking where filling the gap in the affidavit "would require a number of inferences, even inferences drawn upon inferences")).

Here, the magistrate could reasonably infer that Taylor's cell phones would contain relevant evidence related to the two gang-related shootings. A fair reading of the warrant application establishes that police sought to search Taylor's phones for information related to the shooting on Lombard Street, the murder of Wingo, and the ongoing feud between OMB and STK. Taylor and Harris-Dickerson were STK members known to frequent 508 Shearman Street. The application shows that police believed Taylor and Harris-Dickerson communicated about gang-related activities using cell phones. The shooting and murder were part of an ongoing gang feud. It reasonably follows that gang members, here Harris-Dickerson and Taylor, would likely communicate regarding the ongoing quarrel; and, thus, that cellphones carried by Taylor near in time to the criminal gang activities would be a means of communicating with other gang members and would likely – or probably – possess digital evidence related to the crimes.[176]

The apparent scrivener errors in the warrant application, notably in paragraph 23 of the affidavit, do not negate the existence of probable cause. The prosecutor explained that the warrant application challenged by Taylor was drafted at the same time as a warrant application for Latasha Pierce's cell phone and that the paragraph

[176] *See Riley v. California*, 573 U.S. 373, 401 (2014) ("Cell phones have become important tools in facilitating coordination and communication among members of criminal enterprises[.]").

23 references to "her" cell phone should be read as "his" cell phone.[177] The Superior Court reasoned that the warrant clearly was directed to Taylor's cell phones, not Latasha Pierce's cell phone.[178] Thus, the Superior Court properly gave great deference to the issuing magistrate's conclusion, based on a reasonable and common sense reading of the warrant as a whole, that the cellphones referred to in paragraph 23 were Taylor's.

The Superior Court, after thorough review and oral argument by the parties, found sufficient facts existed within the four corners of the warrant application to allow the magistrate to find probable cause that Taylor's cell phones would have evidence regarding the enduring gang war, shootings, and Wingo's killing.

B. The Superior Court reasonably found that the search warrant application for Taylor's cell phones included a temporal limitation.

In addition to probable cause, the Fourth Amendment to the United States Constitution requires a search warrant "particularly describ[e] the place to be searched, and the persons or things to be seized."[179] "The United States Supreme Court has observed that 'the ultimate touchstone of the Fourth Amendment is 'reasonableness[.]'"[180] The Delaware Constitution further requires that the place to

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[177] *See* A0297.

[178] A0302.

[179] U.S. Const. amend. IV.

[180] *Wheeler v. State*, 135 A.3d 282, 296 (Del. 2016) (citation omitted).

be searched and evidence sought be described "as particularly as may be."[181] Finally, the Delaware Code requires that a warrant "shall describe the things or persons sought as particularly as possible."[182] The warrant here satisfied the requirement of particularity.

In *Starkey v. State*,[183] this Court addressed a claim that the search warrants at issue were overbroad, ambiguous, and failed to provide the relevance of the defendant's "cell phone files" to the alleged crimes. This Court rejected the claim that the warrants were vague because "they specifically limited the officer's search of the cell phones to certain types of data, media, and files that were 'pertinent to th[e] investigation.'"[184] The Court held that "[t]his language effectively limited the scope of the warrants, and prevented a boundless search of the cell phones."[185]

In *Wheeler v. State*, this Court surveyed how other courts have addressed challenges to warrants to search computers and noted: "A key principle distilled from the jurisprudence in this area is that warrants, in order to satisfy the particularity requirement, must describe what investigating officers believe will be found on

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[181] Del. Const. art. I, § 6.

[182] 11 *Del. C.* § 2307(a).

[183] 2013 WL 4858988 (Del. Sept. 10, 2013).

[184] *Id.* at *4.

[185] *Id.* (citing *Fink*, 817 A.2d at 786).

electronic devices with as much specificity as possible under the circumstances."[186] The warrant at issue in *Wheeler* sought to search all devices capable of containing digital information and included no limitations as to the scope of the search – most particularly, the warrant failed to include any temporal limitation.[187] The Court found the warrants in *Wheeler* violated the particularity requirement for failure to more precisely describe the items to be searched for and seized.[188]

Here, Taylor asserts that the Superior Court erred by finding (1) that the language included in the warrant - "pertinent to this investigation within said scope" – effectively limited the search[189] and (2) that the affidavit contained time limitations based on the dates of the two incidents (May 16, 2016 and May 19, 2016) and Taylor's arrest (June 1, 2016), such that any evidence from May 16, 2016 through June 1, 2016 seized from the cell phones would be admissible at trial.[190] The Superior Court distinguished this case from *Wheeler* and, consistent with Third Circuit jurisprudence, found that the warrant was broad but could be remedied by

[186] *Wheeler*, 135 A.3d at 304.

[187] *See id.* at 289, 304.

[188] *Id.* at 306.

[189] Op. Br. at 35-36.

[190] Op. Br. at 38.

limiting the State's evidence to the timeframe for which the warrant provided probable cause.[191] Other Delaware Superior Court decisions have done the same.

In *State v. Rizzo*,[192] there was no explicit time limitation recited in the warrant to search the defendant's cell phone, but "the affidavit of the warrant states that the victim began working at the restaurant in the summer of 2016 and the crimes occurred afterwards, and there was a 'precise description of the criminal activity, including an identification of a temporal window in which the crime took place.'"[193] The Superior Court found that: "The holding of *Wheeler* did not impose a temporal requirement for search warrants for digital devices pursuant to Delaware Law. Additionally, there are no facts presented for the Court to determine that evidence was seized outside of the time frame the alleged sexual misconduct occurred."[194] The court also found that the language in the warrant was consistent with the language found to be limiting in *Starkey* and thus was not a violation of the particularity requirement.[195]

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[191] A0303.

[192] 2018 WL 566794 (Del. Super. Ct. Jan. 26, 2018).

[193] *Id.* at *2.

[194] *Id*.

[195] *Id.* at *3.

Another Superior Court judge came to a similar conclusion regarding the limiting language in *State v. Anderson*.[196] Considering a challenge to warrants to search seven cell phones, the court found that "the warrant at issue specifically lists the various categories of data to be searched. The warrant limited the search to types of data pertinent to the investigation as supported by probable cause. This warrant does not contain the limitless request to search a large number of devices condemned in *Wheeler*."[197] The court addressed the temporal issue as well, finding that although the "State established that alleged criminal activity occurred from the second week of August 2017 until the cell phones were seized on October 27, 2017[,] [t]he warrant d[id] not limit the search to that date range."[198] Acknowledging that the temporal limitation should have been in the warrant, the court did "not believe the defect in the warrant is so pervasive as to compel total suppression of all evidence seized."[199] The court explained its decision to limit the State's evidence to the date range in the affidavit of probable cause:

> In *United States v. Santiago-Rivera*, the United States District Court for the Middle District of Pennsylvania was confronted with a very similar issue. In *Santiago*, the District Court considered whether a warrant violated the particularity requirement of the Fourth Amendment because it did not restrict a search of a cell phone to a specific time

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[196] 2018 WL 6177176 (Del. Super. Ct. Nov. 5, 2018).

[197] *Id.* at *4.

[198] *Id*.

[199] *Id*.

> period. Relying on Third Circuit Court of Appeals rulings, the District Court held that the lack of a time period did "not provide a ground for suppressing the evidence." Instead, the proper remedy for the defect "was simply to excise the years for which there was no probable cause[.]"
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> * * * * *
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> [T]he District Court ultimately found the warrant satisfied the Fourth Amendment's particularity requirement:
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> > [T]he Third Circuit considered whether a warrant violated the particularity requirement because it did not restrict the search and seizure to documents concerning transactions that occurred during the time period of the alleged illegal scheme. The court stated that '[t]his argument, however, does not provide a ground for suppressing the evidence....' ...The court finds that while the warrant for defendant's cell phone may be broad in terms of the time frame, it was not general.... Based on the facts and circumstances of the instant case, the court finds that the search warrant satisfied the Fourth Amendment's particularity requirement.
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> In both *Santiago* and the instant case, the "objectives of deterrence and integrity [may be served] in the same way and to the same degree [as total suppression] by [instead] limiting suppression to the fruits of the warrant's" defects.[200]

The next year, in *State v. Reese*,[201] the Superior Court suppressed all evidence seized from a cell phone where the affidavit contained the same language found in

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[200] *Id.* at *5 (citing *United States v. Santiago-Rivera*, 2017 WL 4551039, at *15 (M.D. Pa. Oct. 12, 2017) (quoting *United States v. Ninety-Two Thousand Four Hundred Twenty-Two Dollars & Fifty-Seven Cents*, 307 F.3d 137, 150-51 (3d Cir. 2002)) (emphasis added)) (other citations omitted).

[201] 2019 WL 1277390 (Del. Super. Ct. Mar. 18, 2019).

Taylor's affidavit.[202] Reviewing the *Wheeler* and *Buckham*[203] cases, the *Reese* court found the subject warrant lacked particularity and fell within the *Wheeler/Buckham* line of cases that require suppression of all fruits of the search and do not permit limitation on the scope of the warrant.[204] Specifically, the court found that: the search warrant far exceeded the logical factual nexus between the crime and search, the warrant exceeded the probable cause finding, and the warrant offered vague and general allegations that failed to connect the defendant's cell phone to the shooting.[205] The court noted that this Court has not authorized "the limited remedy of quasi-suppression."[206] Of course, that is not requested here.

Finally, in *State v. Waters*,[207] the Superior Court offered a means of harmonizing the decisions of that court:

> Harmony in these decisions can be found in the difference between "general" warrants and warrants that are "merely" overbroad. The Third Circuit explained the difference:
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> > There is a legal distinction between a general warrant, which is invalid because it vests the executing officers with unbridled discretion to conduct an exploratory rummaging through [the defendant's] papers in search of criminal evidence, and an overly broad warrant, which describe [s] in both specific and inclusive

[202] *Id.* at *1.

[203] *Buckham v. State*, 185 A.3d 1 (Del. 2018).

[204] *Reese*, 2019 WL 1277390, at *5-7.

[205] *Id.* at *7.

[206] *Id.* at *7 n.54.

[207] 2020 WL 507703 (Del. Super. Ct. Jan. 30, 2020).

> general terms what is to be seized,' but 'authorizes the seizure of items as to which there is no probable cause. As discussed above, an overly broad warrant can be redacted to strike out those portions of the warrant that are invalid for lack of probable cause, maintaining the remainder of the warrant that satisfies the Fourth Amendment. In contrast, the only remedy for a general warrant is to suppress all evidence obtained thereby.[208]

The *Waters* court found that the warrant was broader than the probable cause because the requested time period for which the State sought cell site location information, four days prior and two weeks subsequent to the murder, was not supported in the warrant and affidavit.[209] Because the warrant was particular in seeking only the cell site information for a period of time, the court found that the warrant was overbroad, but not a general warrant.[210] The court concluded: "When a warrant is broader than the probable cause that supports it, for example in its temporal limitations, the Court may limit the scope of permissible evidence to that for which probable cause is present in the warrant."[211] After considering additional briefing from the parties, the

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[208] *Id.* at *4 (quoting *United States v. Yusuf*, 461 F.3d 374, 393, n.19 (3d Cir. 2006) (internal citations omitted) and citing *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (a general warrant permits "a general exploratory rummaging in a person's belongings."); *State v. Westcott*, 2017 WL 283390, at *2 (Del. Super. Ct. Jan. 23, 2017) (a general warrant is one that fails to describe the data to be searched with particularity)).

[209] *Id.*

[210] *Id.*

[211] *Id.* (citing *United States v. Christine*, 687 F.2d 749 (3d Cir. 1982); *United States v. Fleet Mgmt. Ltd.*, 521 F. Supp. 2d 436 (E.D. Pa. 2007)).

court ultimately confined the State to the afternoon before the murder (the warrant included language that the suspect had been casing the location that afternoon) and for twenty-four hours after the murder (to determine when the suspect left the scene).[212]

Here, the Superior Court found the probable cause in the affidavit and warrant supported a temporal search limitation of May 16, 2016 (the first incident in the affidavit) through June 1, 2016 (the date of arrest). The court was free to consider the affidavit because, contrary to Taylor's assertion, it was incorporated into the warrant.[213] The court's decision to suppress evidence outside of the clear temporal parameters provided in the warrant is consistent with other Superior Court decisions and the Third Circuit Court of Appeals.

C. Harmless error

Should this Court find that the evidence from Taylor's cell phones should have been suppressed, the error did not unfairly prejudice Taylor because the State's case was overwhelming. "[W]here the evidence exclusive of the improperly admitted evidence is sufficient to sustain a conviction, error in admitting the evidence is

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[212] *Id.* at *5.

[213] *See* A0254 ("specified in the annexed affidavit and application, **which is hereby incorporated herein by reference**") (emphasis added); *Groh v. Ramirez*, 540 U.S. 551, 557-58 (2004).

harmless."[214] None of the facts recited in the fact section of the State's Answering Brief were derived from the evidence seized from Taylor's cell phones.[215] Moran independently discovered what Taylor posted on Facebook, and Moran captured screen shots of Taylor's Facebook page and his postings on Smith's page. Harris-Dickerson testified to the use of Facebook by STK members and the meaning of some of the social media postings. Multiple witnesses confirmed Taylor was a member of STK. Ballistics evidence and surveillance video linked Taylor, Smith, and Harris-Dickerson to various crimes. Although photos from Taylor's phone showed him with a gun and text messages included admissions, none of that evidence was critical to the prosecution of this case. Because the State's case was overwhelming, any error in the admission of the evidence seized from Taylor's cell phone was harmless.

[214] *Williams v. State*, 98 A.3d 917, 922 (Del. 2014) (quoting *Johnson v. State*, 587 A.2d 444, 451 (Del. 1991) (internal quotations omitted)).

[215] *See* Statement of Facts *supra* at 8-21.

II. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED TAYLOR'S REQUEST FOR A MISTRIAL.[216]

Question Presented

Whether the trial court abused its discretion by denying Taylor's application for a mistrial.[217]

Standard and Scope of Review

This Court reviews the denial of a motion for a mistrial for abuse of discretion.[218] A mistrial is appropriate only when there are no meaningful or practical alternatives to that remedy or the ends of public justice would otherwise be defeated.[219] Because "a trial judge is in the best position to assess the risk of any prejudice resulting from trial events," the Court will reverse the denial of a motion for a mistrial "only if it is based upon unreasonable or capricious grounds."[220] Granting a mistrial is an extraordinary remedy, warranted "only when there is

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[216] Argument II addresses Argument III in Taylor's Opening Brief.

[217] *See* A0935-41; A1007-09.

[218] *Chambers v. State*, 930 A.2d 904, 909 (Del. 2007); *Guy v. State*, 913 A.2d 558, 565 (Del. 2006); *Smith v. State*, 913 A.2d 1197, 1220 (Del. 2006); *Taylor v. State*, 827 A.2d 24, 27 (Del. 2003).

[219] *Guy*, 913 A.2d at 565; *Chambers*, 930 A.2d at 909.

[220] *Revel v. State*, 956 A.2d 23, 27 (Del. 2008) (citations omitted).

'manifest necessity'"[221] and "no meaningful and practical alternatives."[222] An alleged infringement of a constitutional right is reviewed *de novo*.[223]

Merits

On Monday morning March 26, 2018, Taylor moved for a mistrial. On the Friday before, Nadana Sullivan testified regarding her observations of Wingo's murder.[224] Sullivan, sitting in her car down the street from the murder scene, saw a tall, brown-skinned man about 17 years of age, wearing a hood and coat, and carrying a black gun in his hand, running down the middle of street towards her.[225] She saw the man turn down Shearman Street.[226] Sullivan's daughter, Treasure Evans, told her she had seen "Diamonte" ride up the street prior and "I think they're having a beef."[227] Sullivan said that she had not seen the person who was running down the street before.[228] Defense counsel declined to cross-examine Sullivan, but

[221] *Chambers v. State*, 930 A.2d 904, 909 (Del. 2007) (citations omitted).

[222] *Dawson v. State*, 637 A.2d 57, 62 (Del. 1994) (citing *Bailey v. State*, 521 A.2d 1069, 1077 (Del. 1987)).

[223] *Keyser v. State*, 893 A.2d 956, 961 (Del. 2006) (citations omitted).

[224] A0820.

[225] A0821.

[226] A0821.

[227] A0823.

[228] A0823.

the State asked that the witness not be excused.[229]

Prosecutors then called Det. Kirlin to the stand and asked if she had spoken with Sullivan the day before.[230] Defense counsel objected and asked for a proffer as to relevance.[231] The prosecutor explained that Sullivan had on a prior occasion said that she had seen Taylor before and that the officer was being called "as a 613 witness to impeach Sullivan."[232] The prosecutor informed defense counsel that Sullivan had mentioned during a trial preparation meeting that she had seen the individual running towards her before and that she had seen him within three days of the murder holding a gun at the corner of Clifford Brown Walk and Shearman Street.[233] Defense counsel claimed a *Jencks*[234] violation, asserting that counsel was entitled to any recording of the statement prior to her testimony.[235] The trial judge informed the prosecutors that they would need to recall Sullivan before attempting to elicit the statement from Kirlin.[236] The State re-called Sullivan who then testified

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[229] A0823. Defense counsel was provided with a transcript of Sullivan's June 1, 2016 statement under a protective order on January 9, 2018. *See* A0011 at DI 52.

[230] A0823.

[231] A0823.

[232] A0824.

[233] A0824.

[234] *Jencks v. United States*, 353 U.S. 657 (1957).

[235] A0824.

[236] A0825.

that she had seen the man running down the street and she knew it was Diamonte "[f]rom the children" and "It was three days prior. I saw Diamonte and another guy. They were fiddling with a gun. [] On the corner of Shearman and Clifford Brown Walk."[237]

On cross examination, Sullivan explained that the children had told her a name – "Diamonte" – but that she had seen Diamonte.[238] Between the time of the shooting on May 19, 2016, and Sullivan's original interview with Kirlin, the children had shown her pictures of a person named Diamonte whom she recognized as the person running down the street.[239] Then, Sullivan testified that she had looked at a photo lineup with Kirlin at the June 1st interview and had identified Diamonte.[240] Sullivan testified that she did not remember telling Kirlin that she could not see the person's face.[241] Sullivan, after being shown part of a transcript of that interview, agreed that she had said "I didn't see his face."[242] Defense counsel did not lodge any objection after Sullivan testified.[243]

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[237] A0825.

[238] A0826.

[239] A0826.

[240] A0827.

[241] A0827.

[242] A0828.

[243] A0828.

On the Monday following Sullivan's testimony, Taylor moved for a mistrial on the basis that Sullivan had lied about the photo lineup identification and the State had failed to correct the record.[244] Defense counsel suggested that the prosecutors should have immediately called Kirlin to testify that she had not shown Sullivan a photo lineup.[245] Defense counsel explained that: "And now we've had a whole weekend where the jury has . . . this idea that Nadana Sullivan basically ID'd Diamonte Taylor as the shooter, that all these other little children who haven't testified ID'd him as the shooter. And he is prejudiced to the point where the only remedy is a mistrial."[246] The State offered to call Kirlin to clarify that she never showed a lineup to Sullivan.[247] The judge deferred ruling on the motion until she had an opportunity to review the transcript of Sullivan's cross examination, but asked the State to call Kirlin first to address the lineup issue.[248]

The State called Kirlin as the day's first witness and she testified that she had interviewed Sullivan but did not show Sullivan a photo lineup.[249] Immediately thereafter, the judge invited counsel to sidebar and announced that she intended to

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[244] *See* A0936-37.

[245] A0937-38.

[246] A0938.

[247] A0939.

[248] A0941.

[249] A0946.

instruct the jury to disregard any statement made by Sullivan with respect to her being shown a photo lineup.[250] The court explained:

> And I just want to make the record clear that I'm giving you [defense counsel] an opportunity, or at least I'm giving you the choice to have that instruction so as to make sure that there is at least some effort, and there appears to be some effort on my part to mitigate whatever damage may have been caused by that testimony. Although I don't think that that's particularly prejudicial frankly.

Defense counsel elected not to have the jury instruction because counsel wanted to be able to use the statement to argue Sullivan lacked credibility.[251]

Later that day, Taylor's counsel alleged that the State had failed to inform counsel that Sullivan had a more than sixteen-year-old criminal conviction for misdemeanor shoplifting.[252] The Superior Court found that the existence of the conviction would not have been admitted due to its age, but the court would consider the claim as part of the application for a mistrial.[253] Taylor's counsel provided additional argument by email overnight and, the following morning, the court heard argument from the parties before ruling:

> All right. Let me just address first the two cases that were cited by [defense counsel].

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[250] A0946.

[251] A0947.

[252] A1002.

[253] A1002.

I guess that was the Johnson[254] case and the [Napue] vs. Illinois[255] case. I think in those particular cases, the State had knowingly relied on the perjured testimony by the cooperating witness, and that was in the Johnson case. And there was no knowingly allowed the witness to testify as was obvious here. When we talk about the false testimony that was provided by Ms. Sullivan with respect to the photo lineup, that was elicited on cross examination. I don't find the authority that was submitted to me prevailing for two reasons: one, as soon as we were notified of it -- it wasn't until Monday morning on March the 26th that I was aware that false testimony had been given by Ms. Sullivan. The defense did not bring it to my attention and didn't raise it until Monday through this motion for a mistrial. And it was cured immediately with the next witness. And so I feel that even based on the case law that was supplied to me, I find that the State cured that particular false testimony appropriately.

Let me address the 609 issue and the State's potential failure to disclose Ms. Sullivan's 2002 misdemeanor shoplifting offense. That -- had I done that 403 analysis, it wouldn't have -- I wouldn't have allowed it, recognizing that under 609 the crime of dishonesty would have come in without necessarily that 403 analysis.

This case is such an old conviction that under 609(b), I would not have -- it would have been obviously limited based on the time considerations and the time limit considerations here of 16 years. I would have found that the probative value of the conviction did not substantially outweigh its prejudicial effect and I would not have allowed it to come in. So I don't feel that that's any basis for a mistrial.

When I look at the factors and I think about the mandate of a mistrial when there is no meaningful and practical alternative to that remedy, I think that here the effort that was made to mitigate whatever happened here with that false testimony with Ms. Sullivan was made appropriately. I also had asked the defense if they wanted an additional curative instruction. And, certainly, the false testimony of Ms. Sullivan affected the credibility of the witness. And that can certainly be

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[254] *Johnson v. State*, 587 A.2d 444 (Del. 1991).

[255] *Napue v. Illinois*, 360 U.S. 264 (1959).

properly weighed and determined by the jury. And the defense decided that it was best strategy to use -- to have no curative, no other instruction, so that her credibility could be properly weighed.

So I don't think that the remedy of a mistrial is appropriate in this case considering also – and I do want to say this, because I'm not sure that [defense counsel], when you sent the e-mail about the fact that the jury heard for the first time that this person identified as Mr. Taylor with the gun, my understanding in the record is that Treasure Evans, and the jury had just seen an entire recorded -- her recorded interview where she indicates that she's identified Mr. Taylor.

* * * * *

My understanding also, that not only does she say that [Diamonte was the same one in the car and same one I saw shoot], but she also, I think, demonstrates what she observed in terms of what was pointed and how the object was pointed. I don't know, I'm not clear honestly of whether she had identified that there was a gun.

However, I will note that in the direct testimony of Ms. Sullivan, Ms. Sullivan on direct from the very beginning made her own personal observations about seeing the individual. The individual is running towards her. She identifies that the individual is running towards her with a gun. She identifies the color of the gun. She also identifies the time frame when she sees this. She indicates that she was on -- that she observed him for what she described as approximately five minutes or so. And then also describes the direction where he was headed, identifies that the person is the same that was identified in one of the State's exhibits. I think it might have been Exhibit 143, I can't be sure.

But -- and then identifies the individual as having come close, as close as she was from the witness stand to the court reporter, which was approximately six or seven feet. And so she made these personal observations.

And I think on cross examination -- and even, I think, on direct, one of the things that was notable, at least when I read the transcript, is that she was asking a question when -- on direct -- about the name, the

> name that was provided. And she said "I was trying to place the name to that individual."
>
> And so it seems to me that when I review the transcript of her testimony, she was explaining to [defense counsel] on cross examination the differences between how she obtained the name versus how she obtained an identification.
>
> And that's not – that's not to say that that's how I'm interpreting it. I'm simply saying that from my review of the transcript, there was -- it was fast and furious from when she was being asked the questions on cross examination about, you know, her testimony. I think she was trying to explain her testimony, albeit very convoluted. I don't think that it represents sufficient -- and warrants a mistrial. So the motion for a mistrial is denied.[256]

To the extent Taylor contends that the Superior Court should have granted a mistrial based on the State's delayed production of *Brady* material, the delay was brief – the witness had made the inconsistent statement only the day before – and the State alerted defense counsel that Sullivan stated she had previously seen Taylor before Det. Kirlin took the stand.[257] Moreover, the statement was not exculpatory, and the statement had no impeachment value until Taylor elicited incorrect information from Sullivan on cross examination. There was thus no reasonable basis for the extreme remedy of a mistrial requested by Taylor.

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[256] A1007-09.

[257] A0824.

Because the false testimony was the result of defense cross examination and not questioning by the State, the *Pena v. State*[258] analytical paradigm is appropriate to apply here.[259] In *Pena*, this Court articulated a four-factor analysis to determine whether unsolicited comments of a witness require the trial judge to declare a mistrial.[260] This analysis considers: (1) the nature and frequency of the comments; (2) the likelihood of resulting prejudice; (3) the closeness of the case; and (4) the sufficiency of the trial judge's efforts to mitigate any prejudice.[261] Consideration of these factors is implicit in the Superior Court's oral ruling, and the court did not abuse its discretion.

Applying the first *Pena* factor, the nature, persistency and frequency of the comments, the inaccurate and inconsistent testimony were made by a single witness – Sullivan - testifying on the fourth day of an eight-day trial and she was not the only witness who identified Taylor. Although Sullivan's inconsistent statement was impeaching – in fact, the State sought to impeach its own witness - the evidence was not favorable to Taylor's defense. And, the false testimony was made in response Taylor's cross examination and was not elicited by the State. Sullivan was clearly

[258] 856 A.2d 548 (Del. 2004).

[259] *See Revel v. State*, 956 A.2d 23, 28 (Del. 2008).

[260] *Pena*, 856 A.2d at 550-51.

[261] *Id*.

confused, and Taylor's counsel were aware of Sullivan's recorded statement in which she had discussed how she "got a glimpse at him"[262] and that "from me seeing the dark face and me asking the kids that Treasure hangs out with and whatnot, they had told me his name and pulled up a picture. I, myself, did not see his actual characteristics of his face to say yeah, if I wasn't shown a picture before, and say yeah, that was him.[263]

As to the second *Pena* factor, the likelihood of resulting prejudice, Det. Kirlin informed the jury that she had not shown Sullivan a lineup and that Sullivan had not picked anyone out of a lineup. The jury could easily conclude from Kirlin's testimony that Sullivan's testimony was untrue, thereby bolstering Taylor's defense by discounting Sullivan's credibility. In fact, this is precisely why Taylor declined the court's offer of a curative instruction. And, Sullivan acknowledged that she had told police that she could not see the shooter's face when interviewed close in time to the shooting. Accordingly, the second *Pena* factor weighs against declaring a mistrial.

The third *Pena* factor also weighs in favor of the State. This was not a close case. The State presented overwhelming evidence that Taylor shot Wingo: both Treasure Evans and Harris-Dickerson place Taylor at the scene; Taylor's

[262] B-13.

[263] B-14.

fingerprints were on the front passenger door of the vehicle Harris-Dickerson was driving; the descriptions of the shooter by multiple witnesses who were on Clifford Brown Walk at the time of the murder match Taylor; Taylor had access to the gun (the same gun used in other shootings in the area), ammunition, and the black coat at 508 Shearman Street; Taylor's Facebook postings showing his "beef" with OMB; and his flight to North Carolina shortly after the shooting.

As to the final *Pena* factor, the remedial steps taken, the trial court directed the State to have Det. Kirlin take the stand to correct Sullivan's false statement, which she did. And, the trial court offered to instruct the jury to disregard the false testimony and to give a curative instruction to mitigate any prejudice caused by Sullivan's testimony. In fact, the trial court gave defense counsel an opportunity to craft the curative instruction to its satisfaction for submission to the court. Significantly, however, Taylor made a strategic decision to decline the court's offer to strike the testimony or give a curative instruction. Specifically, Taylor's counsel stated, "If Your Honor instructs the jury they can't consider it, we can't argue it in terms of assessing her credibility."[264] Taylor's counsel expressly requested that the trial court "should leave it as it is for now."[265] Accordingly, the fourth *Pena* factor weighs in favor of the State.

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[264] A0947.

[265] A0947.

In closing, Taylor used the false testimony to attack Sullivan's credibility:

> Nadana Sullivan. Nadana Sullivan got her own slide in the PowerPoint, I was surprised by that. Nadana Sullivan told you, the first time she testified, didn't see who shot Brandon, couldn't see his face, didn't recognize him, and then all of a sudden she's back on the stand and talking about what she told Detective Kirlin the day before.
>
> Let's talk about the differences between sitting in that chair and talking to Detective Kirlin in some room at the State Building, okay. In that chair you take an oath, and you put your hand on this (indicating), if you so choose, and you swear to God that you're going to tell the truth. And if you don't, you can get charged with perjury, because it's giving a false sworn statement. That doesn't really fly or apply when you just sit in a room with Detective Kirlin.
>
> So Nadana Sullivan testified the first time under oath that, no, she didn't recognize Diamonte, didn't see who it was, couldn't identify him. And then she's called back and she's just asked about what she said the day before, not under oath, wasn't asked if it was true. And then she says that after her interview on June 1st where she couldn't identify anybody -- June 1st, by the way, being the same day that Diamonte Taylor was arrested -- people start telling her that Diamonte Taylor killed Brandon Wingo, which makes sense because you know he was arrested for it. And [defense counsel] talked to you in opening about how people out there, they get to rush judgment, they can assume somebody's arrested, so they must be guilty. So they're talking to Nadana and they're saying this guy Diamonte, right?
>
> And then Nadana tells all of you that Detective Kirlin showed her a lineup on June 1st, that Diamonte Taylor was in it, and that she picked out Diamonte Taylor all on June 1st, wholly contradicting the first time she's on the stand where she said she couldn't identify Diamonte, and as we came to learn from Detective Kirlin a few days later, wholly untrue. Not only did Nadana Sullivan not pick out Diamonte Taylor from a lineup, she wasn't even shown a lineup. So any stock that you might think to put in Nadana Sullivan's testimony is completely undercut by the fact that she said one thing the first time

> and then just made up a lineup that didn't occur, thinking that nobody would catch it. You caught it.[266]

Thus, Taylor's counsel effectively used Sullivan's inconsistent testimony at trial to offer an explanation as to why Sullivan lied – that others had heard about Taylor's arrest and had told her that Taylor was the shooter.

The Superior Court's thorough analysis and ruling are correct. Here, the trial court's decision denying the motion was far from capricious or unreasonable.[267] Neither "manifest necessity" nor the "ends of public justice" warranted a mistrial. The trial judge, "in the best position to assess the risk of any prejudice resulting from trial events,"[268] found insufficient prejudice to grant such extraordinary relief. Application of the *Pena* factors weighs heavily in favor of the State, and thus the Superior Court did not abuse its discretion in denying Taylor's motion for a mistrial.

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[266] A1289.

[267] *See Revel,* 956 A.2d at 27.

[268] *Id.*; *accord Snipes v. State*, 2015 WL 1119505, at *2 (Del. Mar. 12, 2015).

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

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IN THE SUPREME COURT OF THE STATE OF DELAWARE

DIAMONTE TAYLOR,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 91, 2020
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

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Dated: November 23, 2020 /s/ *Elizabeth R. McFarlan*

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