

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Aiken County

Honorable Doyet A. Early, Circuit Court Judge

Opinion No. 5954

THE STATE,

RESPONDENT,

V.

RASHAWN VERTEZ CARTER,

APPELLANT.

APPELLATE CASE NO. 2018-000358

PETITION FOR REHEARING

Appellant petitions for rehearing on both issues raised to this Court. Respectfully, this Court erred in its analysis of the first issue regarding the Fourth Amendment and the higher requirements of the South Carolina Constitution. Neither the exigent circumstances exception nor the Davis¹ good-faith exception applies to appellant's case, especially under the South Carolina Constitution's right of privacy, which this Court relegated to a conclusory footnote in

¹ Davis v. United States, 564 U.S. 229 (2011).

its Opinion. The Court correctly recognized the Brewer² error, but mistakenly applied the harmless error doctrine to the admission of the video, whether under the first or second issues raised.

Fourth Amendment

The police needed a warrant. The Court's Opinion omits several key facts that undercut its exigent circumstances analysis. The central factual mistake is assuming the police knew that Carter was a participant in the home invasion when they converted his cell phone into a tracking device. The police did not arrest Carter when they found him in Columbia. They did not approach Carter with guns drawn. The police repeatedly insisted Carter was not under arrest and that he voluntarily accompanied them to Aiken. Finally, even after they finished interrogating Carter, **they let him go**. At no point did the police treat Carter as if he were a fleeing suspect who presented a great danger to the community. The Court omits these important points from its analysis.

During Officer Hembree's proffer, he first said, "We believed [appellant] was a part of the, the group that had committed the home invasion." R. 224, l. 1 – 9. He then said that Patrick Neely gave them the number used to make the exigency request. R. 224, l. 18 – 225, l. 3. On cross-examination, Officer Hembree said they did not know the phone number belonged to Carter at the time they got Carter's real-time location from T-Mobile. R. 227, l. 11 – 17. This fact is omitted from the Court's opinion.

The Court mistakenly says that getting a search warrant was "not feasible" because a warrant for historical CSLI "would not have provided Carter's real-time location." Op. at 6. Nothing limits the police from seeking a warrant for real-time location information. The police

² State v. Brewer, 411 S.C. 401, 768 S.E.2d 656 (2015).

get warrants for GPS trackers and wiretaps that provide real-time information. This assertion by Officer Hembree makes no sense. R. 230, 1. 2 – 7. To the extent that Officer Hembree meant getting a warrant was not feasible because of the time involved, multiple officers were at the scene, Officer Hembree had time to fill out the T-Mobile forms and communicate with the company, two officers tracked Carter, an officer went to the hospital, and the ATF task force was involved. R. 30-31. R. 41-42. R. 144. R. 462-464. The police had the manpower and the time to get a warrant.

The Court failed to distinguish the violent circumstances of the crime from the exigency of finding Carter. A violent crime with an unknown perpetrator does not give the police *carte blanche* to claim an exigency with respect to every action they take. The exigency must relate to the action taken. For example, if the police find the body of someone who has been murdered, the police cannot obtain real-time information for every person or phone number contained in the dead man's phone without a warrant. The murder may be an exigency, but finding the real-time whereabouts of an acquaintance in the victim's phone is not an exigency. Without enough information to arrest or even detain Carter, no exigency existed with respect to Carter.

The Court erred in applying the Davis good-faith exception to this case. Op. 7 at n.6. In order for Davis good-faith to apply, the police must rely on "binding appellate precedent." Davis at 232. The Court cites a Fourth Circuit case, but Fourth Circuit precedent is not "binding appellate precedent" in South Carolina. South Carolina's courts are bound by decisions of our state's appellate courts and the United States Supreme Court, not the federal intermediate appellate courts. The Circuit Courts' decisions cannot form the basis of Davis good-faith. No decision specifically authorized this kind of warrantless search.

The opposite is true. As the Court said in Carpenter v. United States, 138 S.Ct. 2206, 2220-23 (2018), in which it relied heavily on decisions available to the police at the time of this search, (Riley v. California, 134 S.Ct. 2473 (2014) and United States v. Jones, 565 U.S. 400 (2012)), the Court held that “the fact that the information is held by a third party does not by itself overcome the user’s claim to Fourth Amendment protection.” Carpenter, 138 S.Ct. at 2217. “Whether the Government employs its own surveillance technology as in Jones or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. The location information obtained from Carpenter’s wireless carriers was the product of a search.” Id. The United States Supreme Court—in Jones, Riley, and Carpenter—has demonstrated its clear intent to require judicial approval when the government seeks to use new developments in technology to maintain constant surveillance over its citizens. See also, Kyllo v. United States, 533 U.S. 27, 35 (2001) (stating that the Court would not leave homeowners “at the mercy of advancing technology”). It also seems clear that after Jones, which held that the police needed a warrant to use a GPS tracker, converting a cell phone into a tracker without a warrant is an illegal search and Davis should not apply. Regardless, the police should not get a free illegal search every time technology makes an incremental advancement.

South Carolina Constitution

This Court erred in failing to conduct a full legal analysis under the South Carolina Constitution. The sum of this Court’s state constitutional analysis is a single sentence equating it to the federal constitution. Op. at 7, n.6. “The South Carolina Constitution, with an express right to privacy provision included in the article prohibiting unreasonable searches and seizures, favors an interpretation offering a higher level of privacy protection than the Fourth

Amendment.” State v. Forrester, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001). An example of the greater protection is the requirement of reasonable suspicion before conducting a “knock and talk.” State v. Counts, 413 S.C. 153, 161, 776 S.E.2d 59, 63 (2015).

Just as our Supreme Court recognized a greater privacy protection in the home in Counts, a strict interpretation of exigent circumstances as it relates to digital privacy comports with our state constitutional right. Forrester cited the study of the state constitution by the West Committee and its conclusion that greater protection was needed from “the emergence of new electronic technologies that increased the government’s ability to conduct searches.” Forrester at 647, 541 S.E.2d at 842 (citing Committee to Make a Study of the Constitution of South Carolina, 1895, Minutes of Committee Meeting 6 (Sept. 15, 1967)). The West Committee suggested revising the constitution “to take care of the invasion of privacy through modern electronic devices.” Id.

The Legislature was concerned with the potential of electronic devices to deprive citizens of their privacy—in 1967. That concern was well-founded as every citizen of this state now carries in their pocket an electronic device that the police can convert to a real-time tracker. If the state right to privacy is to mean anything, the police should not be able to use this technology without a warrant. Under the greater state right of privacy—which was drafted to protect citizens from the exact type of technological intrusion that occurred in this case—a stricter application of the exigent circumstances requires suppression.

Davis Good-Faith Should Not Apply Under the State Constitution

This Court erred in assuming that the Davis good-faith exception exists under the state right to privacy. The expansion of the good faith exception by the federal courts in Davis has been greatly criticized by legal scholars for allowing police a grace period during which they do not need

to seek warrants when they use a new technology. See generally Wayne R. LaFave, 1 Search & Seizure § 1.3(h) (5th ed. 2012); Orin S. Kerr, Fourth Amendment Remedies and Development of the Law: A comment on Camreta v. Greene and Davis v. United States, 2011 Cato Sup. Ct. Rev. 237 (2011). The Davis rule gives the police little incentive to seek the approval of a magistrate because they know that an appellate court must give them explicit warning that their behavior violates the Fourth Amendment before the exclusionary rule will apply.

South Carolina can do better. The most reasonable interpretation of our state right to privacy would be to require a warrant every time a new advance in technology is made. The police should not assume, under our state constitution, that if a court has not expressly prohibited the warrantless use of a technology that they can use it with impunity. This Court erred in finding that Davis good-faith applies, especially when dealing with a technological advance leading to a privacy intrusion.

Harmless Error

The Court erred in finding the admission of the unredacted interview to be harmless. In addition to the Brewer error, the interview was fruit of the poisonous tree and should have been suppressed. Included in the Court's harmless error analysis were items that should have been suppressed. The illegal search led the police to tie the rental car to Carter with police witnesses instead of co-defendants or other witnesses with dubious credibility. The illegal search also led police to Carter's girlfriend. The Court cites this evidence that should have been suppressed as making the error harmless.

Even if this evidence could be considered, the Brewer error is not harmless. Appellant's case and Brewer are sufficiently similar that if the error in Brewer was not harmless, then neither can it be harmless in appellant's case. In Brewer, the defendant was arrested following two

separate shootings at a night club in Beaufort. 411 S.C. at 403-404, 768 S.E. at 657. The first shooting occurred when the night club owner confronted Brewer over the gun he was carrying. Id. Brewer responded by pulling out his pistol and pointing it at the owner's head. Id. Brewer then fired a shot inside the night club, hitting a nearby bystander. Id.

The second shooting occurred while Brewer and his friends fled the night club. Shots were fired by at least two individuals, including Brewer and one other identified person. Id. Another bystander was struck during the second shooting and killed. For unknown reasons, police only pursued Brewer for the second shooting. Id. at 405, 768 S.E.2d at 658.

Beaufort County Sheriff's Deputies Interrogated Brewer. He waived his Miranda rights and denied any involvement in the shootings. Id. Investigators repeatedly told Brewer that numerous witnesses had identified him as the shooter in what the Court described as "hearsay-laden questions and comments." Id. Brewer attempted to stop the interrogation on several occasions, but the police persisted. During the interrogation, investigators repeatedly urged Brewer to "prove his innocence" and to produce his gun so that they could clear him from suspicion. Id.

The Court reversed Brewer's conviction for the fatal, second shooting holding that the investigators repeated references to eyewitness identifying Brewer as the shooter constituted inadmissible hearsay. Id. at 406-407, 768 S.E.2d at 659. "During the interrogation, investigators frequently referenced and quoted many purported eyewitnesses This evidence was hearsay, offered for the sole purpose of proving the truth of the matter asserted, establishing Brewer's guilt to all charges." Id.

The Court specifically rejected the State's argument that the investigators' questions were necessary to understand the context of the interrogation. Id. While not creating a categorical

rule against allowing investigators' questions to be played before the jury, the Court stressed that "caution must be exercised in the admission of such evidence to ensure that all out of court statements" are properly admissible. Id. Despite not being raised by the defense on appeal, the Court made clear that the admission of investigator's repeated insistence that Brewer prove his innocence was a "grave Constitutional error." Id. at 408, 768 S.E.2d at 659.

The Court rejected the State's contention that the admission of the interrogation video was harmless error with respect to Brewer's murder conviction. Id. at 409-410, 768 S.E.2d at 660. The Court held that the evidence of Brewer being the second shooter was circumstantial and there were at least two shooters. In a concurring opinion, Chief Justice Beatty held that the admission of the interrogation video constituted a structural error, rendering harmless error analysis improper. Id. at 410-412, 768 S.E.2d at 661-662. "[T]he jury was repeatedly bombarded with the unconstitutional notion that Brewer had to prove that he was innocent." Id.

The video admitted in this case contains the same types of inadmissible statements in Brewer, as thoroughly delineated in defense counsel's motion. R. 640 (Court's Ex. 4). For example, the officers tell Carter they have "some of your people saying they were with you at 2 and 3 in the morning" and asks why these people would lie. R. 640 (Court's Ex. 4). This statement is hearsay and pitting witnesses. The police tell appellant to "cut the bullshit" and that he "started lying to us right off the bat." R. 640 (Court's Ex. 4). The police tell appellant, "But you got to answer for what you did, the best thing you can do is say you know what guys," which is burden-shifting. R. 640 (Court's Ex. 4). They recount appellant's lies and ask him to start over with the truth. R. 640 (Court's Ex. 4). Many of the references to hearsay are unattributed. R. 640 (Court's Ex. 4). The video is replete with these kinds of statements by the officers and should have been suppressed or thoroughly redacted. The evidence of guilt in Carter's case was

not overwhelming and consisted of unreliable witnesses and circumstantial evidence regarding cell phone mapping. The jury acquitted Carter on one of the counts. The jury hearing the police call Carter a liar and shifting the burden to Carter was also “a grave constitutional error” that was not harmless.

Conclusion

For the foregoing reasons, this Court should grant rehearing and reverse appellant’s convictions.



David Alexander
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR APPELLANT

This 15th day of December, 2022.

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APPELLATE CASE NO. 2018-000358

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon Joshua A. Edwards, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Rashawn Vertez Carter, #357744, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 15th day of December, 2022.



David Alexander
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR APPELLANT

From: [Stock, Chris](#)
To: [SC - EDWARDS JOSHUA](#); [Leigh Ann Stone](#)
Cc: [Alexander, David](#)
Subject: Carter, R. - Petition for Rehearing - 2018-000358
Date: Thursday, December 15, 2022 5:06:00 PM
Attachments: [Carter, R. - Petition for Rehearing - 2018-000358.pdf](#)
[Carter, R. - Petition for Rehearing - 2018-000358 - AG Cover Letter.pdf](#)

Mr. Edwards,

Please find attached for service the Petition for Rehearing for Rashawn Vertez Carter's appeal which will be filed today with the Court of Appeals.

Thank you.

Chris

Chris Stock

Administrative Assistant
Commission on Indigent Defense
Appellate Division
(803) 734-1330