[Cite as *State v. Gipson*, 2012-Ohio-515.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio	Court of Appeals No. E-10-038
Appellee	Trial Court No. 2008-CR-266
v.	
Aaron A. Gipson	**DECISION AND JUDGMENT**
Appellant	Decided: February 10, 2012

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Brian J. Darling, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of conviction of the Erie County Court of Common Pleas which, following a jury trial, found appellant guilty of complicity to aggravated murder, complicity to aggravated robbery, complicity to trafficking in marijuana, and complicity to trafficking in cocaine. Appellant was sentenced to life in prison, with eligibility for parole in 30 years. For the forgoing reasons, the judgment of the trial court is affirmed.

{¶ 2} Appellant, Aaron Gipson, sets forth five assignments of error:

#1 - MR. GIBSON'S DUE PROCESS RIGHTS WERE VIOLATED AS HIS CONVICTIONS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

#2 - THE EVIDENCE PRESENTED WAS INSUFFICIENT TO SUSTAIN A CONVICTION AND, AS A MATTER OF LAW, MR. GIPSON'S CONVICTION SHOULD BE VACATED.

#3 - THE COURT VIOLATED MR. GIPSON'S DUE PROCESS RIGHTS UNDER THE 14TH AMENDMENT AND HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE 6TH AMENDMENT BY ALLOWING TESTIMONY OF AN EXPERIMENT THAT WAS NOT DISCLOSED IN DISCOVERY, PRIOR TO TRIAL, TO THE DEFENSE.

#4 - MR. GIPSON'S DUE PROCESS RIGHTS WERE VIOLATED BY THE SANDUSKY POLICE'S DESTRUCTION OF THE MATERIALLY EXCULPATORY EVIDENCE IN VIOLATION OF HIS 5TH AND 14TH AMENDMENT PROTECTIONS.

#5 - THE TRIAL COURT ERRED IN DENYING MR. GIPSON'S MOTION TO SUPPRESS CELL PHONE RECORDS IN DIRECT VIOLATION OF MR GIPSON'S RIGHTS UNDER THE 4TH AND 14TH

AMENDMENTS TO THE FEDERAL CONSTITUTION AND SECTION 14, ARTICLE I OF THE OHIO CONSTITUTION.

{¶ 3} Appellant also initially submitted a sixth assignment of error arguing appellant's convictions must be overturned because the indictment failed to charge a gun specification on any counts pursuant to R.C. 2941.145. The assignment was withdrawn at oral argument as the indictment did have a gun specification. Accordingly, it is moot and will not be addressed.

{¶ 4} The following undisputed facts are relevant to the issues raised upon appeal. In March 2008, appellant and an accomplice, Thomas Ricks, both of Detroit, Michigan, traveled to the Sandusky, Ohio residence of Chanel Harper, the sister of an area drug dealer, Calvin Harper, Jr. The underlying purpose of the trip to Ohio was for appellant to collect money owed for marijuana that appellant had previously supplied to Chanel. In conjunction with this, Chanel and appellant were also engaged in an intimate relationship at this time. Chanel was aware that her brother was actively involved in drug trafficking.

{¶ 5} At some point, appellant and Ricks left Chanel's home and returned to Michigan. The following morning, Chanel called appellant. Appellant indicated to her that he would be coming back to Sandusky later that day in order to deliver marijuana to her. At approximately 2:30 p.m., Calvin Harper went to his mother's house to pick up $3,000 in connection to a pending drug deal. After Harper had arrived back at his home with the funds, he phoned his neighbor, Rhonda Farris, and advised her to come by and pick up cash that she had previously asked to borrow.

{¶ 6} While at Harper's house to borrow money, Farris noticed two large stacks of money, totaling $20,000, sitting on Harper's stove. Farris observed that some of the money had apparently fallen onto the floor. Farris asked Harper if she could take that money as well. Harper refused to allow her to take the additional money. Farris returned next door to her residence. At approximately 5:00 p.m., Farris observed a man, whom she did not recognize, coming up her front steps. Farris later identified appellant as the man she had observed. Farris next observed appellant turn around and walk up the sidewalk to Harper's adjacent house. Farris called Harper to warn him about the approaching stranger. Harper indicated that he was expecting this visitor. Harper replied to Farris, "Oh, he cool, he cool, that's my dude."

{¶ 7} Later that night Farris observed Ricks leaving Harper's house. Farris tried to call Harper. She received no answer. Harper's girlfriend, Jessica King, left Harper's house around 4:30 p.m. because Harper told her that he had a meeting with appellant and another party. Upon returning to Harper's around 10:00 p.m., King could not gain access to the house. All of the doors were locked.

{¶ 8} The next morning Farris called Harper's mother to voice her concern about not being able to contact Harper. His mother told Farris to go to the house to check on him. She knew Farris had a way to get into the house. Upon gaining entry, Farris saw Harper lying on the floor and called for emergency assistance. In response to the call, detectives arrived on the scene. Harper had no pulse. It appeared that he had been dead for some time. Chanel disclosed to the officers that she believed that her drug dealer,

appellant, was involved in the death of her brother. Appellant was located several days later. He was arrested in Canton, Michigan on armed robbery charges.

{¶ 9} Appellant admitted that he had gone to Sandusky to engage in a drug transaction with Harper. However, appellant also claimed that while driving to Sandusky at approximately 5:15 p.m. he called Harper on his cell, changed the plans, turned around, and headed back towards Michigan. Although appellant's cell phone records do reflect a mobile call to Harper at 5:15 p.m., the cell records further reflect hits off two separate towers in Sandusky at 5:48 p.m. and 5:52 p.m., more than 45 minutes after appellant claimed to have left Sandusky. Thus, appellant's alibi does not comport with the objective evidence in the record.

{¶ 10} On May 9, 2008, appellant was indicted by the Erie County Court of Common Pleas Grand Jury for two counts of aggravated murder, two counts of aggravated robbery, one count of trafficking in marijuana, and one count of trafficking in cocaine.

{¶ 11} Appellant subsequently filed a motion to dismiss, or in the alternative, to suppress the testimony of Detectives Wichman and Volz, who had conducted an investigative interview with appellant. On January 19, 2010, the motion was denied.

{¶ 12} On June 15, 2010, a jury trial commenced. On June 22, 2010, appellant was found guilty of complicity to aggravated murder, complicity to aggravated robbery, complicity to trafficking in marijuana, and complicity to trafficking in cocaine. On July 8, 2010, appellant was sentenced to life in prison with parole eligibility after 30 years.

{¶ 13} In his first and second assignments of error, appellant asserts that his convictions are against the manifest weight of the evidence and are not supported by sufficient evidence. We will address these two assignments of error simultaneously, as they encompass an analogous underlying premise.

{¶ 14} The record shows that at trial appellee presented extensive cell phone records that carefully tracked appellant's whereabouts throughout the night. Appellant argued a lack of direct evidence and disputed witness credibility.

{¶ 15} In determining whether a verdict is against the manifest weight of the evidence, the appellate court "weighs the evidence and all reasonable inferences, and considers the credibility of witnesses." *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E. 2d 541 (1997). The court then makes a determination as to whether, in resolving conflicts in the evidence, the factfinder "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Id*.

{¶ 16} The underlining inquiry we must resolve is whether a rational trier of fact could have found the disputed elements of the crime established beyond a reasonable doubt. *State v. Wilson*, 8th Dist. No. 84593, 2005-Ohio-511.

{¶ 17} We have carefully reviewed and considered the record of evidence. Appellant characterizes the witnesses in this case as, "a slew of drug dealing family members." However, we note that the fact that the family members were willing to reveal their own unlawful conduct in the course of this matter could reasonably be perceived as indicia of their credibility. The jury in this case found the statements by

appellee's witnesses, including not only family members but also numerous police officers and experts, to be credible and sufficient for conviction.

{¶ 18} We find no evidence reflecting that the factfinder lost its way or created a manifest miscarriage of justice. On the contrary, we find that the record contains ample evidence in support of conviction. Appellant's first and second assignments of errors are not well-taken.

{¶ 19} Appellant's third assignment of error alleges the trial court violated his due process rights when it allowed the testimony of an experiment that was not disclosed in discovery to the defense.

{¶ 20} The record shows that Larry Carlisle, an engineer with Ericsson, testified as to the way cellular telephone towers register signals at the beginning and end of cell phone calls. He further testified that he made a call in the area where appellant asserts he turned around on his trip to Sandusky in order to assess appellant's unsupported alibi claim. Appellant argues that this was a scientific experiment that was not disclosed before trial and the testimony prejudicially violated his due process rights.

{¶ 21} We find the case before us to be analogous to *State v. Goble*, 5 Ohio App.3d 197, 450 N.E. 2d 722 (9th Dist.1982) which stated in relevant part,

> Particularly in light of the fact that defendant claimed an alibi defense, it appeared reasonable for the prosecution to present testimony from a detective who, utilizing common sense, had performed investigative work regarding possible routes taken by defendant and the times of travel

involved therein. We are unwilling to state that such work constituted a scientific test or experiment as is referred to in Crim. R. 16 (B)(1)(d).

{¶ 22} We are not persuaded that Carlisle's "test" constituted a scientific experiment. The testimony was only introduced in anticipation of an alibi defense to demonstrate appellant's location around the time of the death of Harper. In addition, given the number of witnesses who testified as to the appellant's activities, Carlisle's testimony cannot be considered prejudicial. Wherefore, we find appellant's third assignment of error not well-taken.

{¶ 23} In his fourth assignment of error, appellant claims his due process rights were violated by the Sandusky Police Department when it inadvertently destroyed an interview tape. Appellant maintains that the interview contained potentially exculpatory evidence.

{¶ 24} The record shows that on March 19, 2008, Detectives Wichman and Volz interviewed appellant and recorded the interview. Due to the interview being inaudible on tape, the recording was not saved on file in the computer.

{¶ 25} This court has clearly held, in relevant part,

> A right of a criminal defendant to have access to evidence applies only to that evidence which is material. *Brady v. Maryland* (1963), 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194. It is the character of the evidence which is crucial to the determination [of materiality.] *United States v. Agurs* (1976), 427 U.S. 97, 110, 49 L. Ed. 2d 342, 96 S. Ct. 2392.

> The state's duty to preserve evidence, as it relates to materiality, exists where the evidence requested is both (1) apparently exculpatory and (2) unique. *California v. Trombetta* (1984), 467 U.S. 479, 488-89, 81 L. Ed. 2d 413, 104 S. Ct. 2528. This test applies where the state destroys evidence in good faith and in accord with normal practice. Id. at 488, quoting *Killian v. United States* (1961), 368 U.S. 231, 242, 7 L. Ed. 2d 256, 82 S. Ct. 302. *State v. Sherman*, 6th Dist. No. S-00-023, 2001 WL 42258 (Jan. 19, 2001).

{¶ 26} In the case before us, we find that appellant has wholly failed to demonstrate the exculpatory nature of the lost interview. Likewise, the record is devoid of evidence that the police lost or destroyed the tape in bad faith. Furthermore, the officers who conducted the interview were available for cross examination. Wherefore, we find appellant's fourth assignment of error not well-taken.

{¶ 27} In his fifth assignment of error, appellant argues the trial court erred when it denied his motion to suppress cell phone records.

{¶ 28} The record shows that the cell phone records in question were used to demonstrate appellant's location. They did not contain actual contents of any conversations. Notably, the cell phone records were obtained by subpoena.

{¶ 29} A recent federal district in Indiana held, "By voluntarily using the equipment [cell phone communications] the cell phone user runs the risk that the records concerning the cell phone call will be disclosed to police." *United States v. Benford*, N.D.Ind. No. 2:09 CR 86, 2010 WL 1266507 (Mar. 26, 2010).

{¶ 30} Additionally a recent decision by the Northern District of Ohio concluded, "The defendant also seeks to suppress his cell phone records, which were obtained via subpoena. However, there is no reasonable expectation of privacy in cell phone records, *Smith* [*v. Maryland* (1979)], 442 U.S. 735, 744, or in cell site location information." *United States v. Dye*, N.D.Ohio No. 1:10CR221, 2011 WL 1595255 (Apr. 27, 2011).

{¶ 31} The trial court's denial of appellant's motion to suppress his cell phone records was not an abuse of discretion. The cell phone records were obtained through a subpoena in a context devoid of an expectation of privacy. Wherefore, we find appellant's fifth assignment of error not well-taken.

{¶ 32} The judgment of the Erie County Court of Common Pleas is affirmed. Pursuant to App.R. 24, costs of this appeal are assessed to appellant.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE