EFiled: Apr 24 2023 02:43PM EDT
Filing ID 69879458
Case Number 268,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SHAMAYAH THOMAS,	)	
	)	
Defendant Below,	)	
Appellant,	)	**Case No. 268, 2022**
	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE OF DELAWARE'S ANSWERING BRIEF

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DATE: April 24, 2023

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NATURE AND STAGE OF THE PROCEEDINGS

On September 17, 2019, New Castle County police arrested Shamayah Thomas and the State later indicted him for Stalking, Aggravated Act of Intimidation, and Terroristic Threatening. B1; B2 at DI 1, 10.[1] The charges stemmed from an incident in which Thomas sent threatening messages to the mother, A.S., of his child, A.T.[2] A106–07. A Justice of the Peace Court ordered that Thomas have no contact with A.S. as a condition of Thomas's bond. A91. On October 11, 2019, A.S. obtained a protection from abuse ("PFA") order in the Family Court against Thomas.[3] A103–04.

On January 18, 2020, New Castle County police arrested Thomas for charges stemming from Thomas's attempts to contact and threaten A.S., A.S.'s sister, and A.S.'s friend, S.M., on January 10 and 11, 2020. A1 at DI 1; A92–96; B14 at DI 1; B21 at DI 1. On March 2, 2020, a New Castle County grand jury returned an indictment, which superseded the prior indictment for the September 2019 incidents, and charged Thomas with Stalking, two counts of Aggravated Act of Intimidation, six counts of Terroristic Threatening, three counts of Non-compliance with Bond

[1] "DI" refers to items on the Superior Court criminal dockets referenced and included in the appendices in this case.

[2] The State has not included the victim's full names to protect their privacy, and because A.T. is a minor.

[3] A.S. had also obtained a PFA order from the Family Court on February 10, 2017. A99.

Conditions, 10 counts of Harassment, three counts of Criminal Contempt of a Domestic Violence Protective Order, seven counts of Criminal Contempt, and two counts of Endangering the Welfare of a Child. A1 at DI 4; B6 at DI 31; B14 at DI 4; B21-22 at DI 4; B29 at DI 1; B36.

On September 22, 2020, Thomas filed a Motion to Dismiss Current Counsel and/or Appoint New Counsel. A3 at DI 13; B8 at DI 44; B15-16 at DI 13; B23 at DI 14; B46. The court responded in a letter (on which the prosecutor and trial counsel were copied) that it would not consider Thomas's motion under Superior Court Rule 47 since Thomas was represented, but that it would address Thomas's concerns regarding his representation at an upcoming suppression hearing. A3 at DI 16; B8 at DI 47; B16 at DI 16; B23-24 at DI 17-18; B50. In the meantime, Thomas's counsel filed a motion to suppress and a motion for a bill of particulars. A3 at DI 14, 15; B8 at DI 46; B16 at DI 16; B23 at DI 16; B30 at DI 11. On January 4, 2021, Thomas's counsel filed a Motion to Suppress Digital Evidence (Pink Cell Phone).[4] A4 at DI 20; B9 at DI 51; B17 at DI 17; B24 at DI 21; B31 at DI 15.

The State responded to Thomas's motions to suppress and for a bill of particulars, and on August 11, 2021 and October 5, 2021, the court held a hearing

[4] The original motion filed by counsel sought to suppress evidence obtained from a different iPhone belonging to Thomas. *See* A3–4 at DI 17. The State was not seeking to introduce any evidence obtained from that phone, so trial counsel did not further pursue that motion. *Id.*

on the motion to suppress. A3–5 at DI 17, 21, 22, 27; B9-10 at DI 52, 53, 58; B16-18 at DI 17, 21, 22, 24; B24-25 at DI 18, 22, 23, 28; B30-32 at DI 12, 16, 17, 22. On October 19, 2021, during a status conference, the court denied in part and granted in part Thomas's motion to suppress digital evidence from the pink iPhone. A5 at DI 28; B10 at DI 59; B18 at DI 25; B25 at DI 29; B32 at DI 23. The court did not address Thomas's motion to dismiss trial counsel during the hearing or the status conference.

Trial began on October 25, 2021 and lasted two days. A6 at DI 29; B11 at DI 61; B18 at DI 26; B26 at DI 30; B32-33 at DI 24. Thomas waived his right to a jury trial. *Id.* The court had him sign a written waiver and conducted a colloquy with him to ensure that Thomas was waiving his right knowingly, intelligently, and voluntarily. A6 at DI 29; A81; B11 at DI 61; B18 at DI 26; B26 at DI 30; B32-33 at DI 24;. Prior to the end of trial, the State entered *nolle prosequis* on two counts of Terroristic Threatening, four counts of Harassment, one count of Non-compliance with Bond Conditions, and one count of Criminal Contempt of a Domestic Violence Protective Order. *See* A1, 237; B14. At the State's request and without defense objection, the court permitted the State to amend the dates in two counts of Criminal Contempt and dismissed five counts of Criminal Contempt that were made duplicative by the amendments. A243–45. On October 27, 2021, the Superior Court found Thomas guilty of Stalking, both counts of Aggravated Act of Intimidation,

three counts of Terroristic Threatening, three counts of Harassment, two counts of Non-compliance with Conditions of Bond, two counts of Criminal Contempt of a Domestic Violence Protective Order, and two counts of Criminal Contempt. A288–99. The court found Thomas not guilty of three counts of Harassment, one count of Terroristic Threatening, and both counts of Endangering the Welfare of a Child. *Id.* The court ordered a presentence investigation. A300.

On March 22, 2022, Thomas filed another Motion to Dismiss Current Counsel and/or Appoint New Counsel. A31–35. It appears that Superior Court staff forwarded the motion to the prosecutor instead of to trial counsel. *See* A30. At sentencing on July 22, 2022, the parties addressed the motion to dismiss counsel with the court. A304–05. The court advised Thomas that he could represent himself at sentencing if he chose and provided a break for Thomas to discuss the issue with trial counsel. A304. Thomas opted to have trial counsel represent him. A305. The Superior Court sentenced Thomas to an aggregate of 36 years of Level V incarceration (with credit for 14 days previously served), suspended after 10 years for decreasing levels of supervision. A8–12, 309–10.

Thomas appealed and filed his Opening Brief. This is the State's Answering Brief.

SUMMARY OF THE ARGUMENT

I. Appellant's first claim is DENIED. The Superior Court did not err in finding the warrant to search his pink iPhone contained sufficient particularity to pass constitutional muster. The warrant adequately described the items sought to be seized in a limited manner and provided a logical nexus between those items (text messages, message apps, message and call logs, and photographs and videos), the phone, and the crime (Stalking). The warrant did not give investigators authority to rummage through the complete contents of the cell phone. To the extent the warrant was overbroad, the court appropriately limited its scope instead of invalidating the warrant entirely.

II. Appellant's second claim is DENIED. The Superior Court did not abuse its discretion in declining to consider the merits of Thomas's first *pro se* motion to dismiss counsel and appoint new counsel. Thomas did not request to represent himself and the reasons he gave for his dissatisfaction with trial counsel did not justify the appointment of new counsel. The court also did not abuse its discretion for failing to hold a more extensive hearing on Thomas's second *pro se* motion to dismiss counsel and appoint new counsel, filed several months after trial had ended and before sentencing. Again, Thomas did not request to represent himself, and when told that his options were that or to proceed with his current counsel, he opted for the latter.

STATEMENT OF FACTS

Thomas and A.S. had a child, A.T., together in 2015. *See* A103. On February 10, 2017, A.S. obtained a PFA order against Thomas, which directed him to have no contact with A.T. and her family. A99. On September 11, 2019, Thomas sent A.S. a number of threatening messages, such as "Nobody can't save you," "I'm a give you two minutes to call my phone or [A.T.] will be motherless," and "I'm going to come back over here and smoke your dumb ass." A106–08. Among other things, he threatened to "smoke" A.S., kick her door in, and wait for her at A.T.'s daycare. *Id.* A.S. called the police and Thomas was arrested. A106. As a condition of his bond, Thomas was ordered to have no contact with A.T. and he was required to wear a GPS monitoring device. A91, 133. On October 11, 2019, A.S. was granted another PFA order in the Family Court against Thomas. A103–04.

Thomas continued to try to contact A.S. by phone over the next several months. *See* A102–03; State's Exs. 7–9. On January 11, 2020, Thomas's pretrial supervisor received an alert that Thomas had removed his GPS device. A134. That same day, A.S. contacted New Castle County police because Thomas had sent her and her friend, S.M., a number of text messages on January 10 and 11 that alarmed

them.[5] A86, 92; *see* A162–71, 186–201. In one message, Thomas sent S.M. a message asking him, "Which one do you want to get hit with?" A197. Attached to the message were photos of two guns. A197, 201. While officers were present at A.S.'s residence, Thomas called her. A101. An officer, whose body camera was operating at the time, answered the call and turned on the speaker. A93, 100–01. During the call, Thomas threatened to kill A.S. while A.T. was present.[6] A272–74; *see* State's Ex. 5.

New Castle County police arrested Thomas on January 18, 2020 at an apartment where they had geolocated his phone and where they had seen him earlier that day. A53, 55; B148, 153. Officers located a pink iPhone on the dining room table near where Thomas was taken into custody. A54. Prior to obtaining a search warrant for the phone, an officer called what he knew was a number connected to Thomas from a known phone number. A58. The pink iPhone rang and showed the known number on its screen. *Id.* The officer then drafted and obtained a search warrant for the pink iPhone. A59. After the warrant was approved an officer from the technical forensics unit extracted the data from the phone's SIM card and

[5] On January 13, 2020, A.S.'s sister also contacted New Castle County police about text messages she had received from Thomas. A96. Thomas was acquitted of all charges related to messages he sent to A.S.'s sister. *See* A298; B42.

[6] The Superior Court acquitted Thomas of the two counts of Endangering the Welfare of a Child stemming from this phone conversation. A296–97.

prepared an extraction summary report. A125, 146; *see* State's Ex. 14. From the phone extraction, the State introduced at trial the extraction summary report, and the messages sent between Thomas and A.S. on January 10, 2020 and between Thomas and S.M. and Thomas and A.S.'s sister on January 11, 2020. A148–203, 215–16; *see* State's Exs. 14–18.

None of the victims testified at trial. Nor did Thomas. A243. The State proved its case through police officer testimony, court records, call detail records for the victim's phone numbers, the bodycam footage, and photographs of text messages taken of the victim's phones, in addition to the evidence admitted from the extraction from Thomas's cell phone.

ARGUMENT

I. THE SUPERIOR COURT DID NOT ERR IN FINDING THE WARRANT TO SEARCH THE PINK iPHONE CONTAINED SUFFICIENT PARTICULARITY TO PASS CONSTITUTIONAL MUSTER.

Question Presented

Whether the Superior Court erred in finding the warrant to search Thomas's iPhone contained sufficient particularity in its identification of the items to be seized and searched to pass constitutional muster.

Standard and Scope of Review

This Court reviews a trial court's denial of a motion to suppress for an abuse of discretion.[7] "Where the facts are not disputed and only a constitutional claim of probable cause is at issue, [the Court] reviews the Superior Court's application of the law of probable cause *de novo*."[8]

Merits of the Argument

Thomas claims the search warrant authorizing investigators to search his pink iPhone violated the Fourth and Fourteenth Amendments because it was a "general warrant," i.e., it authorized a general exploratory search through Thomas's iPhone

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

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

"without specifying the particular items to be seized." Opening Br. at 15.[9] He made the same argument in the Superior Court in his motion to suppress (*see* B59-62, 169-70, 201-03) and the court denied it. A68-72. He asserts the court erred in so deciding. Opening Br. at 17–19. Thomas's claim is unavailing.

"Under the United States and Delaware Constitutions, 'a search warrant may be issued only upon a showing of probable cause'"[10] An affidavit in support of a search warrant must set forth facts within the four corners of the affidavit adequate to permit an impartial judicial officer to reasonably conclude that the items sought to be seized will be found in a particular location.[11] There must be a logical nexus between the items being sought and the location to be searched.[12]

In *Coolidge v. New Hampshire*,[13] the United States Supreme Court held that one of the two constitutional objectives served by the warrant requirement is to avoid the "'general warrant,' abhorred by the colonists", or to protect individuals from "a general, exploratory rummaging in a person's belongings."[14] The court noted that

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[9] Quoting *Myers v. Med. Ctr. Of Del., Inc.*, 86 F. Supp. 2d 389, 401 (D. Del. 2000).

[10] *Sisson*, 903 A.2d at 296 (internal quotations omitted) (citing *Fink v. State*, 817 A.2d 781, 786 (Del.2003); U.S. Const. Amend. IV; Del. Const. art. 1, § 6)).

[11] *Spencer v. State*, 2018 WL 3147933, at *5 (Del. June 25, 2018) (citing *Sisson*, 903 A.2d 296); *see* 11 *Del. C.* §§ 2306 & 2307.

[12] *Jones v. State*, 28 A.3d 1046, 1057 (Del. 2011).

[13] 403 U.S. 443 (1971).

[14] *Id.* at 467 (citations omitted).

"[t]he warrant accomplishes this second objective by requiring a 'particular description' of the things to be seized."[15] In recent years, this Court has on several occasions found that warrants for cell phones or other digital media devices were not sufficiently particular to pass constitutional muster,[16] holding in the recent *Taylor v. State* decision that "a search warrant for electronic devices must contain more than a general authorization to search all the contents of electronic devices for evidence of criminal conduct."[17] Thomas claims the search warrant in his case was similarly deficient. He is mistaken.

The affidavit (A039–41) in support of the warrant to search Thomas's pink iPhone provided the following operative facts establishing a fair probability that evidence of the crime of Stalking would be found in the data on the phone:

- Thomas was released to probation on February 22, 2019 after serving time for Aggravated Menacing and Criminal Contempt of Domestic Violence Protective Order. The victim in the case was A.S. and a no contact order

[15] *Id.*; *see United States v. Fallon*, 61 F.4th 95, 107 (3d Cir. 2023) (noting that the particularization requirement was included to prohibit general warrants, and that sufficient particularity "depends on the nexus between the evidence to be sought or seized and the alleged offenses").

[16] *See Taylor v. State*, 260 A.3d 602, 617 (Del. 2021); *Buckham v. State*, 185 A.3d 1 (Del. 2018); *Wheeler v. State*, 135 A.3d 282 (Del. 2016).

[17] *Taylor,* 260 A.3d at 617.

prohibited Thomas from contacting A.S. while Thomas was on probation. ¶ 3.

- Thomas was arrested by New Castle police on September 17, 2019 for Stalking and related charges after he had called A.S. multiple times and sent threatening messages to her cell phone. ¶ 4.
- On January 11 and 13, 2020, police officers conducting a domestic violence investigation into Thomas learned that Thomas had called A.S. and S.M. approximately 81 times from blocked numbers and that he had called and sent threatening text messages to them from a phone number (the 8763 number), which included "text messages sent of various handguns threatening the victims." He also sent threatening text messages to A.S.'s sister from the 8763 number and via Facebook Messenger. The officers obtained arrest warrants for Thomas stemming from the domestic abuse investigation. ¶¶ 5–8.
- Officers arrested Thomas at a residence on January 18, 2020. Incidental to that arrest, they collected a pink iPhone XR. ¶ 9. A phone call from a known number to the 8763 number appeared on the screen of the pink iPhone as an incoming call. ¶ 10. A DELJIS inquiry revealed that the 8763 number belonged to Thomas. ¶ 11. The 8763 number was the number Thomas had registered with Probation and Parole. ¶ 12.

- In one case, Thomas included photos of where the victim was located. A BMW steering wheel can be seen in the photos and one of Thomas's cars was a BMW "reg. 311630." ¶ 13.

The warrant identified the items to be searched for and seized as:

> Pink iPhone XR cell phone #XXX-XXX-8763 for the purpose of obtaining cell phone call log and text messages log and the associated dates and times. Any applications/social media capable of sending/receiving texts messages or making/receiving phone calls as well as any attached storage devices which may hold text messages log or phone calls log, from 02/22/19 at 0001 hours to 01/18/20 at 2359 hours. The content of any photos or videos from iPhone XR Wireless cellular telephone number XXX-XXX-8763 not subject to the above time frame (no limitations).

A37.

After a hearing, the Superior Court judge found that the warrant was not a general warrant, but that it was overbroad with respect to the time frame for which the warrant provided probable cause to search for text message and call logs, applications or social media capable of sending or receiving calls or messages, or attached storage devices that might hold messages or call logs. A68, 71–72. The judge held that Thomas's case was different from those cases in which this Court has found cell phone search warrants unconstitutional, finding:

> The search warrant does not authorize a general authorization to search all the contents of the phone. The warrant is tailored to the suspected crime, the suspected instrument of the crime, specific dates [] (dates

> associated with the purported criminal acts) [] and only limited sections of the phone.

A70. Although, the judge also found the warrant was overly broad, he noted that "[a]n 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 satisfied the Fourth Amendment." A70.[18] Thus, the judge limited the allowable time range to January 1, 2020 through January 18, 2020 instead of from February 22, 2019 to January 1, 2020. A72. Additionally, the judge noted that the text messages had to be limited to those "that are referenced to" or relate to the named victims. *Id.* The judge placed no limit on the search for photographs and videos except that seizure of photographs or videos would be limited by paragraph 13 of the probable cause affidavit. *Id.* Paragraph 13 discussed the photographs of A.S.'s location. A40.

The Superior Court judge did not err in so deciding. In *Wheeler v. State*, this Court found a warrant unconstitutionally general when it listed as items to be searched almost any possible digital device likely to be found in the defendant's home and workplace and requested to search "any and all data . . . stored by whatever means on any items seized."[19] According to the search warrant, investigators were

[18] Citing *Taylor*, 260 A.3d at 10 (quoting *United States v. Yusuf*, 461 F.3d 374, 393 n.19 (3d Cir. 2006)).

[19] 135 A.3d at 289, 304–07.

looking for evidence of witness tampering that had occurred on or after July 2013, in part, through written communication.[20] The search, however, revealed child pornography images on Wheeler's computer.[21] Wheeler was then indicted for and convicted of Dealing in Child Pornography.[22] In finding the search warrant unconstitutional, the Court noted that, *inter alia*, the search was not limited to a relevant time frame, the investigators failed to provide a precise description of the alleged criminal activity, and nothing in the affidavits linked some of the digital media to the original crime charged (witness tampering).[23]

In *Buckham v. State*, Buckham was implicated in a shooting.[24] The State obtained a search warrant for his phones that authorized police to search for "'any and all store[d] data contained within the internal memory of the cellular phones [sic], including but not limited to, incoming/outgoing calls, missed calls, contact history, images, photographs and SMS (text) messages' for evidence of 'Attempted Murder 1st Degree.'"[25] The only information in the probable cause affidavit to the warrant connecting the phone to the crime was that the police believed GPS data

[20] *Id.* at 287.

[21] *Id.* at 290–91.

[22] *Id.* at 284, 291.

[23] *Id.* at 304–06.

[24] 185 A.3d at 5.

[25] *Id.* at 6.

from the phone might help them determine where Buckham was at the time of the shooting and that "criminals often communicate through cellular phones."[26] This Court found that the warrant both lacked particularity and was overbroad, noting that the warrant "did not limit the search of Buckham's cell phone to any relevant time frame and authorized the search of any data on the phone."[27]

In *Taylor v. State*, Taylor, a member of the Shoot to Kill gang, was implicated in a gang-related murder and multiple violent felonies.[28] The State obtained search warrants for his four cell phones based on, *inter alia*, Taylor's involvement in the gang-related shooting incidents, his personal connections with other gang members, and the statement from a detective that, based on her training, knowledge, and experience, "people involved in criminal acts like those described in her affidavit use smartphones to communicate about their illegal acts"[29] The warrant authorized police to search "any/all data stored by whatever means . . . , to include but not limited to" a laundry list of items that can be found on a smartphone, "and any other

[26] *Id.* at 17–18.

[27] *Id.* at 19.

[28] 260 A.3d at 604.

[29] *Id.* at 609.

information/data pertinent to this investigation within said scope."[30] This Court found the warrant was both a general warrant and overbroad,[31] noting:

> Like the warrant struck down in *Buckham*, the Taylor warrant authorized "a top-to-bottom search" of "[a]ny and all store[d] data" of the digital contents of the devices. The Taylor warrant also "did not limit the search of [the] cell phone to any relevant time frame ...." And like the warrants in *Buckham* and *Wheeler*, the Taylor warrant used the open-ended language "including but not limited to" to describe the places to be searched. The Taylor search warrant allowed investigators to conduct an unconstitutional rummaging through all of the contents of Taylor's smartphones to find whatever they decided might be of interest to their investigation.[32]

The warrant in Thomas's case is vastly different from those in *Wheeler, Buckham*, and *Taylor*. Here, the cell phone was the instrument of the crime and, as noted by the Superior Court judge, the search was limited to certain sections of the phone—those where call and message logs and messages themselves might be found, along with videos and photographs stored on the phone. In addition, the search for messages and calls was limited in time frame. Contrary to Thomas's claim (*see* Opening Br. at 17), the warrant also did not contain the problematic language discussed in the other cases. Investigators did not ask to search "any and all stored data" on the phone, nor did they include the phrase "including, but not limited to." Simply put, the warrant did not allow investigators to conduct an

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[30] *Id.*

[31] *Id.* at 615.

[32] *Id.* at 615.

unconstitutional rummaging through all of the contents of Thomas's phone to find whatever they decided might be of interest to their investigation. The warrant was distinctly targeted to find evidence of Stalking. The Superior Court did not err in finding the warrant was sufficiently particular to pass constitutional muster.

The court also did not err in redacting those portions of the warrant it found to be overbroad instead of invalidating the warrant entirely. This Court has cited the Third Circuit to explain that:

> 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 general terms what is to be seized,' but 'authorizes the seizure of items as to which there is no probable cause ....' " [A]n 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.[33]

Here, the Superior Court appropriately limited the scope of the search to a shorter time period because it found that the affidavit of probable cause did not provide facts to support a claim that the pink iPhone was connected to Thomas stalking A.S. prior to January 1, 2020.[34]

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[33] *Yusuf*, 461 F.3d at 393 n.19, *cited in Taylor*, 260 A.3d at 617.

[34] Although the warrant mentioned that Thomas had been arrested on September 17, 2019 on stalking and other related charges, it also stated that the police had collected

Thomas also argues that the warrant was unconstitutional because "the State maintained that they would still look at, inventory, and prepare for use any and all information outside the scope of both warrants (initial and newly limited) in case they needed to use it after their case in chief." Opening Br. at 17. But Thomas mischaracterizes the record. In arguing below that the cell phone evidence should be suppressed, trial counsel asserted that the State had extracted the entire contents of the phone and "the State . . . indicated that . . . this may come up in impeachment, or in rebuttal." A51. Trial counsel's argument was based on the prosecutor's statement in her response to the motion to suppress that:

> The technology used to extract the cell data on this phone will extract everything on the phone. The program used at the time was not capable of only extracting select data. The State agrees that anything on the phone outside the limits of the warrant may not be used in its Case-in-Chief absent another warrant lawfully obtaining such information.

B95-96; *see* A52. Although the court and trial counsel had a discussion about whether information outside the scope of the warrant could be used for impeachment purposes (*see* A51–52; B175-77), the prosecutor never indicated that she intended to do that or that such use of the additional information extracted would be appropriate (*see* A52). Instead, the prosecutor explained that, although the extraction program downloads everything on the phone, the investigator only

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and analyzed another cell phone belonging to Thomas at the time and had recovered no evidence from it. A39; *see* B189-93.

searches the extraction for information within the scope of the warrant. A52. She also acknowledged that the State would not be able to use additional information accidentally discovered if it was outside the scope of search warrant. *Id*. In any case, the court declined to rule on the issue in addressing the motion to suppress. *See* B176 ("I'm not going to rule on what might be used in the rebuttal at this point. I'm trying to figure out what can be used in the case-in-chief."). And Thomas did not testify or present any defense witnesses. Therefore, the issue is not justiciable because Thomas has not alleged a constitutional violation of his rights based on any use of material outside the scope of the warrant; no such evidence was introduced at trial.[35] Moreover, although the State seized the entire contents of Thomas's phone, nothing in the record indicates that the State's search of the phone exceeded the scope of the search warrant.[36]

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[35] *See Mills v. Trans Caribbean Airways, Inc.*, 272 A.2d 702, 703 (Del. 1970) ("It is settled in this State that a party has no standing to challenge the constitutionality of a statute, or of any action thereunder, unless it is shown that a right of the complainant is affected thereby.").

[36] This Court has generally recognized that, when it comes to digital media, a search warrant authorizing the seizure of a specific items or records permits the seizure of computers or other media that could reasonably contain those items. *See Bradley v. State*, 51 A.3d 423, 435 (Del. 2012) ("A search warrant authorizing the seizure of specific items permits the seizure of objects that could reasonably contain those items." (citing *United States v. Giberson*, 527 F.3d 882, 886–87 (9th Cir.2008); *United States v. Reyes*, 798 F.2d 380, 383 (10th Cir.1986))). *Cf. United States v. Palms*, 21 F.4th 689, 701 (10th Cir. 2021) (finding warrant and search of cell phone complied with Fourth Amendment despite physical extraction of all data from cell phone, noting extraction was reasonable and search methodology were sufficiently

II. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO GRANT THOMAS'S MOTIONS TO DISMISS COUNSEL AND APPOINT NEW COUNSEL.

Question Presented

Whether the Superior Court abused its discretion in failing to hold a hearing on or to otherwise further consider Thomas's first motion to dismiss counsel.

Whether the Superior Court abused its discretion in failing to hold a more extensive hearing on Thomas's second motion to dismiss counsel.

Standard and Scope of Review

The decision on whether or not to appoint substitute counsel is reviewed for abuse of discretion.[37] "An abuse of discretion occurs if the trial court's decision is

limited). *See also United States v. Karrer*, 460 F. App'x 157, 163 (3d Cir. 2012) (finding no merit to defendant's argument that warrant was overbroad for failing to specify a particularized computer search strategy (citing *United States v. Stabile*, 633 F.3d 219, 234 (3d Cir. 2011); *United States v. Brooks*, 427 F.3d 1246, 1251 (10th Cir. 2005))); *United States v. Taylor*, 2022 WL 17582270, at *12–13 (E.D. Ky. Dec. 12, 2022) ("[T]he Sixth Circuit has recognized that the Government can, in some cases, examine the entire contents of a computer system to look for evidence, so long as the data ultimately seized by authorities is limited to 'evidence explicitly authorized in the warrant.'" (quoting *United States v. Richards*, 659 F.3d 527, 540 (6th Cir. 2011))).

[37] *Joyner v. State*, 2017 WL 444842, at *3 (Del. Jan. 20, 2017).

based on clearly unreasonable or capricious grounds."[38] This Court reviews questions of law and alleged constitutional violations *de novo*.[39]

Merits of the Argument

Thomas claims his case should be remanded for a new trial because the Superior Court did not adequately address his motions to dismiss and/or appoint new counsel. Opening Br. at 20–22. Thomas is correct that a defendant has a Sixth Amendment right to waive his right to counsel and to instead represent himself, and that if he invokes that right, the trial court must make further inquiry. His claim fails, however, because Thomas did not invoke his right to represent himself. He asked for substitute counsel. Any error by the court in failing to follow up on Thomas's first motion to dismiss counsel was harmless and the court did not abuse its discretion in not holding a more extensive hearing on Thomas's second motion to dismiss counsel.

In *Faretta v. California*,[40] the United States Supreme Court "held that the Sixth and Fourteenth Amendments include a constitutional right to proceed *without*

[38] *Bultron v. State*, 897 A.2d 758, 762 (Del. 2006) (internal quotations and citation omitted).

[39] *Zebroski v. State*, 12 A.3d 1115, 1119 (Del. 2010).

[40] 422 U.S. 806 (1975).

counsel when a criminal defendant voluntarily and intelligently elects to do so."[41] The right of self-representation, however, is not absolute.[42] A defendant must timely make his request to represent himself[43] and he must do so clearly and unequivocally.[44] A motion to disqualify counsel is not a clear and unequivocal assertion of a defendant's right to self-representation.[45] While "[c]ourts must indulge every reasonable presumption against a waiver of counsel[,]"[46] a defendant is not entitled to the appointment of new counsel if he is dissatisfied with his current

[41] *Indiana v. Edwards*, 554 U.S. 164, 170 (2008) (quoting *Faretta*, 422 U.S. at 807) (emphasis in original) (internal quotations omitted).

[42] *Edwards*, 544 U.S. at 171.

[43] *See United States v. Bankoff*, 613 F.3d 358, 373–74 (3d Cir. 2010) ("[A]fter trial has 'commenced'—*i.e.*, at least after the jury has been empaneled—the right of self-representation is curtailed." (internal citation and quotations omitted)); *Walker v. Phelps*, 910 F. Supp. 2d 734, 744 (D. Del. 2012) ("There is no Supreme Court precedent articulating an absolute right of self-representation after the defendant's trial begins, and the applicable Supreme Court cases reflect the basic principle that a trial court has broad discretion in granting mid-trial requests to proceed pro se.").

[44] *Buhl v. Cooksey*, 233 F.3d 783, 792 (3d Cir. 2000).

[45] *Milton v. State*, 2016 WL 5415763, at *2 (Del. Sept. 27, 2016).

[46] *Id.*

counsel's performance.[47] And an indigent defendant does not have the right to counsel of his choice.[48]

In Thomas's first motion to dismiss counsel, dated September 17, 2020 (more than a year before trial), Thomas asked that the court appoint new counsel to represent him. B47-48. He did not request to represent himself. Nor did he indicate that he was interested in retaining private counsel. Thomas asserted that trial counsel had failed to address charges at his preliminary hearing, had "failed to file various motions [Thomas] instructed councel [sic] to file"; and had failed "to object at hearings when instructed to by [Thomas]." B48. The Superior Court declined to consider Thomas's motion under Superior Court Criminal Rule 47 because he was represented by counsel and had not been granted permission to participate with counsel in the defense.[49] B50. The court also noted that trial counsel had since filed motions to suppress and for a bill of particulars. *Id.*

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[47] *See Trotter v. State*, 2018 WL 6167322, at *3 (Del. Nov. 21, 2018) (finding "Trotter's disagreements and dissatisfaction with his counsel did not entitle him to new counsel"); *Bultron*, 897 A.2d at 762 ("Although a defendant has the right to counsel, it is not an absolute right to the defendant's counsel of choice.").

[48] *See Bailey v. State*, 438 A.2d 877, 878 (Del. 1981) (". . . an indigent defendant has no right to the appointment of private counsel unless the Public Defender has a conflict of interest in the case or other cause is shown.")

[49] Thomas had also filed a *pro se* motion for reduction of bond; the court's letter disposed of both motions together. B50.

This Court has held that, if the reasons for a defendant's dissatisfaction with counsel are made known to the court, it may rule on the motion without further inquiry.[50] Although the Superior Court did not rule on Thomas's motion and instead referred it to trial counsel, any error in doing so was harmless.[51] The reasons stated by Thomas did not justify granting his request for new counsel and, also, did not warrant further inquiry.[52] And it does not appear from the record that trial counsel was neglecting the case, or that Thomas ever informed trial counsel that he wanted different representation or to represent himself. Thomas did not raise the issue again until after trial.

Trial concluded on October 27, 2021 and on March 22, 2022, Thomas filed a second motion to dismiss counsel in which he mentioned his prior motion and asserted that trial counsel had failed to adequately communicate with him. A32–33.

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[50] *Jones v. State*, 2000 WL 1504965, at *2 (Del. Aug. 30, 2000) (citing *United States v. Welty*, 674 F.2d 185, 188 (3d Cir. 1982); *see Joyner*, 2017 WL 444842, at *3 (noting a trial judge must be afforded broad discretion in deciding a motion to appoint new counsel).

[51] *Cf. Jones*, 2000 WL 1504965, at *2 (finding no error in the trial court's failure to question Jones about his dissatisfaction with counsel before deciding whether to grant his request).

[52] *See In re Deputy*, 1998 WL 171077, at *1 (Del. Mar. 20, 1998) ("[M]ere dissatisfaction with [] counsel does not, by itself, justify the appointment of different counsel."); c*f. Welty*, 674 F.2d at 188 (finding that "in order to warrant a substitution of counsel during trial, the defendant must show good cause, such as a conflict of interest, a complete breakdown in communication, or an irreconcilable conflict with his attorney").

Thomas maintained that he had sent trial counsel several letters and left her several voicemails, but that she had not provided him with "discovery items, pretrial motions, and transcripts for suppression hearing and trial." A33. Again, Thomas requested that he be appointed new counsel, not that he be permitted to represent himself. A34. This time, at trial counsel's request, the court addressed the issue with Thomas before sentencing on July 7, 2022. A304–05. Counsel maintained that she had not received copies of either motion to dismiss her.[53] A304. The court informed Thomas that he had the choice to continue with counsel or to represent himself. A304. The court then gave Thomas a chance to speak with his attorney. A305. After doing so, Thomas opted to keep his attorney. *Id.*

The Superior Court did not abuse its discretion in refusing to appoint new counsel for Thomas before sentencing. Nor did it err in failing to hold a *Faretta* hearing on whether Thomas wished to exercise his right to self-representation. Thomas did not "clearly and unequivocally" assert that right[54] and, when the court informed him that that was his only other option, he opted to keep his attorney.[55]

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[53] As noted above, the second motion to dismiss counsel was mistakenly referred by the court to the prosecutor instead of to trial counsel. A30.

[54] *Cf. Pringle v. State*, 2007 WL 4374197, at *2 (Del. Dec. 17, 2007) (finding defendant's argument that the Superior Court erred in refusing to allow him to represent himself lacked merit when he requested substitute counsel in his motion, not to represent himself)

[55] *Cf. Milton*, 2016 WL 5415763, at *2 (finding Superior Court did not err in failing to hold *Faretta* hearing after defendant filed a motion to disqualify counsel because

CONCLUSION

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

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he did not clearly and unequivocally assert his right to self-representation and abandoned his efforts to discharge trial counsel after being informed that self-representation was his only other option).

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SHAMAYAH THOMAS,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	**No. 268, 2022**
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

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DATE: April 24, 2023