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Case Number 303,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KWESI HUDSON	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	
v.	)	No. 303, 2022
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

APPELLANT'S OPENING BRIEF

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DATED: April 28, 2023

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NATURE AND STAGE OF THE PROCEEDINGS

The police arrested the Defendant on August 12, 2019. A grand jury later indicted him for the following offenses: Two counts of Kidnapping in the first degree, Robbery in the First Degree, Assault in the Third Degree, and Terrorist Threatening, as well as Unlawful Sexual Contact in the First Degree, Rape in the Second Degree, Home Invasion, Burglary in the First Degree, Aggravated Menacing, Attempted Kidnaping in the Second Degree, and Attempted Robbery in the Second Degree, (A-1, D.I. 1).

Before trial, Defendant filed a Motion in *Limine* to suppress and challenge the smartphone-related search warrants and a Motion to Suppress challenging the admissibility of D.N.A. testing results complied with using suspect data (A-8-9, D.I. 36-45). The Court denied both Defendant's Motion in *Limine*, as well as Motions to Suppress (A-8 D.I. 39, A-9, D.I. 45)

After a jury trial, the jury convicted Defendant on all the above-indicted charges (A-10, D.I. 48-25). The Trial Judge sentenced Defendant to, *inter alia*, (162) one hundred sixty-two years imprisonment at Level 5 suspended after (152) one hundred fifty-two years, for (2) two years at Level 3 and (4) four years at Level 2 (See Exhibit A attached to Opening Brief).

Defendant docketed a timely notice of appeal. This document is the Defendant's opening brief on appeal.

SUMMARY OF THE ARGUMENTS

Defendant based his defense solely on his assertions that he was not the individual who committed these offenses, and that evidence did not support a conviction. The Defendant did not testify at trial, and the complaining witnesses could not identify their attacker. Notwithstanding, Defendant asserted the D.N.A. evidence was so diluted and unreliable that it could never support a conviction. Furthermore, search warrants were so broad and vague as to include multiple individuals who could have committed these offenses.

The State, in contravention, introduced Defendant's cell tower data, cellular search history, and D.N.A. possibility to argue that Defendant was the individual who committed these offenses.

Without such overly broad search warrants, notwithstanding the diluted and unreliable D.N.A. evidence, the State would not have been able to support such an untrustworthy conviction.

STATEMENT OF FACTS

Day 1

Leanne Mercure testified that on the night of February 13, 2017, she returned home to her former address of 2116 Haven Road in North Wilmington, New Castle County, Delaware. As Ms. Mercure was walking to her apartment, she was attacked from behind by an unknown assailant. Ms. Mercure could not identify the assailant; however, she could remember that the assailant was a male, wearing gloves and a ski mask, carrying a black gun, and having a foreign accent. The assailant forced her back into her vehicle. As Ms. Mercure attempted to resist, she was physically assaulted and made to drive to several banks to withdraw money or attempt to withdraw money. During the ordeal, the assailant removed Ms. Mercure's lower garments and forced her to touch or penetrate herself sexually. The assailant also sexually touched her naked buttock. (A-91). On cross-examination, Ms. Mercure admitted that she originally described the assailant as a "White" male (A-97) with hazel eyes (A-99).

Robert DiCristino testified that on February 13, 2017, Ms. Mercure came to his home immediately after her assault. He further testified that she was scared, upset, and traumatized by events that had recently taken place in Delaware. (A-102). As a result of her statements to him, he drove her to the hospital in Delaware County, Pennsylvania (A-102). The Defense did not cross-exam Mr. DiCristino (A-103).

Sergeant Charles Levy testified multiple times in this trial. During his first call to the witness stand, he testified that he was the chief investigating officer. Sergeant Levy confirmed, via his investigation, that Ms. Mercure withdrew money from her bank and retrieved the surveillance from the bank or attempted bank withdrawals. (A-103-105)

Patrolman Brian McLaughlin of Pennsylvania testified that he was the first to contact Ms. Mercure at the hospital and took her initial statement while she was in the Pennsylvania hospital (A-106). On cross-examination, he testified that Ms. Mercure described the assailant as a small, framed white male (A-108).

Corporal Kyle Webb testified that he found a smartphone near Ms. Mercure's apartment (A-108). The Defense did not question Corporal Webb (A-108).

Officer Troy Vincenzo testified that he processed Ms. Mercure's vehicle for potential evidence, including fingerprints, D.N.A., and digital pictures. This officer also took pictures of Ms. Mercure's injuries. He also determined that the recovered fingerprints belonged to Ms. Mercure. (A-109-117)

Day 2

Steffani Carrig testified that on the night of February 19, 2017, she returned home to her former address of 2901 Cross Fork Drive in Pike Creek, New Castle County, Delaware, when she was attacked from behind by an unknown assailant (A-143). Ms. Carrig was unable to identify the assailant; however, she did recall that

the assailant had a gun, forced her to return to her apartment (A-143-153), and removed her lower garments (A-154). While Ms. Carrig was partially nude, the assailant penetrated her with the gun barrel (A-156, 165). During the ordeal, the assailant forced Ms. Carrig to return to her car and drive him to several banks to obtain money (A-165-168). On cross-examination, Ms. Carrig admitted that the assailant spoke with a middle eastern or foreign accent. She further stated that based on the eye holes of the ski mask, the assailant appeared to be a dark-skinned black male (A-184, 185).

Delicia McCallister testified that on February 19, 2017, she was in the Pour House bar in Pike Creek, Delaware (A-208). That night, she recalls Ms. Carrig entering the bar and running directly into the restroom (A-209). She confirmed that Ms. Carrig was partially nude from the waist down, crying, and huddled on the restroom floor (A-212).

Nicole Carville testified that on February 19, 2017, she was in the Pour House bar in Pike Creek, Delaware (A-219). She recalls Ms. Carrig escaping the bar and running directly into the restroom (A-221). She confirmed that Ms. Carrig was partially nude from the waist down, crying, and huddled on the restroom floor (A-223).

Master Corporal Gary Truver testified that he interviewed Steffani Carrig after the assault (A-227). Ms. Carrig described the assailant as 6-foot tall, 200

pounds, muscular build, wearing a dark hoodie, full ski mask, and black gloves. On cross-examination, he recalled Ms. Carrig to have described the assailant as a muscular built man with a heavy, possibly Middle Eastern accent (A-231).

Angela McNulty testified that she was the sane nurse who examined Ms. Carrig (A-242). Nurse McNulty documented Ms. Carrig's injuries and gathered potential D.N.A. evidence from Ms. Carrig's body (A-255-256). Nurse McNulty also noted abrasions or injuries to Ms. Carrig's anus (A-258). On cross-examination, Nurse McNulty confirmed Ms. Carrig's description of the assailant as 6-foot tall, muscular built, approximately 30 to 39 years of age, black or middle eastern (A-268).

Detective Amy McCabe testified she processed the bank, vehicle, and Ms. Carrig's apartment for video, pictures, D.N.A., and fingerprints (A-27). Detective McCabe also testified that he discovered no fingerprints from this assault (A-297).

Day 3

The State recalled Sergeant Levy, who testified that he was also the Chief Investigating officer for this case (A316). Sergeant Levy testified that he did direct Detective McCabe to swab some evidence for D.N.A. (A-319). He testified to the similarity between the Mercure and Carrig cases, including the fact that the victims were female, taken from their apartment complex, forced to withdraw money and use their vehicle, and positioned distinctly in the vehicle while being transported (A-

322-323). He further stated that both victims described the assailant as wearing gloves, a ski mask, and dark clothing (A-324). On cross-examination, Sergeant Levy testified that he pulled cell tower records of citizens to see if any number were in the location of the assault on the day and time of the assaults (A-326).

Sergeant Levy had his staff obtain still photos of cash withdraws and opined that the glove was the common, cheap, and popular "Wells Lamont Cold Weather Grip" glove (A-326-330). He further stated that Antoinette Warfield was the only car in the vicinity of both incidents during the incident (A-330).

On cross-examination, Sergeant Levy admitted that the police failed to take samples for D.N.A. from Ms. Carrig's hallway, which was one of the scenes for the sexual assault (A-345). He further stated that he had no suspect or person in mind when he applied for and received cell tower records for every Delaware citizen who passed a tower near the victim's apartment (A-346). The police received a cell tower hit for thousands of Delaware Citizens (A-346). Sergeant Levy also admitted that after such an invasive search, he could locate four individuals near both scenes during the attacks; however, such individuals could be at least 3 to 4 miles away from the scenes (A-347).

As cross-examination continued, Sergeant Levy admitted that other gloves fit the description of the glove he believed to be a Wells Lamont Cold Weather grip

glove (A-349-351). He further stated that he did not cross-reference Ms. Warfield's license plate with her phone number (A-354).

Jennifer Biondi testified that on the night of March 6, 2017, she was walking her dog at her former apartment at 1304 Sheldon Drive, Newark, Delaware. During this walk, an unknown assailant attacked her. (A-362-366). Ms. Biondi could not identify her assailant but recalls that he approached her from the front and forced her to return to her apartment (A-368). As she bent to pick up a boot, she had lodged in the hall door, she pressed the doorbell that alerted her boyfriend, who was in the apartment (A-370). Her boyfriend Sean came to the door, and the assailant fled (A-372). On cross-examination, she described the assailant as 5 feet 7 or 8 inches tall (A-378), wearing a ski mask with a white outline around the eyes and mouth, and holding a silver gun. The assailant sounded black, not middle eastern. (A-340).

Sean Conklin testified that he rescued his then-girlfriend and chased the assailant across the parking lot. He confirmed that the assailant was 5 feet 7 or 8 inches (A-389-395).

Master Corporal Robert Williams testified that he and his canine Loki tracked the assailant’s scent to a parking lot across the complex (A-410-416)

Detective Witte testified that he was undercover at the Bluff's Apartment at the time of the attack on Ms. Biondi. (A-430). His testimony included observing a

woman who reacted strangely to her surroundings. (A-434). Detective Witte was the first on the scene and confirmed the statements of Mr. Conklin. (A-435).

Corporal Robert Phillips testified that he documented and processed the scene at the Bluff's Apartment (A-460). He was unable to obtain any fingerprints from the scene (A-469). The Defense did not cross-examine this witness (A-475).

Detective Troy Vincenzo testified that he collected the Defendant's D.N.A. pursuant to a search warrant issued by the Court (A-482). The Defense did not cross-examine this witness (A-484).

Day 4

Sarah Vassallo testified that she lived at the Bluff's Apartments and was collecting groceries from her car when she saw a male run down the hill (A496).

Detective Charles Levy was recalled and testified that there was no surveillance in the Bluff's Apartment complex (A-500). He also stated that he received data from 5,000 phone numbers from nine cell towers (A-505). He stated that at the time of the application for the search warrant, the police were unsure if they were looking for a white, black, Hispanic, Indian, or Middle Eastern male (A-513). Detective Levy stated that many months after the last incident, he received word from Delaware County, Pennsylvania, that they had arrested an individual wearing dark clothing, gloves, and a ski mask. This individual also had a firearm and had robbed a drug store. (A-514). Detective Levy traveled to Pennsylvania and

directed the swabbing of the gun discovered recovered from Mr. Hudson's incident. (A-522).

The State recalled Detective Robert Phillips. Detective Phillips testified that he swabbed the gun recovered in Pennsylvania (A-576).

Sarah Lindauer testified that she performed the standard D.N.A. testing on the items submitted by the police (A-600). Her conclusions after comparing the D.N.A. of the victims and Mr. Hudson were that she could not identify Mr. Hudson as the major or minor contributor. The D.N.A. Profile varied to include the D.N.A. of either mixed or multiple individuals (A-601-607). Ms. Lindauer also testified concerning the BB gun discovered in Pennsylvania (A-621). During this part of her testimony, she could not draw an official conclusion or statistical analysis; however, she did recommend additional D.N.A. analysis by an outside facility (A-621-622). Ms. Lindauer recommended a new form of D.N.A. testing, "probabilistic genotyping"(A-623).

On cross-examination, Ms. Lindauer admitted that mixtures of three or more samples are more problematic for analysist (A-628). She also stated that when dealing with multiple D.N.A. alleles, it is impossible to tease out individual alleles shared by individuals (A-33). Furthermore, standard D.N.A. considers any mixture between 300 and 100 too low to provide a statical conclusion. (A-635). Ms.

Lindauer described "probabilistic genotyping" as a "science that is beginning to be used around the country" (A 651).

Day 5

Alicia Cadena testified that she worked as a senior D.N.A. Analyst for a private forensic D.N.A. testing laboratory (A-672). She stated that she received an extract of a mixture from a sample from the B.B. gun found in Pennsylvania (A-694). Ms. Cadena stated that she did not use the traditional D.N.A. interpretation method but utilized software to evaluate the D.N.A. profile (A-697) further. She further added that without the software, she would likely come to a similar conclusion as traditional D.N.A. interpreters (A-697.) She stated that the software used is "Probabilistic Genotyping," or "STRmix," which applies biological models and statistical algorithms to the D.N.A. profiles of the possible contributors to a D.N.A. mixture of 3 or more profiles (A-698). She concluded that the D.N.A. profile obtained from the extract is "approximately 19 times more probable than the sample originated from L. Mercure and two unknown persons than if it had originated from three unknown persons." (A-713). She added that this D.N.A. type "essentially matches up the best with the possible profiles of the contributors in that mixture" (A-714).

Further testimony from Ms. Cadena included the conclusion that the D.N.A. profile is approximately 880 times more probable if the sample originated from three

unknown persons than if it originated from J. Biondi and two unknown persons (A-715). She further admitted that this was within the uninformative range and offered no support (A-715).

Ms. Cadena stated that as to S. Carrig, the D.N.A. mixture was like a jigsaw puzzle because the software had to consider what were the possible D.N.A. profiles without any additional information (A-716). She further opined that the D.N.A. extract was approximately 250 times more probable if the sample originated from S. Carrig, L. Mercure, and an unknown person than if it originated from Steffani and two unknown persons. (A-717).

Finally, Ms. Cadena concluded that it is "extremely strong support" that S. Carrig and two unknown persons contributed to the extract from the B.B. gun rather than three unknown persons. (A-722-723).

On cross-examination, Ms. Cadena admitted that she never had access to the B.B. gun and never compared Delaware's protocols with her private labs (A-727-728). Ms. Cadena was unaware that Delaware extractions concluded two unknown individuals, and her lab's extractions included three D.N.A. profiles (A-730). She admitted that her D.N.A. sample was very low (A-731). Ms. Cadena also admitted that her labs do not detect or account for "Drop in," which is the detection of D.N.A. that is not part of the original sample and is prevalent with low sample amounts (A-732).

Ms. Cadena also testified that every time a sample is run through the software, it will result in different results (A-740-741). She admitted that random match probability and likelihood ratio utilizes two different statistics (A-747). She also admitted that the sample used in her determination was lower than the recommended standard for an optimal source (A-755). Ms. Cadena admitted that she concentrated on the subject D.N.A. sample to make it work with the software (A-758).

Ms. Cadena further testified that the peer review process has concerns with probabilistic genotyping because the scientific world cannot validate the validation process (A-760). She admitted that under this type of testing, mixed samples are more difficult to interpret than single source samples(A-761) and amplifying a low level of D.N.A. can result in one D.N.A. type being amplified preferentially over the other (A-764). She also admitted that her testing was .03, which is below the lab's optimal standard of .1 (A-766).

Ms. Cadena continued by testifying that mixtures of D.N.A. produce more potential for sharing between individuals D.N.A. (A-767). She admitted that there is no single correct likelihood ratio and different individuals or systems often find different likelihood ratio values when presented with the same evidence (A. 771).

Ms. Cadena testified that she knows that Colorado, Texas, and Michigan have rejected using "probabilistic genotyping" results (A-781-782). She stated that she was not saying that the D.N.A. collected was the D.N.A. of S. Carrig. (A-788). She

added that she never compared Mr. Hudson's D.N.A. to the unknown samples (A-797).

Officer Jennifer Marchand testified that she received and removed a sample cut-out of a mask recovered in Pennsylvania (A-826).

Chelsie Weaver testified that she compared the D.N.A. sample from that mask in Pennsylvania to that of the D.N.A. sample of Mr. Hudson (A-834). The D.N.A. from both samples matched Mr. Hudson (A-835).

Special Agent William Shute testified concerning smartphone records and cell tower hits for smartphone use (A-865). He opined that Mr. Hudson's phone hit off cell towers that were at a minimum three miles away from the scene of the subject incidents (A-880-886).

Day 6

Detective Levy testified for the final time by stating that he could verify that Mr. Hudson was not at work dates on Ms. Carrig's or Ms. Mercure's assaults. (A-932). He also testified that Mr. Hudson's Google search history shows a search for Hill Top Apartments (A-837), Kirkwood Highway (A-949), and Sheldon Drive (A-957).

THE SUPERIOR COURT ABUSED ITS DISCRETION AND COMMITTED REVERSAL ERROR BY FAILING TO CONDUCT A DAUBERT HEARING ON THE ADMISSIBILITY OF NEW DNA PROBABILITY TESTING AND THEIR RESULTS

Question Presented

The question presented is whether the Superior Court abused its discretion by not permitting the Defendant to challenge the admissibility of probabilistic genotyping testing as required under *Daubert*. Defendant preserved this question via his Motion in *Limine* filed on August 8, 2021. (A-8, D.I. 36)

Standard and Scope of Review

The Supreme Court will review the trial court's evidentiary rulings for an abuse of discretion.[1]

Argument

The Defendant, in his pre-trial Motion in *Limine,* moved and requested a *Daubert*/*Nelson*[2] hearing to challenge the admissibility of probabilistic genotyping, which has no prior acceptance in Delaware. The Delaware Uniform Rule of Evidence 702 (Rule 702) and *Daubert*[3] governs the admissibility of expert testimony. The Delaware standards applicable to the admissibility of scientific evidence require consideration of the five factors outlined in *Daubert*:

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1 *Kelly v. State*, 981 A.2d 547, 549 (Del. 2009).

2 *Daubert v. Merrell Dow Pharmaceuticals, Inc*. 509 U.S. 579 (1993)

3 Id.

a. Whether the theory or technique has been tested and found to be accurate and reliable.

b. Whether it was subjected to peer review and publication.

c. Whether there is a high known or potential rate of error.

d. Whether there are standards controlling the application of the technique.

e. Whether the theory or technique enjoys general acceptance within the relevant scientific community.

The Delaware Supreme Court has interpreted *Daubert* as mandating trial courts to examine the expert's methodology by analyzing whether the "experts" theory (1) was based on scientific or otherwise specialized knowledge that has or is testable; (2) has been subject to peer review; (3) has a known or potential rate of error within an existing and controlling standard for operation; and (4) has a general acceptance in the relevant specific community. [4]

When evaluating the admissibility of D.N.A. evidence to be admissible, the trial court must determine if the disputed evidence complies with the Delaware Rules of Evidence and whether:

a. The expert witness is qualified (D.R.E. 702);

b. The evidence is otherwise admissible, relevant, and reliable (D.R.E. 401 and 402);

c. The bases for the opinion are those reasonably relied upon by experts in the field (D.R.E. 703);

d. The specialized knowledge being offered will assist the trier of fact to understand the evidence or determine a fact in issue (D.R.E. 702); and

4 *State v. McMullen*, 900A.2d 103, 113 (Del. Supr. 2006) (Slights, J.) (quoting *Daubert*, 509 U.S. at 590)

e. The evidence does not create unfair prejudice, confuse the issues, or mislead the jury (D.R.E. 403). [5]

Pursuant to Rule 702, an "expert" witness should be permitted to offer opinion testimony only if such testimony is based on sufficient facts and data necessary to form such an opinion. Furthermore, such an opinion must be a product of reliable scientific principles and methods. It must be based on a reliable application of such principles and methods to the facts of the case. [6] Notwithstanding, the State bears the burden of proving the admissibility of the expert evidence and the Court must determine whether the State's scientific conclusions are based on sound and reliable scientific methods and approaches. [7]

In this case the trial judge failed to convene a hearing to permit the Defendant an opportunity to prove the inadmissibility of the STRmix testing results (A-9, D.I. 39). If the trial judge had permitted a hearing the Court would have discovered the following,

1. The test lab did not use the traditional D.N.A. interpretation method but instead utilized software to further evaluate the D.N.A. Profile (A-697).

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5 *Nelson* v. State, Del. Supr., 628A2d69, 74 (1993).

6 *Id.*

7 Id. at 114.

2. The testing lab would not have been able to perform its testing without the software (A-697).

3. The testing lab would likely come to an inconclusive result if they had not used their specialized software program (A-697).

4. The testing lab's probabilistic genotyping only compares an individual D.N.A. by seeing which one "essentially matches up the best with the possible profiles of the contributors in that mixture" (A-714).

5. The testing lab's comparison of the B.B. gun D.N.A. mixture was like a jigsaw puzzle because the software had to consider what were the possible D.N.A. profiles without any additional information(A-716).

6. The testing lab concluded that it was not Ms. Carrig's D.N.A. but rather that there was "extremely strong support" for her D.N.A. However, the expert could not explain "extremely strong support" (A-722-723).

7. After concentrating the sample, the testing lab identified three profiles in their mixed extraction, while Delaware standard D.N.A. testing only identified two profiles in their non-concentrated sample.

8. The testing lab does not detect or account for "Drop in," which is a D.N.A. profile that is not part of the original sample and is prevalent with low sample amounts (A-732).

9. The testing lab receives different results every time they run the same sample through the software (A-740-741).

10. The testing lab's statistics and conclusion in likelihood ratios differ from random match probability (A-747).

11. The testing lab's sample used to determine the probability ratio was lower than its recommended standard for an optimal source (A-755).

12. The testing lab concentrated the subject D.N.A. sample to make it work with the software. (A-758).

13. The testing lab's "peer review process" showed that the results of probabilistic genotyping may be unreliable because the reviewer cannot validate the validation process (A-760).

14. The testing lab's test of mixed samples is more difficult to interpret than single source samples (A-761).

15. The testing lab's process of amplifying or concentrating low-level D.N.A. samples can amplify one D.N.A. type preferentially over the other (A-764).

16. The D.N.A. samples tested were below the lab's optimal standards (A-766).

17. The testing lab's process for D.N.A. mixtures increased the likelihood and potential for sharing between individual's D.N.A. in the mixture (A-767).

18. Probabilistic genotyping has no single correct likelihood ratio.

19. Probabilistic genotyping is not standardized, such that different individuals or systems often find different likelihood ratio values when presented with the same evidence (A. 771).

20. Colorado, Texas, and Michigan rejected using "probabilistic genotyping" results (A-781-782).

21. The testing lab cannot say with a degree of reasonable scientistic reliability that the D.N.A. collected was the D.N.A. of S. Carrig. (A-788).

The problem with D.N.A. Labs International's results, in this case, is that their conclusions are unfounded and unsupported pseudoscience. The lab technician's interpretation includes unknown mathematical computation that varies widely from laboratory to laboratory. Notwithstanding, the Lab premises its results on "if" and likelihood ratios containing no concrete and scientifically accepted practices.

THE SUPERIOR COURT ABUSED ITS DISCRETION AND COMMITTED REVERSAL ERROR BY FAILING TO SUPPRESS UNCONSTITUTIONALLY ISSUED SEARCH WARRANTS

Question Presented

The question presented is whether the search warrants issued by Superior Court were general warrants and prohibited by the Fourth Amendment of the United States Constitution, Article 1 Section 6 of the Delaware Constitution, and Statutory law. Defendant preserved this question via his Motion to Suppress filed on July 29, 2021. (A-7, D.I. 34)

Standard and Scope of Review

The Supreme Court reviews the trial court's evidentiary rulings, de novo, to see if the trial judge abuses discretion.[8]

Argument

In his pre-trial motion, Defendant moved to suppress the general search warrants issued before and after his arrest. These search warrants authorized the collection of cell tower data for thousands of smartphones that "hit off" any tower near the three dates in question. The United States Supreme Court recently held in *Carpenter v. United States*[9] that citizens have a legitimate expectation of privacy in the records of their physical movements as captured through cell phone

8 *Taylor v. State*, 260 A.3d 602 (Del. 2021).

9 138 S. Ct. 2206 (2018).

identification via nearby cell towers. The *Carpenter* Court held that law enforcement must generally obtain a search warrant supported by probable cause before acquiring CSLI from a wireless carrier is directly applicable to this case. [10] Under the Delaware and United States Constitutions, "a search warrant may be issued only upon a showing of probable cause,"[11] and such application for a search warrant shall designate:

1. The place to be searched;
2. The owner or occupant thereof;
3. The things or persons sought as particularly as may be;
4. substantially allege a cause for which the search is made or the offense committed *by or in relationship to the persons or things searched for*;
5. state that the affiant *suspects that such persons or things are concealed* in the house, place, conveyance, or person designated, and
6. recite the facts upon which such suspicion is founded."[12]

Section 2307 of Title 11 of the Delaware Code authorizes a judicial officer to issue a warrant: "if the judge, justice of the peace or other magistrate finds that the facts recited in the complaint constitute probable cause for the search... [t]he warrant shall designate the house, place, conveyance or person to be searched, and shall describe the things of persons sought as particularly as possible..."[13]

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10 Id. at 2206.
11 *Sisson v. State*, 903 A.2d 288, 296 (Del. 2006) (*citing Fink v. State*, 817 A.2d 781, 786 (Del. 2003).
12 11 *Del. C.* § 2306.
13 11 *Del. C.* § 2307.

Probable cause is proven when a logical nexus between the items sought, and the place to be searched is made.[14] The facts, and any logical inferences from the specific facts in the warrant affidavit, must "demonstrate why it was objectively reasonable for the police to expect to find the items sought" in the house, place, conveyance, or person.[15] In other words, the facts and logical inferences to create the nexus of items sought, and the place searched must be within the four corners of the affidavit.[16] When deciding whether probable cause exists, "the balance ought to be struck on the *side of freedom of the citizen from government intrusion.*"[17] A reviewing Court is to employ a "common sense" rather than a "hyper-technical" approach to the relevant documents.[18]

In this case, the affidavit in the Search Warrants for cell tower data associated with the Arundel Apartment, Top of the Hill Apartment Cell Tower, and the Bluffs Apartment Cell Tower was not supported by probable cause. These general warrants sought information from *all* cell phone providers (AT&T, T-Mobile, Verizon, Sprint, and Metro P.C.S.) for *all* cell towers located in the area of *numerous* locations (3009 Crossfork Dr., Wilmington, DE 19808; 2101 Prior Rd., Wilmington, DE 19809; 1704 Marsh Rd., Wilmington, DE 19810; 4551 New Linden Hill Rd.,

14 *Dorsey v. State*, 761 A.2d 807 (Del. 2000).
15 *Id.* at 812.
16 *See Pierson v. State*, 338 A.2d 571 (Del. 1975).
17 *Jones v. State*, 745 A.2d 856, 868 (Del. 1999) (internal citation omitted).
18 *Jensen v. State*, 482 A.2d 105, 111 (Del. 1984)

Wilmington, DE 19808; and 1913 Sheldon Dr., Newark, DE 19711). The police sought to use CSLI because the police thought it could assist them in identifying "*possible"* suspects and witnesses. During the trial, Detective Levy testified that he pulled cell tower records of citizens to see if any number were in the location of the assault on the day and time of the assaults (A-326).

The Search warrants for Arundel Apartments, Top of the Hill Apartments, and the Bluffs Apartment failed to set forth sufficient facts to support the proposition that the property sought was in a particular place. Furthermore, the police used the unlawfully obtained CSLI to obtain an additional search warrant to search Mr. Hudson' google search history. Detective Levy admitted that the police had no suspect or person in mind when he applied for and received cell tower records for every Delaware citizen who passed a tower near the victim's apartment (A-346). He further testified that (1) the police received a cell tower hit for thousands of Delaware Citizens (A-346); (2) the invasive search only located four individuals who were near both scenes during the attacks (A-347); and such individuals could have been at least 3 to 4 miles away from the scenes (A-347).

The search, in this case, was not as "limited as possible," nor did it occur with probable cause. The warrant approved an exploratory rummaging of multiple person's belongings in their CSLI. The obtaining of CSLI and the subsequent tracking of Hudson is a search under the Fourth Amendment. It is undoubtedly a

search pursuant to Article 1, Section 6 of the Delaware Constitution, which offers even greater protection. These warrants "vest[s] the executing officers with unbridled discretion to conduct and an exploratory rummaging through [the defendant and every Delaware citizen's] papers in search of evidence."[19]

CONCLUSION

The Defendant's convictions and sentences should be vacated and reversed for the reasons and upon the authorities cited herein.

Respectfully submitted,

/s/Raymond D. Armstrong
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