RECEIVED
Jun 30 2023
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Edgefield County

Honorable Courtney Clyburn-Pope, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GABRIEL DANTRAY CURRY,

APPELLANT

APPELLATE CASE NO. 2022-000966

INITIAL BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Constitutional Provisions

STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by refusing to suppress evidence seized from appellant's cellphone, as well as the other evidence obtained from the other search warrants, where the warrants did not allege sufficient probable cause for the searches given the conclusory information -- which did not even vouch for the credibility of the sources -- that appellant was the last person seen with the decedent, and the belief of law enforcement that appellant's girlfriend lied about appellant not being home when they went to talk to him?

2.

Whether the court erred by refusing to suppress the evidence seized from the cellphone of the decedent's mother, Angela Bargeron, since the affidavit to the search warrant, (Court's Exhibit #5) -- which did not even vouch for the credibility of the sources -- only alleged that the decedent was using his mother's cellphone which was not located at the crime scene where the decedent's body was found, that the decedent was shot in the head and oral supplemental information appellant was seen driving the decedent's car since this did not constitute probable cause to search the phone?

3.

Whether the court erred by admitting the cell phone mapping testimony of FBI Agent Matthew Wilde, after initially granting the motion to suppress it, where the state disclosed the maps after five o'clock on the Friday afternoon before the murder trial was starting on Monday morning since the defense could not hire its own expert, which was essential to challenge the validity of this highly prejudicial technical mapping evidence at trial, which was in contravention of appellant's right to fundamental fairness?

STATEMENT OF THE CASE

Appellant was indicted at the January 2019 term of the Edgefield County grand jury for the offense of murder. R. p. *. His case was called to trial on June 27, 2022, before the Honorable Courtney Clyburn-Pope and a jury. Rob Madsen and Jason Chehoski represented appellant. Assistant solicitors Sutania Fuller and Erik Drylie represented the state. Tr. 1.

On June 30, 2022, the jury found appellant guilty. Tr. 670, ll. 14-19. Judge Clyburn-Pope sentenced appellant to thirty-eight years' imprisonment. Tr. 682, ll. 22-24.

This appeal follows.

STATEMENT OF FACTS

Prior to trial, the defense moved to suppress, inter alia, the cellphone and cellphone information that was seized. Defense counsel Madsen argued the state had not presented probable cause to the Magistrate for the search warrants. Defense counsel Madsen stated the crux of the defense argument was contained in the middle paragraph of the warrant affidavit. Counsel argued the affidavit only stated:

> [T]hrough witness statements and surveillance it was discovered that Gabriel Deontray Curry was with Dakota just prior to his murder. When deputies went to 707 Mount Zion Road to locate Gabriel Curry, they asked him about Dakota missing and his girlfriend stated he was not there. A short time later the family, Dakota, arrived with Gabriel who told affiant that he and Dakota had went to obtain and use marijuana and heroin. Kahlo Calhoun, brother of Dakota, told IO that he located Gabriel at his girlfriend's residence on Mount Zion.

Tr. 56, ll. 9-18.

Counsel continued in the following colloquy:

> [T]hat is their entire probable cause in this case and we do not believe that that is sufficient, Your Honor. I gave you a number of cases within my motion that goes over different types of probable cause so within there there's nothing in there to tell the Magistrate where this information comes, how they come about this. It is simply just conclusory statements that are not sufficient. As I said, veracity and basis of knowledge is extremely important when a Magistrate is trying to decide or any Judge is trying to decide, hey, you got this information, you know, what is that? Case law is pretty clear that the Judge can't speculate or infer. In fact, if you look under there, State versus Weston, stated that the affidavit failed to state any facts as to why law enforcement believed that the defendant committed the crime and said that the affidavit contained was merely a conclusory statement. State versus Jenkins, I put that in there. It was initially a Court of Appeals case and the Court of Appeals found that the affidavit was not sufficient and so they reversed and then the Supreme Court looked at it and this was a rape case and so I guess the defense on the rape case was consent and so the Supreme Court reversed the Court of Appeals, but it did it on harmless error analysis so the reason I included that Court of

Appeals is because even the State in that did not say that the affidavit, and I contained the information from that affidavit, even the State didn't say that it contained sufficient probable cause, or basically agreed that it had conclusory statements and did not give any, or give a Judge enough PC and so like I said, that was overturned on harmless error, but like I said, I think the important part was even the State recognized that the affidavit was not sufficient. When you look at just that wording, there's no indication of any type of reliability of these witnesses, no basis for these witnesses. As I said, inferences cannot be drawn from a neutral and detached Judge. The reason for that is obviously you can't just rely on, hey, this is what a officer told us and so it must be true because obviously officers, and case law bears this out, are engaged in a competitive enterprise of ferreting out crimes. They're on one side and so it is not appropriate for a Magistrate to just make inferences. Like I said, paragraph 2, it doesn't list any names of the witnesses, it doesn't tell the Magistrate how they came about getting that information or any type of veracity, whether the people had some type of record or had been in trouble before or problems with law enforcement. There is no indication on there. You know, they try to kind of infer, I guess, that, oh, they were looking for Gabriel Curry, but it doesn't indicate anywhere in there that he was intentionally hiding. They don't say, hey, we talked to his girlfriend and he said to hide me. There is absolutely none of that. There's no information contained in the warrant that he told the girlfriend to lie for him and then they indicate that Kahlo is, brought the client to law enforcement. Doesn't necessarily list a time frame. Doesn't say we brought him there by force. The client came and met with law enforcement on his own free will. So just based on the affidavit in and of itself we do not believe that probable cause has been established and that they are relying on those conclusory statements and like I said, just about all of the other warrants have that second paragraph or basically mirror that same language, although I will point out that there is one of the search warrants and that is what they have delineated as 4719 that doesn't even have that second paragraph. It just has the first one, hey, you know, Dakota has been killed, goes down to the third one which says, hey, law enforcement has this experience and so at some point in time if we get there I can pass up 4719.

THE COURT: And what are you trying to suppress, five search warrants?

MR. MADSEN: Well, I think, Your Honor, the cell phones were all taken from his house and so I guess we start with the fact that they're taken in the house and we're asking for those to be suppressed. If Your Honor suppresses that, suppresses those

> phones, then I don't think - it's a moot point with the other ones. Just for basis, they get the five search warrants for the house, then they go get a search warrant for my client's phone, then they get search warrants from the phone provider to get the records from the service provider which essentially I guess is T-Mobile or Metro PCS, and then they go back later and get a search warrant for the records of Kirtrina Dixon who lived at the house they searched, and then a second search warrant for my client's phone.

Tr. 56, l. 9 - 60, l. 9. (emphasis added).

The assistant solicitor asserted they believed the search warrants were issued upon probable cause and called Edgefield County Magistrate James McLaurin as a witness. Tr. 61, ll. 1-24. Magistrate McLaurin testified he was a former highway patrolman and he was employed as a magistrate on October 12, 2018. Tr. 62, ll. 2-6.

Investigator Jimmy Smith, who was deceased by the time of trial, sought search warrants from him on that day. Tr. 62, ll. 10-12; Tr. 63, ll. 2-6. The magistrate said that the search warrant affidavit was an outline of general statements but that investigator Smith also talked to him about the case. "Sometimes people are maybe not confident in their writing skills, their typing ability, and so in order to make sure he doesn't leave anything out, that's one thing that Jimmy would do when he would come in, sit down and say 'let me tell you what's going on. Let me tell you about this.'" Tr. 62, ll. 19-23.

Magistrate McLaurin said Court's Exhibit #2, R. p.*, was a search warrant for the residence at 707 Mount Zion Road. This search warrant also had cellphones among the items to be seized. He said "Investigator Smith believed there was evidence at the residence that would help to determine what happened to Dakota Calhoun whose body was found in the woods shot to death and Gabriel Curry was a person of interest, somebody we wanted to talk to, and you know, that's the reason he was seeking a warrant for the residence." Tr. 63, ll. 16-24. As to probable cause, the magistrate said law enforcement thought appellant was in the house when they went to

talk to him, and that his girlfriend lied to the police saying he was not there. Tr. 63, l. 25-64, l. 5. The following occurred between the solicitor and the magistrate:

> Q. Okay. Did he [Smith] also provide that Mr. Curry had been with Mr. Calhoun shortly before he was dead?
>
> A. Well, it's not in the body specifically I think, but it is in my notes regarding what he told me also about what had happened. He explained that according to multiple witnesses, that the two had been seen together, Gabriel Curry and Dakota Calhoun had been seen together riding around in Dakota's mother's car and, you know, they had been seen riding around together and then the car was found not far from where the body was eventually found and that's definitely a large part of the reason why they believe that Gabriel Curry had information that would be useful to them.

Tr. 64, ll. 6-17.

The affidavit to the search warrant stated that, through witness statements and video surveillance, it was discovered that appellant was with the decedent just prior to his murder. It also alleged that the police thought appellant's girlfriend lied by stating appellant was not home. "A short time later the family [of] Dakota arrived with Gabriel who told affiant that he and Dakota had went and used [sic] marijuana and heroin. Kahlo Calhoun, brother of Dakota, told I/O that he located Gabriel at his girlfriend's residence on Mount Zion Road. The oral testimony stated that 'multiple witness (sic) stated Gabriel Curry and Dakota Calhoun were together in the time leading up to Calhoun's murder.'" The oral supplementation, again, alleged the police thought appellant's girlfriend lied by saying he was not home when the police came to talk to him. Court's Exhibit #2, R. p.* (affidavit).

On cross-examination, the magistrate admitted he did not know who the witnesses were who supplied the information to Investigator Smith. "I don't remember if he told me specific witnesses." The magistrate admitted there was nothing in his notes as to the names of any witnesses. Tr. 67, l. 21-68, l. 8. The magistrate also acknowledged that video evidence showing

appellant and the decedent in a car together and then other videos showing appellant by himself in the car at the Burger King *were not known* by him at the time he signed the search warrants. Tr. 68, l. 20-69, l. 17.

The assistant solicitor then claimed that the search warrant "was valid on its face" and provided probable cause. The assistant solicitor admitted at the time the search warrant was obtained that law enforcement did *not* have video of appellant driving the decedent's car by himself, but he alleged appellant "instructed his girlfriend to lie to law enforcement saying he wasn't at the house" when they came to talk to him. The assistant solicitor noted that appellant was the last person seen with the decedent, appellant was then seen driving the decedent's car which was owned by the decedent's mother, and where appellant allegedly did not have permission to drive the car. Tr. 71, l. 4-72, l. 21.

Defense counsel Madsen responded that "just about everything he just told you was not told to the magistrate so, I mean, I don't know if he's trying to convince you, hey, we got this information afterwards, but, I mean, you heard Judge McLaurin testify. He's telling you all this stuff that they get afterwards, well, that doesn't have anything to do with the probable cause at that point in time. We're stuck essentially with the middle paragraph. It doesn't give the judge any basis." Tr. 72, l. 22-73, l. 5.

Defense counsel continued that the magistrate testifying that Investigator Smith came into his office and talked was insufficient to establish probable cause. Further, the state was relying on information that was not even available at the time the search warrants were issued. Tr. 73, ll. 6-21.

The assistant solicitor again said the state's position was that "the warrant is valid on its face, what he gave the magistrate, there's enough probable cause for the search of 707 Mount Zion Road." The assistant solicitor alleged that the state had multiple witness statements. He

argued it was wrong to compare these witnesses to confidential informants because they were family members and friends "multiple witness statements that put the two of them together." The assistant solicitor also noted the alleged subterfuge in appellant's girlfriend lying to the police about appellant not being home when they wanted to talk to him. Tr. 73, l. 22-74, l. 19.

Defense counsel responded "it doesn't say there's family and friends. Again, he's trying to add things afterwards. It simply says witnesses. There's nothing in here that says Gabe lies to law enforcement." Tr. 74, ll. 20-24. Defense counsel also stated that the assistant solicitor talking about information learned by law enforcement was an implicit recognition that they did not have probable cause. The judge then denied the motion to suppress, finding sufficient probable cause for the search warrants. Tr. 74, l. 25-75, l. 12.

Defense counsel asked for clarification on whether the judge was relying just on the written portion of the warrant, or on the supplemented testimony. The judge stated she considered both the "oral and the written." Tr. 75, l. 17-76, l. 11.

Defense counsel informed the judge that some of the warrants indicated they were supplemented "although the testimony would be different at different times even in front of different magistrates. Judge Carpenter's here and I think she hears some of them. So obviously potential testimony would be different to her." Tr. 76, l.15-77, l. 1. Defense counsel told the judge that his motion to suppress *covered all of the search warrants issued.* Tr. 77, ll. 2-6. The assistant solicitor then explained the various court's exhibits search warrants as follows:

> (Whereupon, Court's Exhibit #1 through #7 marked for identification.)
>
> MS. FULLER: Publishing Court Exhibit number 2 is what we just covered which is a search warrant that's 3518 and that's the search warrant for 707 Mount Zion Road. That's from 2018. Court Exhibit 3 is search warrant number 3618 and this is for the defendant's phone and this search warrant is from 2018. Court Exhibit 4 is search warrant 4618 and it's the T-Mobile search warrant for

> defendant's phone from 2018. Court's Exhibit 5 is search warrant 4718 and that is the T-Mobile phone records for the victim's mom and we'll explain that later on in the trial, but that's for the victim's mom of Dakota Calhoun and her name is Angela Bargeron. It's the T-Mobile records for her phone. And Court's Exhibit 6 is search warrant 2188. This is again for the defendant's phone, but it was a search warrant obtained in 2021. Court's Exhibit 7 is search warrant 2190, and this is for Kirtrina Dixon's cell phone and that's from 2021 and approaching, Your Honor, to hand you all of them so that you have them in front of you and we'll just follow them where testimony is needed.
>
> THE COURT: Mr. Madsen, I have already ruled on –
>
> MS. FULLER: Court's 2.
>
> THE COURT: -- Court's 2 which is 3518.

Tr. 81, l. 7 - 82, l. 6.

The state then recalled Magistrate James McLaurin. The magistrate then confirmed that when Investigator Smith came to his office seeking a search warrant that he would place him under oath and that he also did so when Smith provided supplemental statements. Tr. 82, l. 16-83, l. 5.

The judge then repeated her earlier ruling that there was probable cause for Court's Exhibit #2, search warrant 3518, and that they would next hear about Court's Exhibit #3 which was the defendant's phone search warrant. Tr. 83, ll. 11-18.

Defense counsel told the judge the motion to suppress Court's Exhibit #3 on the defendant's phone search warrant was essentially the same as his prior motion to suppress. The following then occurred between the judge and the attorneys:

> THE COURT: This one is without oral supplement; is that correct?
>
> MR. MADSEN: No. This one does say supplemented orally, but it doesn't have notes that the other one had.

THE COURT: Okay. And even if this was not supplemented orally, again, my ruling was that the paragraph 2, the middle paragraph on its face was enough to establish probable cause.

MR. MADSEN: Then I think that that's a ruling on that.

THE COURT: And so I do not believe it's necessary to obtain any testimony in that regard.

MR. DRYLIE: Judge, and just to be clear, it is the same Magistrate who signed this search warrant who already testified here today and this is as the investigation is developing, more things are being learned, so we believe that there would also be probable cause for this one.

THE COURT: This was when?

MR. DRYLIE: This was October 15th of 2018.

THE COURT: All right. Exhibit Number 4, 4618 for the T-Mobile, for the defendant's phone from T-Mobile, this appears to have –

MR. MADSEN: Substantially the same language.

THE COURT: -- the same language as paragraph 2 as well.

MR. MADSEN: Right. Although this is with Judge Carpenter, but it is substantially the same language.

THE COURT: All right. So the ruling remains the same as the prior rulings because of the existence of that second paragraph. Exhibit number 5, 4718, T-Mobile, Angela Bargeron's phone.

MR. MADSEN: Judge, if you will look at this one, I believe this is also Judge McLaurin. This one is missing that entire second paragraph.

MR. DRYLIE: Judge, we just state that although it's missing that second paragraph, it was supplemented by oral testimony. It was signed by the same Magistrate who has already signed two warrants previously in the same investigation. You know, Investigator Smith would have been placed under oath. He would have provided the testimony that may be missing from that middle paragraph but, Judge, we believe that there would be probable cause there supplemented by oral testimony and it was given on November the 5th of 2018. Judge, so at this point we're about three and a half, four weeks into the investigation. At this point there's

> substantial, there's more probable cause than there was back when the first search warrant was signed for the house. Law enforcement had received the Burger King video showing the defendant driving by himself as well as another video showing the defendant driving the car by himself.
>
> THE COURT: Mr. Madsen.
>
> MR. MADSEN: Judge, I don't think any of that matters. I mean, certainly I don't think that there's any way that what is written establishes probable cause and while the Magistrate might have had additional or had information in the past, that you can't just jump by not putting someone under oath and giving that additional information. You can't say, hey, Judge, I came and saw you in the past, I'm getting another warrant, just go ahead and this is the same as the last one. I don't think that that's enough.

Tr. 83, l. 19 - 86, l. 8.

The state then continued its examination of magistrate McLaurin. The magistrate said that Court's Exhibit #5 for the cellphone information of Angela Bargeron, the decedent's mother, "missing a paragraph that were in the other warrants." Tr. 87, ll. 4-6.

The magistrate remembered Investigator Smith came to his office on November 5, 2018 with what was now Court's Exhibit #5, the search warrant for the cellphone of the decedent's mother, which the decedent used. The magistrate confirmed that the warrant was missing a paragraph that were in the other search warrant affidavits. Tr. 86, l. 15-87, l. 6. Magistrate McLaurin confirmed that the affidavit was supplemented by oral testimony. Tr. 87, ll. 7-20.

The magistrate said that Smith told him that there was a video showing appellant in the decedent's car by himself and that the car was later located with no one in it and not far "from Mr. Calhoun's remains." Tr. 87, l. 10-88, l. 19.

Defense counsel Madsen argued that the affidavit was insufficient to establish probable for Court's Exhibit #5, the cellphone records of the decedent's mother for the cellphone the

decedent used. Counsel said on that basis the cellphone records evidence should be suppressed. Tr. 90, ll. 6-14.

The assistant solicitor acknowledged that paragraph two from the search warrant for the cellphone Dakota Calhoun was allowed to use was missing. He noted this was not a cellphone which belonged to the defendant. He also argued the magistrate was familiar with how the case was developing as far as probable cause. Tr. 90, l. 13-91, l. 5.

Defense counsel argued the search warrant affidavit was insufficient and that the oral testimony was extremely limited and not enough to constitute probable cause. Defense counsel also argued fact the cellphone did not belong to appellant was irrelevant since the search warrant was being used to obtain evidence to be introduced against appellant at his trial. Consequently, appellant had standing to challenge it. The judge ruled that there was sufficient probable cause for the magistrate to sign Court's Exhibit #5, and therefore denied the motion to suppress the evidence derived from Court's Exhibit #5. The judge ruled that she reasoned the oral testimony given on Court's Exhibit #5, given the totality of the circumstances, was enough probable cause to go forward. Tr. 91, l. 17-92, l. 1.

The judge and the attorneys then agreed that Court's Exhibit #6, the appellant's cellphone data, did include the paragraph the judge had ruled established probable cause. Tr. 91, l. 17-92, l. 18.

Defense counsel also argued that the cellphone and cellphone tower evidence in the exhibits should not be allowed at trial because he only received the cellphone maps on Friday afternoon at 5:12 p.m. when the trial was starting on Monday morning. "[I]'m assuming the FBI and/or potentially the Secret Service in what these maps have done is they are taking cellphone records that we have received in the past and they are placing them on a map, they are, you know, putting them on there, and I mean, Judge, this is a four year old case. I don't have the

ability to go out and get a judge to sign a funding order so that I can get an expert to double-check all this stuff, to make sure that it's appropriate, to make sure that it's right, I mean there is no way after four years that we can do that on a weekend going into a murder trial. I mean, and do so, to give it to us that late it is, it's denying my client his right to due process, it's denying his right to a fair trial, and it's denying his rights under the Sixth Amendment." Tr. 100, l. 18- 101, l. 22. (emphasis added).

Defense counsel repeated this was a four year old case at this point, and he had just received "highly technical maps that are showing which ways the towers supposedly point and are on graphs and other towers, and there's no way in a weekend before a murder trial me as a, you know, country lawyer is going to be able to figure out all this stuff without an expert and to get that at this point in time is just kind of ridiculous so we move that it be suppressed." Tr. 101, l. 14-102, l. 14.

The assistant solicitor said the state planned to introduce the cellphone maps in this case and "we hope to have them finalized by next Tuesday or Wednesday. Unfortunately, the peer review didn't finish reviewing it until Friday and that's when we received them. I indicated once we received them, we will send you copies. The cellphone maps will be simply court's exhibits generated from the cellphone information in discovery. Our expert is SA Matthew J. Wilde with CAST National Asset, Columbia Division with the FBI. [I] placed [them on] notice of who my expert was which I thought was reasonable. In terms of cellphone mapping, Your Honor, from the beginning of this case I've touched this case for maybe the past six months..." Tr. 102, l. 17-104, l. 7.

The assistant solicitor argued the maps were admissible and that "Rule 5 for Brady requires prior disclosure. I could walk in here Monday morning and hand them over, but I placed [them on] notice. I could have introduced them mid-trial based on the rules because

they're not discoverable, but I put them on notice in advance and I turned them over." Tr. 104, l. 24-105, l. 18.

The solicitor also alleged that she could not release the "final maps" until they had been peer reviewed. The solicitor said she did not receive them until Friday just before five o'clock and her assistant was able to prepare them at 5:14 p.m. and turn them over to the defense. The solicitor argued suppression was not proper. Tr. 105, ll. 19-25.

Defense counsel Madsen reiterated there was no way for the defense to obtain an expert to check whether or not this highly prejudicial evidence was actually a valid interpretation of the data that defense had received. The defense would have to hire an expert, and that it was "unconscionable that at 5:14 on a Friday for a four year old murder case that we are getting these things and expected, hey, just go and figure it out. We moved for them to be suppressed..." Tr. 106, l. 2-107, l. 14. The judge ruled that she would suppress the cellphone maps. However, a discussion followed about the exact map evidence the judge was suppressing, and the judge then deferred further argument before making a final ruling. Tr. 108, l. 9-113, l. 7.

As will be seen infra, the defense repeatedly objected when the cellphone map information was introduced in the presence of the jury. This data tracked appellant's cell phone and the decedent's mother's cellphone which decedent was using as appellant traveled to Sandy Springs Road where the decedent's body was found to the Dollar General, the Country Hearth Inn, and from the crime scene to the Burger King. In short, the cellphone mapping information was extraordinarily prejudicial. Tr. 542, l. 5-545, l. 6; Tr. 551, l. 2-564, l. 17.

STANDARD OF REVIEW

Issues 1 and 2, Search warrant issues:

In Fourth Amendment search and seizure cases, the standard of review is limited to the following:

> The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling. The appellate court will reverse only when there is clear error.

State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) (citations and internal quotation marks omitted). This deference does not bar appellate courts from conducting their own review of the record to determine whether the trial judge's decision is supported by the evidence. State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010).

An appellate court reviewing the decision to issue a search warrant should decide whether the magistrate had a substantial basis for concluding probable cause existed. State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct.App.2002); State v. Arnold, 319 S.C. 256, 460 S.E.2d 403 (Ct.App.1995). This review, like the determination by the magistrate, is governed by the "totality of the circumstances" test. State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000); King, 349 S.C. at 148, 561 S.E.2d at 643. The appellate court should give great deference to a magistrate's determination of probable cause. Jones, 342 S.C. at 126, 536 S.E.2d at 678. State v. Dupree, 354 S.C. 676, 683, 583 S.E.2d 437, 441 (Ct. App. 2003).

Issue 3, cell phone mapping evidence, discovery and right to a fair trial and due process issue:

The appellate court analyzes "the circuit court's ruling under an abuse of discretion standard." State v. Lawton, 382 S.C. 122, 127, 675 S.E.2d 454, 457 (2009). "A violation of Rule 5 is not reversible unless prejudice is shown." State v. Landon, 370 S.C. 103, 108, 634 S.E.2d 660, 663 (2006). "Admission of evidence falls within the trial court's discretion and will not be disturbed on appeal absent abuse of that discretion." State v. Colf, 337 S.C. 622, 625, 525 S.E.2d 246, 247 (2000)).

"In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court "is bound by the trial court's factual findings unless they are clearly erroneous." Id. "This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases." State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). "This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." Id. State v. Geer, 391 S.C. 179, 189, 705 S.E.2d 441, 446 (Ct.App. 2010).

ARGUMENT

1.

The court erred by refusing to suppress evidence seized from appellant's cellphone, as well as the other evidence obtained from the other search warrants, where the warrants did not allege sufficient probable cause for the searches given the conclusory information -- which did not even vouch for the credibility of the sources -- that appellant was the last person seen with the decedent, and the belief of law enforcement that appellant's girlfriend lied about appellant not being home when they went to talk to him

Relevant facts

Defense counsel correctly argued that the search warrant affidavits were insufficient to establish probable cause. The affidavits contained only conclusory information, without vouching for the reliability of the information or the person giving the information that appellant was the last person seen with the decedent.

The oral supplemental information was that law enforcement believed appellant's girlfriend lied about appellant not being home when they went to talk to him. The information which was known at the time of the search warrant was not sufficient to establish probable cause as trial counsel correctly argued.

The Fourth Amendment to the United States Constitution protects citizens from unreasonable searches and seizures. It provides that "no warrant shall be issued except upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized." State v. Brown, 401 S.C. 82, 88, 736 S.E.2d 263, 266 (2012). When an appellate court reviews the decision to issue a search warrant, it must

decide whether the magistrate had a substantial basis for concluding probable cause existed. State v. Dupree, 354 S.C. 676, 683, 583 S.E.2d 437, 441 (Ct. App. 2003).

In determining the validity of the search warrant, a reviewing court may only consider information which was brought to the magistrate's attention. State v. Martin, 347 S.C. 522, 527, 556 S.E.2d 706, 709 (Ct. App. 2021). Although a "totality of circumstances" test is utilized in probable cause determinations, our General Assembly has imposed stricter requirements than federal law for issuing a search warrant. *See* State v. Herring, 387 S.C. 201, 212, 692 S.E.2d 490, 495 (2009); State v. Jones, 342 S.C. 121, 128, 536 S.E.2d 675, 678 (2000).

The fact that appellant was allegedly the last person with the decedent before his body was discovered was insufficient to constitute probable cause to search his phone. Adding on the fact that law enforcement thought appellant's girlfriend lied when she said appellant was not at home did not materially add to the allegation that appellant was the last person seen with the decedent while the decedent was alive. Someone is always going to be the last person seen with the victim in every murder case, and that fact alone cannot be probable cause for a search warrant.

In State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997), our Supreme Court held that the search warrant affidavit, which failed to set forth any reason as to why the police believed the defendant committed the crime alleged in the indictment, was insufficient to support a finding of probable cause to search the defendant's car. In Weston, Claud Crumlin provided police with a written statement on September 16, 1994 regarding an incident which occurred on March 19, 1994. Crumlin claimed that Kelvin Weston had attempted to rob him at gunpoint. Based on Crumlin's statement, warrants were issued on September 16, 1994 for Weston's arrest.

The affidavit supporting the search warrant provided:

> On March 18, 1994, at approximately 12:45 hours, the Victim (Claud Crumlin) was the victim of an armed robbery and assault with intent to kill at 5126 Farrow Road. Kelvin Weston, by South Carolina Highway Depts., is registered owner of the above-listed vehicle. Also investigation revealed through witnesses in this matter that the defendant was driving above vehicle at the time of the incident. A search for the above items are needed to fully complete this investigation.

A search was conducted on Weston's 1978 Datsun and a box of .25 caliber bullets were discovered which were used to determine a match to .25 caliber bullets which killed another victim in August 31, 1994 murder in which one James G. Alford was shot and killed with a .25 caliber bullet.

Our Supreme Court held:

> In this case, the affidavit failed to set forth any facts as to why police believed Weston committed the Crumlin crime. The first three sentences of the affidavit were mere conclusory statements. While the fourth sentence provided information linking Weston to his car at the time of the incident, it offered nothing to link Weston or the Datsun to the Crumlin crime itself. Additionally, there was absolutely nothing on the face of the affidavit from which the ministerial recorder could have assessed the veracity and basis of knowledge of the informant. Therefore, based on a totality of the circumstances, we find the affidavit could not have provided the ministerial recorder with a substantial basis for finding probable cause to search Weston's car.

In Weston, our Supreme Court noted that in Illinois v. Gates, 462 U.S. 213 (1983), the United States Supreme Court rejected the application of a rigid two-pronged test in which an informant's veracity and basis of knowledge were considered as separate and independent requirements to finding probable cause. The Court instead adopted a totality of the circumstances test where veracity and the basis of knowledge were relevant to, but not inflexible requirements of, a determination of probable cause.

In this case, defense counsel correctly argued there was absolutely no information as to the veracity or credibility of the persons who allegedly gave information in support of the search warrant affidavits. There was also no explanation in the affidavit as to why the police believed appellant committed the crime of murder against his cousin, the decedent. Appellant understands the state does not have to prove motive, but there was none apparent, and certainly there was no reason stated in the search warrant as to why the police believed appellant committed the murder.

In State v. Smith, 301 S.C. 371, 392 S.E.2d 182 (1990), our Supreme Court held that the search warrant application was defective because it did not set forth the facts as to why the police believed that defendant Smith robbed a certain hotel. The Court noted that while the record revealed that the police relied upon information from an informant, there was no indication that this fact was made known to the magistrate, or that the magistrate made any determination as to the informant's reliability. The affidavit in Smith stated that:

> On May 12 at approximately 11:45PM, Reginald Jerome Smith went into the Master Inn located 1468 Savannah Hwy, Charleston, SC, and he then robbed the manager at knifepoint. Smith has been staying at the Host of America Room 216 since January 1st, 1988. There is every reason to believe that the weapon enclosed used in the robbery will be located in the room. This information was confirmed in person by Sargent Sherman on 05/13/1988.

Our Supreme Court found this affidavit was defective on its face. It did not contain sufficient underlying facts and information upon which a magistrate could make a determination as to probable cause. The Court wrote that mere conclusory statements which give the magistrate no basis to make a judgement regarding probable cause were insufficient. *Citing* Illinois v. Gates, 462 U.S. 213, 239 (1983). See State v. Jenkins, 398 S.C. 215, 727 S.E.2d. 761

(Ct. App 2012)[1]. In short, the affidavits in this case were conclusory and only asserted that appellant was the last person seen with the decedent while the decadent was alive, and the additional information was only that the police believed that the appellant's girlfriend lied about appellant not being home when the police first came to speak with him. There was no attesting to the reliability of the information or no specific indication of where the information came from or the persons that supplied it.

The affidavits by which law enforcement obtained appellant's cell phone were invalid. They did not establish probable cause for law enforcement to believe that appellant committed the murder, and they failed to assert that the information came from reliable sources or credible people. The judge therefore erred by refusing to grant the appellant's motion to suppress this evidence obtained as a result of the defective search warrants.

The cell phone information was very prejudicial because it allowed law enforcement, including Investigator Chase Harley, to reportedly trace appellant's movements to the crime scene, to the Burger King he denied stopping at, and back home. Tr. 457, l. 22 – 499, l. 25. Appellant also properly also objected to the cell phone tracing information of Secret Service Agent John Vanhouten. Tr. 508, l. 14 – 531, l. 14, and the cell phone mapping testimony of FBI Agent Matthew Wilde. Tr. 535, l. 23 – 536, l. 10; tr. 543, l. 2 – 567, l. 22.

---

[1] *Rev'd on other grounds*, 412 S.C. 643, 773 S.E.2d. 906 (2015). The defective affidavits in this case lacked even a conclusory assertion that the information or its source was reliable.

2.

The court erred by refusing to suppress the evidence seized from the cellphone of the decedent's mother, Angela Bargeron, since the affidavit to the search warrant, (Court's Exhibit #5), which did not even vouch for the credibility of the sources only alleged that the decedent was using his mother's cellphone which was not located at the crime scene where the decedent's body was found, that the decedent was shot in the head and oral supplemental information appellant was seen driving the decedent's car since this did not constitute probable cause to search the phone

Relevant Facts

Court's Exhibit #5 was the search warrant and affidavit for the cell phone information of Angela Bargeron. Ms. Bargeron was the mother of the decedent. The affidavit alleged that when the decedent was found, having been murdered, in a wooded area off the roadway and across Sandy Springs Road, the cell phone was not located.

In arguing that the search warrant affidavit was insufficient, Counsel Madsen noted that the affidavit did not contain the entire second paragraph present in the affidavit for the appellant's house his cell phone. The solicitor asserted that although the affidavit was missing the second paragraph, that the affidavit was supplemented by oral testimony. Magistrate McLaurin then testified that Investigator James Smith came into his office on November 5, 2018, with the present search warrant. The magistrate admitted that it was missing a paragraph that was in the other search warrants. Tr. 86 l. 12 – Tr. 87 l. 6.

As to the oral testimony, the magistrate said: "I should have reduced to writing the things he told me, but I again, that's a mistake on my part. When Investigator Smith would come in and has his affidavit of probable cause, when I said he would sit down and just say, here, let me

tell you about this, you know, that was his personality, it wasn't, it wasn't just a causal conversation. He would come in and he would essentially start from the beginning every time. I apologize." Tr. 87 ll. 10-20. The magistrate maintained:

> "At this point they had gathered more evidence. It wasn't solely based on things that they had heard from the community I'll say. There was video tape evidence of the two of them in the car together prior to Dakota's death and again there was a video, I mentioned it earlier, at other [places] because that would have been something I wouldn't have known at first, but by this point we knew about the fact that Gabriel Curry had been in the vehicle by himself and, of course, I did know that the vehicle was later located with no one in it not far from Mr. Calhoun's remains."

Tr. 88 ll. 2-11.

On cross-examination, the magistrate admitted that all he remembered was that there was some video evidence available that appellant and the decedent were together at some point and later appellant was alone while driving the decedent's automobile. Tr. 89 ll. 15-21.

Counsel then argued that the affidavit was not sufficient given that an entire paragraph was not included, and the limited information that the appellant and the decedent were together on the day that the decedent was believed to be murdered was not enough. Tr. 90 l. 6 – Tr. 91 l. 16. The judge denied the motion to suppress as to Court's Exhibit #5, finding that there was sufficient probable cause for the magistrate to sign the warrant. Tr. 91 l. 17 – Tr. 92 l. 2.

Discussion

Court's Exhibit #5, the affidavit for the search warrant information on the cell phone used by the decedent, which was owned by his mother, was invalid. The affidavit only stated that the decedent was reported missing by his family and that his car was located on Sandy Springs Road. The decedent's body was found, and the decedent was found to have been murdered with a gunshot wound. The cell phone was not located at the crime scene.

This did not establish probable cause, as was also true as to Court's Exhibits #2, #3 and #4 for appellant's home or cell phone. The affidavit for this cell phone information was even more deficient. The information was insufficient to constitute probable cause to believe that appellant committed the murder, and that incriminating evidence against appellant would be found on the decedent's cell phone.

In State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997), our Supreme Court held that no probable cause for the warrant existed where the affidavit did not include facts detailing why police believed Weston committed the alleged crime. A statement that Weston was the "defendant in this incident" and "the registered owner of the above listed vehicle" [in which the bullets were found], and "investigation revealed through witness in this matter that defendant was driving above vehicle at the time of the incident" was insufficient to support a belief that Weston committed armed robbery and assault. *Id.* at 290, 494 S.E.2d at 802.

In State v. Smith, 301 S.C. 371, 392 S.E.2d 182 (1990) the Court also held the warrant was not supported by probable cause where affidavit stated that Smith robbed a hotel manager at knifepoint, and that "there is every reason to believe the weapon and clothes used in the robbery" would be located in the hotel room where Appellant was staying at the time. 301 S.C. 371, 372, 392 S.E.2d 182, 183.

In State v. Jenkins, 398 S.C. 215, 727 S.E.2d 761 (Ct. App. 2012), rev'd on other grounds, 412 S.C. 643, 773 S.E.2d 906 (2015) the Court similarly held that no probable cause supporting a warrant for DNA evidence was present where the affidavit stated only that the defendant entered the victim's residence, threatened her, and continued to physically and sexually assault her, and that the DNA samples to be collected would be retrieved in a non-

invasive manner by trained personnel in a medical facility. 398 S.C. at 220, 727 S.E.2d at 763-64.

In State v. Philpot, 317 S.C. 458, 454 S.E.2d 905 (Ct. App. 1995), the Court ruled that probable cause was precluded by the lack of a showing as to the informant's credibility where the warrant was issued on the basis of an affidavit stating: "Within the past 72 hours, a confidential informant has seen a quantity of marijuana in the residence to be searched. Also in the past, agents with the Special Operations Div. . . . have received information the [sic] one of the persons who lives at the residence, Jim Philpot, is involved in illicit drug activity." 317 S.C. at 460, 454 S.E.2d at 906. Here, there was also no attesting for the credibility of the person or persons who provided the minimal information in the affidavit the state alleged constituted probable cause.

Similarly, in State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990), the Court held no probable cause existed where the affidavit only stated that a confidential informant had seen cocaine in the defendant's home in the past seventy-two hours, but it did not communicate the details relating to the reliability of the informant or the information itself. 302 S.C. at 245, 248, 395 S.E.2d at 168-69.

The affidavit for the warrant of the cell phone used by the decedent and the information contained within it failed to state probable cause. Because the affidavit was fatally defective, the judge erred by failing to suppress the information obtained from it. This cellphone information assisted the police in tracking appellant's whereabouts at critical times as seen above during the testimony of Investigator Chase Harley, and it was therefore highly prejudicial evidence against appellant. Tr. Tr. 457, l. 22 – 499, l. 25.

3.

The court erred by admitting the cell phone mapping testimony of FBI Agent Matthew Wilde, after initially granting the motion to suppress it, where the state disclosed the maps after five o'clock on the Friday afternoon before the murder trial was starting on Monday morning since the defense could not hire its own expert, which was essential to challenge the validity of this highly prejudicial technical mapping evidence at trial, which was in contravention of appellant's right to fundamental fairness

Relevant Facts

As seen, defense counsel moved to suppress and exclude the cell phone and cell phone tower mapping evidence because he only received the cell phone maps on Friday afternoon after 5 o'clock when the murder trial was starting on Monday morning. For appellant to have a fair trial, defense counsel correctly told the judge that he would have to obtain a funding order from a judge to hire an expert "to double pass check all of this stuff, to make sure it's appropriate, to make sure that it's right, I mean there's no way after four years that we can do that on a weekend going into the murder trial." Defense counsel added to admit this evidence and not suppress it would deny the appellant his right to a fair trial and to due process. Tr. 100 l. 18 – Tr. 101 l. 22.

The state only countered that it turned over the cell phone mapping information without undue delay and it even asserted that they could have waited until Monday morning at the start of the trial to give the information to the defense. At another point the solicitor asserted the state did not have to disclose the evidence at all. Tr. 104 l. 25 – Tr. 108 l. 12.

The judge ruled that she was granting the defense motion and would suppress the cell phone mapping information. Tr. 108, ll. 14-15. However, after further argument about the exact

nature of the evidence she was suppressing, the judge deferred a final ruling. Tr. 108, l. 20 – 113, 2; tr. 153, 2 – 158, l. 7; Tr. 672, l. 18 - 673, l. 9; See Court's Exhibit 9, R. p. *.

When this evidence and testimony was later introduced, appellant repeatedly renewed his objections to the cell phone tracking mapping evidence. During the testimony of FBI Agent Matthew Wilde, the defense never abandoned – and consistently repeated -- its objections after the judge initially ruled that she would suppress or exclude this mapping evidence but then had second thoughts about the exact nature of the evidence she was excluding.

The mapping testimony of Agent Matthew Wilde was very prejudicial as it traced appellant's whereabouts on the day of the murder, to the Sandy Springs Road Area, to North Augusta implicating contacts with Kirtinia Dixon and Marcus Robinson, to the Dollar General, and from the crime scene to the Burger King appellant denied having stopped at. Tr. 535, l. 23 – 536, l. 10; tr. 543, l. 2 – 567, l. 22.

Discussion

There can be no doubt that the cellphone mapping evidence from FBI Agent Matthew Wilde was very prejudicial. The state sought to convey to the jury through this evidence that appellant was at the Dollar General with the decedent. They travelled to the Sandy Springs Road area and from the crime scene to the Burger King where appellant was shown on a surveillance tape alone in the decedent's car after denying to law enforcement that he had stopped at this Burger King. In short, the state sought to show the jury that this cellphone mapping evidence of FBI Agent Wilde corroborated the state's other evidence in this case, and that appellant was not credible. As such, it was extraordinarily prejudicial.

Defense counsel Madsen correctly argued that the defense could not procure an expert over the weekend to study this evidence and prepare a defense to it. There was simply no time to prepare to rebut this evidence.

In short, this was "trial by ambush" on the part of the state by turning over this mapping evidence after five o'clock in the afternoon before the trial began the following Monday morning. The judge admitting the evidence under these circumstances violated the essential demands of fundamental fairness, and it denied appellant a fair trial and due process as argued by defense counsel.

In this case, the prosecution intended and did use this cellphone mapping evidence during its case in chief by way of FBI Agent Matthew Wilde. As such, since it was material to the preparation of appellant's defense, and it was intended for use by the prosecution as evidence of its case-in-chief at trial, and appellant had a right to possess and review this evidence in advance. Defense counsel correctly argued that what the state was doing with the last second disclosure of the cell phone mapping evidence was in violation of appellant's due process rights and his right to a fair trial. Tr. 100, l. 11-113, l. 2. Cf. State v. Geer, 391 S.C. 179, 705 S.E.2d 441 (Ct. App. 2010), where this Court found an audio tape of the arrest not being revealed to the defense was not a violation of Rule 5, SCRCrimP. In Geer, this Court found that the defense had not shown that the audiotape of Greer's arrest was material to her defense and the record did not indicate the state planned or intended to use the audiotape as evidence in its case in chief at trial.

Here, totally conversely, this cellphone mapping evidence was critical to the state's case, and the manner in which it was disclosed after five o'clock on the Friday afternoon before the trial began on Monday morning was essentially "trial by ambush," and it denied appellant his

right to fundamental fairness and a fair trial. The state obviously intended to introduce this material evidence during its case-in-chief, and it did so over objection at trial.

In State v. Fullwood, 274 S.C. 60, 262 S.E.2d 10 (1979), our Supreme Court held Fullwood was denied fundamental fairness in his trial where the investigating officer falsely informed defense counsel that he had no information beneficial to the defense, and the prosecuting attorney knowingly took advantage of defense counsel's ignorance of this favorable evidence to the prosecution's advantage. See State v. Fullwood, 247 S.C. 60, 62, 262 S.E.2d 10, 11 (1979). *Citing* State v. Fowler, 101 Ariz. 561, 422 P.2d 125 (1967), and State v. Bethune, 104 S.C. 353, 89 S.E.2d 153 (1916).

In this case, appellant was not in any position to defend himself against this cellphone mapping evidence because the defense could not procure an expert to examine the evidence and prepare a defense against it given its extraordinarily late disclosure. The judge properly ruled the evidence had to be suppressed but then changed her mind and erroneously admitted this evidence. The defense properly continued to object to the admission of this evidence at every opportunity.

This case is also distinguishable from State v. Wilkins, 310 S.C. 81, 425 S.E.2d 68 (Ct. App. 1992), where the defense was not prejudiced by the state's failure to meet a Rule 5 deadline where the state made an untimely disclosure of a police report of the co-defendant's drug activities. This Court in Wilkins held it was therefore not an error for the court to refuse to dismiss the charges against Wilkins under these circumstances.

In State v. Gill, 319 S.C. 283, 460 S.E.2d 412 (Ct. App. 1995)[2], this Court held that the summary report prepared by a police officer for the solicitor's use in prosecuting the case was not discoverable. Here, the state intended to and did introduce this cellphone mapping evidence through FBI Agent Wilde, and any argument it was purely an internal prosecution document was, respectfully, untenable.

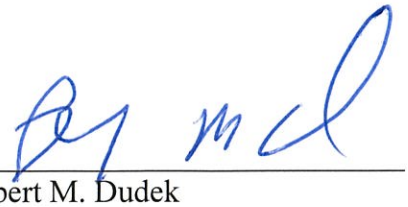
The judge should not have reversed her earlier, correct ruling suppressing the cellphone mapping evidence and highly prejudicial testimony. Again, Wilde's testimony "traced" appellant at important times as going to Sandy Springs Road to North Augusta where Kirtrina Dixon and Marcus Robinson were located. This evidence also traced appellant from the Dollar General area, through the area near Dixon's home, and then the Burger King after allegedly placing him near the crime scene. See, State's Exhibits #110, #122, and #123 are before this Court, as is Court's Exhibit #9. R. p. *.

Given the highly prejudicial nature of this evidence and testimony, and the fact its last minute time of disclosure left appellant utterly without any way to obtain an expert to rebut the evidence and prepare a defense to it, appellant should be granted a new trial since this violated his right to fundamental fairness, a fair trial, and due process. See State v. Fullwood, 274 S.C. 60, 262 S.E.2d 10 (1979).

[2] *Affirmed as modified on other grounds in* State v. Gill, 327 S.C. 253, 489 S.E. 2d 478 (1997).

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed and this case remanded to the Edgefield County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of June, 2023.