STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Honorable Doyet A. Early, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RASHAWN VERTEZ CARTER,

APPELLANT.

APPELLATE CASE NO. 2018-000358

FINAL BRIEF OF APPELLANT

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Whether the trial court erred in admitting the unredacted video of appellant's interview with police, which was replete with hearsay, accusations appellant was lying, and burden-shifting comments, in violation of State v. Brewer, 411 S.C. 401 (2015)?

STATEMENT OF THE CASE

Appellant was indicted in Aiken County for first-degree burglary, kidnapping, armed robbery, and two firearm charges. R. 656 (Indictments). On February 12, 2018, appellant was tried before the Honorable Doyet A. Early, III, and a jury. R. 16. Elizabeth B. Young and Heather M. DeLoach represented the State. R. 16. Michael W. Chesser represented appellant. R. 16. The jury convicted appellant, and Judge Early imposed concurrent sentences amounting to thirty-five years' imprisonment. R. 599. This appeal follows.

STANDARD OF REVIEW

The standard of review for Issue 1 is mixed. The question of whether the police activity is a search is an issue of law and should be reviewed *de novo*, however the trial court's factual findings are entitled to deference and are reviewed for clear error. See State v. Counts, 413 S.C. 153, 160, 776 S.E.2d 59, 63 (2015). The standard of review for Issue 2 is abuse of discretion. "The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Brewer, 411 S.C. 401, 406, 768 S.E.2d 656, 658 (2015) (internal quotation omitted).

ARGUMENT

1.

After overruling appellant's objections based on the Fourth Amendment and the privacy clause of the South Carolina Constitution, the trial court erred in admitting evidence gleaned from the police's warrantless use of appellant's cell phone as a tracking device to obtain his real-time location.

The police obtained appellant's real-time information from his cell-phone provider without a warrant by claiming an exigent circumstance. R. 221-230. They claimed this exigent circumstance existed and bypassed the warrant requirement despite lacking any probable cause to arrest or even detain appellant Rashawn Carter. R. 30-34, 42-44, 48-52. When they found Carter by converting his personal property into a tracking device, they did not arrest him and repeatedly testified that Carter was free to leave at any point as they drove him from Columbia to Aiken for an interview. R. 30-34, 42-44, 48-52. Even after the interview, the police did not arrest Carter and he left with a friend. R. 39.

The police ignored the warrant requirement of the Fourth Amendment and the privacy clause of the South Carolina Constitution in response to a robbery and shooting at a drug "stash house" in Aiken. R. 446-447. Melvin Chandler dealt cocaine and crack in Aiken. R. 428. His girlfriend was Elizabeth Miller. R. 427. Chandler used Miller's house to keep the majority of his cocaine and money (the "stash house") and another location to deal drugs to the public (the "trap house"). R. 446-447. R. 435-436.

Miller knew Chandler was a drug dealer. R. 92. In the early morning hours of May 9, 2015, Miller was sleeping when she heard a "big kaboom." R. 97-98. Three men came into her room with guns, demanding to know where the "bread" was. R. 98-99. Their faces were covered except for their eyes. R. 98. She could not identify any of the intruders. R. 122.

Keith Byrd lived near Miller and was on his back porch for a smoke when he saw the intruders heading to Miller's house. R. 133-137. Byrd called Chandler and told him what he saw. R. 138. Byrd did not go to Miller's house, but then heard multiple gunshots. R. 139-140. Before the police arrived, Chandler came to Byrd's house and gave him a sandwich bag of money to hold. R. 140.

After Chandler got Byrd's call, he called his friends "G" and "Trill." R. 432-433. He said they were his friends and he called them for help. R. 433.

During the middle of the intruders' assault on Miller in her bedroom, things suddenly "got really quiet." R. 102-103. She heard one of the men say, "Oh, shit," and realized none of them were in her room. R. 102-103. Using the opportunity to escape, she looked out of her bedroom door and saw a body "laying out of the bathroom." R. 103. Miller ran to her neighbor's house and then heard gunshots. R. 104.

One of the first officers on the scene arrived in time to hear the gunshots. R. 144. He met up with "two other officers" who were clearing the house. R. 146. Inside he saw a dead black male who had been shot in the head. R. 146-147. The police took a phone and ID from the dead man, who turned out to be Darius Scruggs. R. 147. R. 83. The solicitor told the jury in her opening that Scruggs was shot by an unknown person. R. 83. Appellant was charged with crimes related to the invasion of Miller's house, not with anything related to the death of Scruggs.

Investigator William Cameron was one of the officers who went to Miller's house and talked to the witnesses on the scene. R. 458-461. The solicitor asked Officer Cameron if "different investigators [were] doing a bunch of different things at the same time." R. 462-463. Officer Cameron responded, "There was a lot of people doing a lot of different things at the same time, yes, ma'am." R. 463.

Officer Cameron went from the scene to the hospital and met with Darius Scruggs' family. R. 463. He met Darius Scruggs' brother, Patrick Neely. R. 276. R. 463-464. Neely gave Cameron "information on the timeline of his evening, who he was with, where he was at, gave me a couple of phone numbers of a subject who had called him that morning and told him that his brother was shot. . . ." R. 463. He also gave Cameron a phone number "related to" Carter. R. 463. Officer Cameron relayed the information to officers in Aiken "which stated some balls rolling in Aiken, on—on—you know, finding out who these phone numbers belonged to and what have you." R. 464.

One of these officers, Matthew Morlan, testified during the Denno hearing that another officer, Detective Jeremy Hembree, found Carter based on tracking his phone. R. 41-42. Defense counsel asked whether the police got a search warrant to track Carter and Officer Morlan replied, "It was an exigent order." R. 42. Defense counsel asked if the "exigent order" was "obtained from a judge" and Officer Morlan replied, "No, sir, we can do an exigent order through the phone companies if the carriers agree with what we want as far as—due to the circumstances." R. 42-43.

The officers used Carter's phone to track his movements and confronted him in Columbia. R. 30. Officer Morlan and Detective Colindres, who was part of an ATF task force, saw a rental car they suspected was involved in the home invasion and saw Carter walking around talking on his cell phone. R. 30-31. They approached Carter and he agreed to ride with them to Aiken for an interview. R. 30-34. Officer Morlan stated that Carter was not under arrest, went with the officers voluntarily, and was free to leave at any time. R. 33-34. After the interview, Carter was still free to leave and left with a friend who followed him to Aiken. R. 38, 44, 52. Defense counsel asked Detective Colindres "what was exigent if you weren't even going to require him to come back with you to Aiken?" R. 52. The detective replied, "Well, it's just

the nature of the case itself." R. 52. Judge Early admitted the statement taken by the police in Aiken. R. 59-60.

At the beginning of a day of court during the middle of the trial, defense counsel moved to suppress Carter's statement based on the Fourth Amendment and the South Carolina Constitution. R. 218-221. Appellant argued that using his phone to track his whereabouts constituted a warrantless, illegal search. R. 218-221. Defense counsel informed Judge Early that the United States Supreme Court heard oral argument the previous November on this issue in Carpenter v. United States, which was decided after the trial. R. 219-221. R. 231-236. Carpenter v. United States, 138 S.Ct. 2206 (heard Nov. 29, 2017; decided June 22, 2018).

In response, the State proffered the testimony of Officer Hembree about how he obtained Carter's real-time location without a warrant. R. 221-236. Officer Hembree sent an "exigent request" to Carter's cell phone company. R. 221-222. R. 639 (Court's Ex. 2). On the form, it states:

> I hereby certify that I am a member of the above named government agency and **have been granted authority by that agency** (or as a 911 operator, am acting on behalf of someone granted that authority) **to determine and declare an exigent circumstance involving:**
>
> a) immediate danger of death or serious physical injury to any person,
> b) conspiratorial activities threatening the national security interest, or
> c) conspiratorial activities characteristic of organized crime

R. 639 (Court's Ex. 2) (emphasis added). Officer Hembree described the basis of the request on the form:

> On 05/09/2015 the Aiken Department Public Safety responded to a home invasion in which shots were fired. Upon arrival a male was located with a gunshot wound to the head. The investigation has provided us with a telephone number for an unknown individual who was involved in the incident. The male located with the gunshot wound has seen [sic] deceased as a result of the gunshot wound.

R. 639 (Court's Ex. 2). Officer Hembree asked the phone company for current subscriber information, call detail records and "Real-Time Location of the Mobile Device (E911 Locator). R. 639 (Court's Ex. 2).

Describing the reason for using extrajudicial path during the proffer, Officer Hembree said, "We believed [appellant] was a part of the the, the group that had committed the home invasion," and after stating his belief that the group was armed said, "So we felt that there was a need to get them off the street as soon as possible." R. 224. The phone company complied with Officer Hembree's request and began sending emails every fifteen minutes to him with the location of the device. R. 225. Carter's phone became a tracking device accurate to "within 11 meters." R. 233.

Officer Hembree acknowledged the police did not get an arrest warrant for Carter before going to Columbia. R. 228. When asked why the police did not get a search warrant instead of the "exigent order," he replied:

> It was a fluid scene that morning. We were still actively investigating the scene. **So it wasn't feasible for me to go away for a certain amount of time to obtain a search warrant, locate a judge,** just for call detail records because search warrant won't provide us with location information . . . at the time.

R. 229-230 (emphasis added).

The State argued using Carter's cell phone to track him in real-time was not a search, but "strictly an attempt to gain the information from the company to locate the person." R. 232. Appellant argued that getting a person's location from the phone was a search and protected by the Fourth Amendment and the South Carolina Constitution. R. 234. Appellant asked that the interview and information from the encounter with police in Columbia was fruit of the violation of Carter's rights and should be suppressed. R. 234. Judge Early analogized the police's activity to a pen register and said the police were "simply asking for pings." R. 235-36. He reasoned

that because the police did not listen to any communications, they did not invade Carter's privacy and denied the motion to suppress. R. 235-36.

The trial court erred in holding appellant had no right of privacy and that using his cell phone to track him was not a search. See Carpenter v. United States, 138 S.Ct. 2206, 2220-23 (2018). Carpenter dealt with the third-party doctrine and whether a warrant was required to obtain historical cell site location data. Id. Relying heavily on 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 State undoubtedly will seize on the fact that that Carpenter Court did not "express a view on matters not before us: real-time CSLI." Id. at 2220. But the leap in logic from historical CSLI to real-time location data is infinitesimally small. Finding that a citizen has a right to privacy in his historical location, but not his present location would make no sense and would be contradictory to the Court's reasoning in Carpenter. Going back to the original intent of the Founding Fathers, the Court stated "that a central aim of the Framers was 'to place obstacles in the way of a **too permeating police surveillance.**'" Id. at 2214 (quoting United States v. Di Re, 332 U.S. 581 (1948)). The Court used this quote from a 1948 case that worried about police surveillance. The 1948 Court could not have imagined the vast power of the State to surveil its citizens today. When the State can leverage the technology of a wireless carrier—

or in-home devices like Amazon's Alexa, or any of a multitude of proliferating technologies—the power of the State becomes nearly unlimited.

Unlimited—except by the guarantees of privacy and the warrant requirements of the state and federal constitutions. U.S. Const. amend IV, XIV. S.C. Const. art. I, section 10. 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"). "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). Under our greater privacy protections, even if the federal courts departed from the logic of Carpenter and somehow held that no warrant was required for real-time location data, our state must stand as a bulwark against such massive police intrusion under our own constitution.

The State here will also rely on language in Carpenter about the exigent circumstances exception to the warrant requirement. Carpenter, 138 S.Ct. at 2222-23. Included among the Court's list of possible exigencies is pursuing a fleeing suspect, but the Court also used "bomb threats, active shootings, and child abductions" as examples. Id. The Court indicated it would not limit the police's ability to respond to an "ongoing emergency." Id.

But no such ongoing emergency existed here. The police were not even sure of Carter's involvement—**even after the interviewed him.** They did not arrest him or compel him to go to Aiken. If Carter was a "fleeing suspect" standing in a yard casually talking on his phone when officers approached without guns drawn, then every citizen suspected of a crime can be

converted into a "fleeing suspect" and the warrant requirement will be extinct. The police's excuse for not getting a warrant was that they did not have enough time. This was despite the presence of multiple officers at the scene of the crime, Officer Hembree getting emails from the carrier, two officers sent to track Carter, another officer sent to the hospital to talk to the family, and the involvement of the ATF task force. If this number of officers is allowed to excuse their lack of a warrant based on not having enough time to find a judge, once again, the warrant requirement will be extinct.

Converting Carter's phone into a tracking device was a search and no exception applied. The trial court erred in not suppressing appellant's interview and the evidence about seeing the silver rental car when they encountered appellant in Columbia as fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471 (1963). Had the police not used Carter's phone to track him, they would not have been able to interview him on that day and they would not have found the car near him in Columbia. Appellant's conviction should be reversed.

2.

The trial court erred in admitting the undredacted video of appellant's interview with police, which was replete with hearsay, accusations appellant was lying, and burden-shifting comments, in violation of State v. Brewer, 411 S.C. 401, 768 S.E.2d 656 (2015).

Prior to trial, appellant filed a motion in limine to suppress and redact the video of appellant's interrogation. R. 640 (Court's Ex. 4). State v. Brewer, 411 S.C. 401, 768 S.E.2d 656 (2015). Appellant provided a lengthy list of objectionable statements by the investigators, including hearsay, accusations of lies, and burden shifting. R. 640 (Court's Ex. 4). The trial court heard argument on the motion at a pretrial hearing and again at trial. Hearing R. Jan. 8,

2015, 4 – 5. R. 71-73. The Court denied all of appellant's motions and the unredacted video was played for the jury. R. 71-73. R. 337-43. State's Ex. 9.

When the Court reviews the video of this interrogation, they will see the close similarity to the interview in Brewer. 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 also 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. Under these circumstances, the improper admission of the interrogation was not harmless.

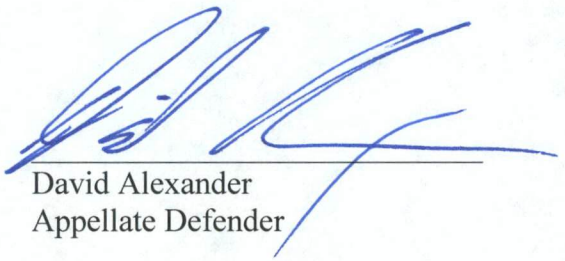
In a concurring opinion, Chief Justice Beatty held that the admission of the interrogation video constituted a structural error, rendering harmless error analysis improper. Id. at 410-412, 768 S.E.2d at 661-662. "[T]he jury was repeatedly bombarded with the unconstitutional notion that Brewer had to 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 trial court erred under Brewer and appellant's conviction must be reversed.

CONCLUSION

For the foregoing reasons, appellant's convictions should be reversed and this case remanded for a new trial.



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This 9th day of October, 2019.

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

October 9, 2019

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