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RECENT DEVELOPMENT

STATE V. PAYNE: POLICE OFFICER NEEDED TO BE QUALIFIED AS AN EXPERT WITNESS TO TESTIFY AS TO THE FUNCTION OF CELL PHONE TOWERS; CO-DEFENDANTS ARE NOT A PARTY OPPONENTS FOR HEARSAY PURPOSES.

By: Allison Terry

The Court of Appeals of Maryland held that a police officer testifying as to the methods used to place a defendant near a crime scene through the use of cell phone towers and call logs must be qualified as an expert witness. *State v. Payne*, 440 Md. 680, 718, 104 A.3d 142, 164 (2014). The court further held that statements made by a criminal co-defendant will not be admissible under a hearsay exception as a statement of a party opponent under Maryland Rule 5-803(a)(1). *Id.* Finally, the court held that the trial court erred in admitting the statement of a co-defendant as that of a co-conspirator. *Id.*

Officers discovered a body on fire in the woods. Early investigation led detectives to the cell phone records of Desmond Jones (“Jones”), who later testified about the decision to burn the victim’s body. Using these records, investigators identified numbers associated with Joseph William Payne (“Payne”) and Jason Bond (“Bond”) as pertinent to their investigation. Detective Brian Edwards (“Edwards”) obtained subpoenas for Payne and Bond’s cell phone records. During trial, Edwards testified, without being qualified as an expert witness, as to his use of the defendants’ cell phone records to determine their location on the night of the crime.

The prosecution offered into evidence six telephone calls between Bond and various individuals regarding an alibi for the night of the murder against both Payne and Bond. In these conversations, Bond discussed the use of a fabricated alibi placing himself and Payne with Brittany Keller (“Keller”) and others the night of the murder. Payne was not on the phone for any of these calls. At trial, Keller testified about her face-to-face meeting with Payne.

The trial court convicted Payne and Bond in a joint trial for first degree felony murder and other related crimes. The trial court found that Edwards’s testimony did not require him to be qualified as an expert. Further, the trial court found the six phone conversations were admissible against Payne under the co-conspirator hearsay exception provided by Maryland Rule 5-803(a)(5).

The defendants appealed to the Court of Special Appeals of Maryland, which reversed the convictions and ordered a new trial. The intermediate appellate court held that the trial court erred in admitting Edwards’s testimony because he should have been qualified as an expert witness. The intermediate appellate court also found the wiretapped phone calls admissible against Payne; however, the phone calls were held admissible under Maryland Rule 5-803(a)(1) as admissions of a party opponent rather than under Maryland

Rule 5-803(a)(5) as statements of a co-conspirator. The State then filed a petition for writ of certiorari, which the Court of Appeals of Maryland granted.

The Court of Appeals of Maryland began its analysis by addressing whether Edwards needed to be qualified as an expert witness. *Payne*, 440 Md. at 685, 104 A.3d at 144. The court discussed Maryland Rules 5-701 and 5-702, which govern the admission of opinion testimony and expert testimony, respectively. *Id.* at 698-700, 104 A.3d at 153. Maryland Rule 5-702 provides that expert testimony “may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue.” *Id.* at 698, 104 A.3d at 153 (citing Maryland Rule 5-701). Further, expert testimony will be admitted when a juror would have to rely on speculation and conjecture rather than actual understanding of the subject matter. *Id.* at 699, 104 A.3d at 153.

The court analyzed Edwards’s testimony using precedent requiring police officers to be qualified as experts where they characterized interactions as drug transactions. *Payne*, 440 Md. at 699, 104 A.3d at 153-54 (citing *Ragland v. State*, 385 Md. 706, 725-26, 870 A.2d 609, 620 (2005)). In *Ragland*, the court found that the officers’ opinions were based on their time spent studying the drug trade, therefore requiring knowledge superior to that of a lay person. *Id.* In the case sub judice, the court similarly found that Edwards’s methods used to reach his conclusion were beyond the knowledge of a lay person and required additional training and experience. *Id.* at 701, 104 A.3d at 154. Specifically, the court determined that Edwards could not reach his conclusions by simply reading the records and following directions provided by the cell phone carrier. *Id.* Therefore, the court held that the prosecution needed to qualify Edwards as an expert due to the complicated nature of cell phone towers and the manner in which Edwards used the cell phone records. *Id.* at 702, 104 A.3d at 155.

The court next analyzed the admissibility of the wiretapped statements between Bond and other individuals as evidence against Payne under the party opponent hearsay exception. *Payne*, 440 Md. at 703, 104 A.3d at 155. The party opponent hearsay exception allows for the admission of a person’s own statement “in either an individual or representative capacity,” which mirrors the corresponding Federal Rule of Evidence. *Id.* at 709, 104 A.3d at 159 (quoting Md. Rule 5-803(a)(1))(citing Fed.R.Civ.P. 801(d)(2)(A)). While there is a lack of judicial interpretation regarding the Maryland Rule, federal courts have held that a criminal co-defendant does not qualify as a party opponent; only the government is a party opponent in criminal cases. *Id.* (citing *United States v. Hardwood*, 998 F.2d 91, 94 (2d Cir. 1993); *United States v. Gossett*, 877 F.2d 901, 906 (11th Cir. 1989)(*per curiam*)). Using this, the court found that in the instant case the State was Payne’s only opponent; thus, the wiretaps were improperly admitted against Bond as statements of a party opponent. *Id.* at 710, 140 A.3d at 159.

The court then addressed whether the wiretapped statements could be admitted as statements of a co-conspirator. *Payne*, 440 Md. at 710, 104 A.3d

at 159-60. The co-conspirator exception allows admittance of a statement made by a co-conspirator during and in furtherance of the conspiracy. *Id.* at 724 n.3, 140 A.3d at 169 n.3 (quoting Md. Rule 5-803(a)). To be admissible, the proponent must make a prima facie showing of conspiracy and prove the opposing party's assent to the conspiracy. *Id.* at 712-13, 140 A.3d at 161 (citing *State v. Johnson*, 367 Md. 418, 424, 788 A.2d 628, 632 (2002)). In determining assent to the conspiracy, the commission of one crime does not automatically establish consent to a second conspiracy to then cover up the first crime. *Id.* at 712, 104 A.3d at 161 (citing *State v. Rivenbark*, 311 Md. 147, 158, 533 A.2d 271, 276 (1987)). However, if the parties agree at the outset to engage in a second conspiracy to conceal the crime, statements made in the context of this conspiracy are admissible. *Id.* (citing *Rivenbark*, 311 Md. at 158, 533 A.2d at 276). The court determined the evidence was sufficient to establish the requisite prima facie showing of a conspiracy. *Id.* at 718, 533 A.3d at 165. Despite this, the court concluded that neither Jones nor Keller's testimony was sufficient to establish Payne's assent. *Id.* at 713-14, 104 A.3d at 161-62. Although both Keller and Jones's testimony reflected Payne's involvement of the crime, neither demonstrated any assent to enter into the conspiracy. *Id.*

Finally, the court considered whether the State could play the recordings at the joint trial as evidence against Bond without violating Payne's Sixth Amendment rights. *Payne*, 440 Md. at 714, 104 A.3d at 714. The court found that the statements made in the wiretapped conversations were non-testimonial. Therefore, the court held that the wiretapped conversations did not implicate the Confrontation Clause. *Id.* at 717-18, 104 A.3d at 164. Nevertheless, the trial court must consider on remand the adequacy of a cautionary instruction or joinder to protect Payne's rights. *Id.*

In *Payne*, the Court of Appeals of Maryland held that statements of a co-defendant cannot be admitted under the party opponent or co-conspirator hearsay exceptions. The court also held that a police officer testifying regarding the interpretation of cell phone records should be qualified as an expert. Practitioners will have to keep in mind the possibility of qualifying officers as expert witnesses, or providing a second expert witness to explain the technology, when cell phone towers are used during investigations. This requirement is likely to prove troublesome for lower income or indigent clients who may not be able to shoulder the added expense of acquiring an expert witness to combat the expert testimony of a police officer.