RECEIVED
Jan 03 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
The Honorable Courtney Clyburn-Pope, Circuit Court Judge
Appellant Case No. 2022-000966

THE STATE,……………………………………………………………………RESPONDENT

v.

GABRIEL DANTRAY CURRY,…………………………………………………APPELLANT

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Attorney General

TOMMY EVANS, JR.
Assistant Attorney General
P.O. Box 11549
Columbia South Carolina 29211
(803) 734-6305

S.R. Hubbard, III
Solicitor, Eleventh Judicial Circuit
205 E. Main SR., 3rd Fl.
Lexington, South Carolina 29072
(803) 785-8352

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

Table of Authorities……………………………………………………………………………..ii

Appellant statement of issue on appeal…………………………………………………………iii

Respondent counter-statement of issue on appeal……………………………………………...iv

Statement of the case……………………………………………………………………………1

Argument

1. Trial court did not err in allowing into evidence items seized from a lawful search warrant that was served on Appellant's girlfriend once sufficient probable cause was given to the magistrate for the issuance of the search warrant………………..6

2. Trial court did not err in allowing into evidence cell phone mapping related to the information gathered from cell phones that was given to Appellant almost two years earlier in discovery, and the Assistant Solicitor informed them that these maps exist and would be introduced almost two weeks prior to the beginning of trial……………………………………………………………………………….11

3. If the Court of Appeals find that the trial judge committed any error it should be considered harmless, since ample evidence was presented by the State proving Appellant committed this crime beyond a reasonable doubt…………………….14

Conclusion………………………………………………………………………………….16

TABLE OF AUTHORITIES

Cases

State v. Anderson, 407 S.C. 278, 754 S.E.2d 905 (2014) 12
State v. Bellamy, 336 S.C. 140, 519 S.E.2d 347 (1999) 8
State v. Davis, 309 S.C. 56, 419 S.E.2d 820 (1992) 14
State v. Dunbar, 361 S.C. 240, 603 S.E.2d 615 (2004) 9
State v. Dupree 354 S.C. 676, 583 S.E.2d 437(2003) 8, 9
State v. Jones, 342 S.C. 121, 127, 536 S.E.2d 675, 679 (2000) 8,10
State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017) 11
State v. Missouri, 337 S.C. 548, 525 S.E.2d 394 (1999) 8
State v. Simmons, 423 S.C. 552, 566, 816 S.E.2d 566, 573 (2018) 15
State v. Sullivan, 267 S.C. 610, 230 S.E.2d 621 (1976) 10
State v. Tench, 353 S.C. 531, 579 S.E.2d 314 (2003) 9
State v. Tucker, 319 S.C. 425, 462 S.E.2d 263(1995) 8, 11
State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001) 7, 11

Rules

Rule 5(a)(1)(D) SCRCrim.Proc. 12

APPELLANT STATEMENT OF ISSUE 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 Exhibit #5) – which did not even vouch for the credibility of the sources – only alleged that 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?

RESPONDENT'S COUNTER-STATEMENT OF ISSUE ON APPEAL

1. Did the trial court err by allowing into evidence Appellant's cell phone and other evidence obtained from a valid search warrant which was obtained through witness statements and video surveillance when it was discovered that Appellant and Victim were together prior to Victim's murder, and Appellant's girlfriend later lied to law enforcement telling them that Appellant was not at her residence when he was in fact there, and Appellant informing the affiant himself that he was with the Victim that day to obtain marijuana and heroin revealing sufficient probable cause to obtain this search warrant?

2. Did the trial court err in allowing evidence seized from the cell phone of the Victim's mother Angela Bargeron when an oral statement given by law enforcement to the Magistrate informed him that there was video evidence of the Appellant and Victim together prior to the Victim's murder, and of the Appellant's in Victims mother's car alone?

3. Did the trial court err in allowing the cell phone mapping testimony of FBI Agent Matthew Wilde when Appellant was notified of the existence of this mapping two weeks before the case was called for trial, and this mapping was a result of cell phone tower information that was already provided to the Appellant through discovery two years earlier, thereby, allowing sufficient time for the Appellant to hire an expert, or at least request an continuance which he failed to do prior to trial?

STATEMENT OF THE CASE

On October 8, 2018, Mr. Dakota Calhoun (Victim) got a ride from his brother's girlfriend Jordan Thomas to a local Dollar General where his mother Angela Bargeron worked. The Victim went there to borrow his mother's vehicle. (R. p. 131 l. 8-10) Ms. Bargeron testified that she told the Victim that she needed him to come back to the store at 5 to help her with some work at the store. (R. p. 114 l. 1-2). The Victim was also to return later that evening in order to give Ms. Bargeron a ride home. (R. p. 119 l. 8-14). The Victim showed up at the Dollar General later that day around 3:55 pm to borrow money from Ms. Bargeron for gas. (R. p. 119 l. 14-15). Riding with the Victim was Gabriel Deontray Curry. (Appellant) (R. p. 355 l. 1-4).

During the day the Victim and Appellant were seen riding together to the Country Hearth Hotel arriving around 3:00 pm. (R. p. 265 l. 15-21; p. 268 l. 7-9). The Victim drove there in order to repay money owed to Danarius Garrett. (R. p. 267 l. 14-15). The Victim and Appellant were seen together at numerous other places during the day.

Later that night at around 9:45 pm, the Victim's girlfriend Vanessa Boulware received a phone call from Ms. Bargeron. Ms. Bargeron asked if she heard anything from the Victim, he was supposed to pick her up from work, he never arrived. (R. p. 316 l. 8-11). Appellant had possession of Ms. Bargeron's cell phone that day. They were calling that number and receiving no answer. Later that night the Victim's family went directly to Appellant to find out if he knew anything since he was the last person seen with him. During this conversation Appellant got nervous and got into his car and left. (R. p. 319 l. 16 – p. 320 l. 1). That next day around 7:48 am the Victim's brother Kahlo called law enforcement to report the Victim as a missing person. (R. p. 84 l. 12-15).

At 11:57 am law enforcement received a call that the Victim's mother's car was located off Sandy Springs Rd. (R. p. 86 l. 8-11). When law enforcement arrived, it appeared that the front end

of the vehicle was wrecked, however, the Victim was not found inside. (R. p. 87 l. 16; R. p. 88 l. 1). Law enforcement then received information that the last person seen with the Victim was the Appellant. (R. p. 88 l. 8-11). Law enforcement went to the home of the Appellant's girlfriend Kirtrina Dixon for the purpose of questioning the Appellant. When law enforcement got to the home, they found Ms. Dixon in the front yard. Once she saw them, she ran inside the home. (R. p. 90 l. 13-21). When they got to the door, she informed them that the Appellant was not there. (R. p. 91 l. 2-6). Officers believed she was not telling the truth.

After the vehicle was found the Victim's family was contacted, they went to the scene. Arriving with them was the Appellant. He informed law enforcement that he was with the Victim the day before and the Victim was snorting heroin. Appellant told law enforcement that the Victim left him around 5:00 pm. (R. p. 94 l. 8-12). The Appellant denied being at Burger King, even though a Burger King receipt was found inside the vehicle. (R. p. 93 l. 7-9).

At the scene where the car was found law enforcement contacted the South Carolina Law Enforcement Division (SLED) to get a helicopter in order to assist in the search. However, before the helicopter could arrive, around 3:20 pm, the Victim's body was discovered across the road from the vehicle. (R. p. 96 l. 15-18). The Victim was lying in the woods with a gunshot wound to the back of the head. (R. p. 145 l. 17-20).

With the information they received from family members and the fact that Ms. Dixon lied regarding the Appellant's whereabouts, law enforcement thought that they had sufficient probable cause to obtain a search warrant. The search warrant was served on Ms. Dixon. Law enforcement searched her residence and seized five cell phones. Among them was a gold phone belonging to the Appellant and another phone belonging to Ms. Dixon. (R. p. 348 l. 25- p. 349 l. 3; p. 572;

After receiving video surveillance of the Victim and Appellant in the vehicle together that day, and surveillance of the Appellant in the vehicle alone, they were able to obtain five more search warrants for the phone records of the phone belonging to Ms. Bergeron, Appellant and Ms. Dixon. They were requesting records on their call history, text, and geographical location history. At the conclusion of the investigation and the gathering of evidence, Appellant was arrested and charged with the offense of murder.

On June 27, 2022, this case was called for trial before the Honorable Courtney Clyburn-Pope. Assistant Solicitors Sutania Fuller and Erik Drylie of the Eleventh Circuit Solicitor's Office were present before the court. Representing the Appellant was Assistant Public Defenders Rob Madsen and Jason Chehoski of the Eleventh Circuit Public Defender's office.

During the trial Agent Todd Schenk of SLED testified. Agent Schenk stated that he was called to the scene where he observed the Victim in the woods with a gunshot wound to the back of the head. He searched the area and found a single cartridge casing fired from a .380 Federal Auto. (R. p. 145 l. 17-20; p. 156 l. 8-10; p. 156 l. 16-17). It appeared the Victim was shot right where he was found, by someone standing behind him. (R. p. 178 l. 5-6; p. 179 l. 15-18).

Also testifying was SLED Agent Megan Fletcher. Agent Fletcher was found qualified as an expert in the field of gunshot primer residue. (R. p. 242 l. 23 – p. 243 l. 4). Agent Fletcher testified that there was material from the steering wheel cover which included gunshot primer residue. (R. p. 250 l. 9-13). Agent Fletcher also testified that if someone shot a gun and touched an object it is possible that primer residue would transfer to that object. (R. p. 252 l. 23-25).

Ms. Dixon also testified that when law enforcement arrived Appellant was inside the house, however, he told her to lie and tell them he was not there. (R. p. 275 l. 3-6). Ms. Dixon also testified

that the Appellant told her that he threw a gun into the woods. (R. p. 279 l. 11). The murder weapon was never found.

Lieutenant Chase Alan Harley of the Edgefield Sheriff's Department was the chief investigator. Lieutenant Harley testified that during the investigation they gathered surveillance video from numerous places the day of the murder revealing the Victim and Appellant together. Lieutenant Harley testified that at 1:15 pm they were seen at the Dollar General, (R. p. 358 l. 17-18), then they were at the Country Hearth Inn and Suites from 2:54 pm. to 3:01 pm. (R. p. 358 l. 19-20). Then they were seen together at Greg's Gas Plus from 3:15 pm to 3:30 pm. (R. p. 358 l. 21-22). Then back at the Dollar General from 3:54 pm to 3:57 pm. (R. p. 358 l. 22-24). Then at the Circle K from 3:59 pm to 4:02 pm. (R. p. 358 l. 24-25). After that the Victim was never seen again alive. (R. p. 467 l. 25 – p. 468 l. 4). Appellant was then found driving the Victim's mother's vehicle at Burger King at 4:28 pm. Appellant bought a Whopper Meal at the drive-thru and left at 4:30. (R. p. 378 l. 21 – p. 379 l. 13). No one was found riding in the passenger seat. (R. p. 381 l. 3-5). When they spoke to the Appellant, he lied to them telling them he was not at Burger King that day. (R. p. 383 l. 1-5). Lieutenant Harley testified that the Victim was found dead in the same clothing he was wearing the day before in the surveillance video. (R. p. 366 l. 10-14).

Also testifying was Special Agent Matthew Wilde of the Federal Bureau of Investigation (FBI). Agent Wilde was introduced as an expert in the field of historical call records and cellular technology. (R. p. 432 l. 2-8). Agent Wilde prepared for court with exhibits maps revealing the location of the Appellant's phone and Ms. Bargeron's phone which was in the Victim's possession at the time of his death. (R. p. 432 l. 11-21). Agent Wilde testified that between 1:50 – 2:57 the phones traveled from around Ms. Dixon's home to an area near the County Hearth Inn in Augusta

Ga. (R. p. 446 l. 12-15). Then there was activity on Victim phone at the Dollar General and Circle K at 3:17 pm. There was no other activity on that phone until 9:12 pm. (R. p. 447 l. 12-13).

Agent Wilde also testified that there was activity on Appellant's cell phone at 4:36 pm – 4:37 pm just south of the Circle K and Burger King. (R. p. 449 l. 4-8). At 4:18 pm the Appellant's phone was used at the tower in the sector consistent with Ms. Dixon's home and the crime scene location which was close by. (R. p. 450 l. 5-7, 15-18). And between 4:18 pm and 4:36 Appellant's phone moved from the area around the crime scene and Ms. Dixon's home to the area of the Burger King and Circle K. (R. p. 450 l 25 – p. 451 l. 3).

Dr. Janice Richards Ross also testified. Dr. Ross was found qualified as an expert in the field of forensic pathology. (R. p. 295 l. 15-16). On October 11, 2018, Dr. Ross performed the autopsy on the Victim. (R. p. 296 l. 6-7). Dr. Ross determined the cause of death was a laceration of the brain due to a gunshot wound to the head. (R. p. 296 l. 16-18). She testified that the bullet went into the back of the Victim's head just right at the midline and traveled to the front going slightly upward but there was no exit wound. (R. p. 297 l. 7-11). Dr. Ross stated that she did not see any stippling, which means that the gun muzzle was about eighteen to twenty-four inches away or more. (R. p. 302 l. 23 – p. 303 l. 1).

After four days of testimony a jury of his peers found the Appellant guilty of murder. (R. p. 543 l. 14-19). Appellant then appeared before the trial court for sentencing. The trial court proceeded to sentence Appellant to a thirty-eight (38) year period of incarceration. The trial court ordered that the Appellant receive credit for all pre-trial incarceration. (R. p. 546 l. 22 – p. 547 l. 1).

ARGUMENTS

1. Trial court did not err in allowing into evidence items seized from a lawful search warrant that was served on the Appellant's girlfriend once sufficient probable cause was given to the Magistrate.

Relevant Facts

During the investigation law enforcement sought six search warrants. The first was not long after the Victim's body was found during the beginning of the investigation. At that time law enforcement was informed that the Appellant was the last person seen with the Victim. There was also some suspicion raised by law enforcement that the Appellant's girlfriend lied about Appellant's whereabouts when she was questioned. Law enforcement placed both of these matters on the search warrant to raise sufficient probable cause. In this warrant they were seeking any clothing, keys, phones, firearms, bullets shell casings, illegal drugs, or any other items involved in a criminal enterprise. The location and description of the home was placed on the search warrant. During the search five cell phones were taken from the residence, nothing else was removed.

There were five more search warrants issued. These warrants came later during the investigation after law enforcement gathered more evidence, including surveillance video revealing the Appellant and Victim driving together, and the Appellant driving the Victim's mother's vehicle alone. These search warrants were seeking the ability to retract information and historical data from these cell phones. Primarily law enforcement sought information from the cell phone of the Appellant and the Victim's mother Angela Bargeron. This is due to the fact the Victim had in his possession Ms. Bargeron's cell phone at the time of his murder.

During trial Appellant moved to suppress information gathered from these search warrants. Appellant argued that sufficient probable cause was not given in order to authorize these warrants. During the hearing The Honorable James McLaurin an Edgefield County Magistrate testified. The

law enforcement officer who sought the search warrant, Investigator Jimmy Smith, was deceased so he could not testify. Judge McLaurin testified that Investigator Smith came into his chamber seeking this warrant. He not only had probable cause on the face of the search warrant, but he also gave him information verbally under oath. Judge McLaurin testified that sometimes Investigator Smith did this because he was unsure of his writing skills. (R. p. 13 l. 15-23). In Court Exhibit #2 the extra information that Investigator Smith testified to was written down by Judge McLaurin and revealed by bullet points at the end of the attachment one.

Court's Exhibit #5 was issued when Investigator Smith came to his office seeking a warrant to obtain information from the cell phone seized from the home of Ms. Dixon. (R. p. 37 l. 15-21). In the explanation of probable cause this search warrant was missing a paragraph that the other search warrants had revealed that witnesses told them the Victim was last seen with the Appellant and Ms. Dixon lied to them about Appellant's whereabouts. Judge McLaurin testified that the warrant had missing language, however that was supplemented by oral testimony. (R. p. 38 l. 7-9). He testified that by then he was informed of the additional evidence discovered by the Burger King video showing the Appellant in the Victim's mother's vehicle by himself. (R. p. 39 l. 2-11).

Upon the conclusion of the pre-trial hearing the trial judge decided to deny Appellant's motion to suppress. The trial judge determined that sufficient probable cause was revealed to the Magistrate for the issuance of the search warrants. The trial court decided that the evidence discovered through these search warrants would be allowed.

<u>*Standard of Review*</u>

In criminal cases the appellate court sits to review errors of law only. *State v. Wilson,* 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose discretion will not be reversed on appeal absent an abuse of

discretion. *State v. Tucker,* 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995). "The South Carolina General Assembly has enacted a requirement that search warrants may be issued 'only upon affidavit sworn to before the magistrate…establishing the grounds for the warrant'" *State v. Dupree* 354 S.C. 676, 683, 583 S.E.2d 437, 441 (2003), *quoting, State v. Bellamy,* 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). When reviewing a magistrate's decision to issue a search warrant, we must consider the totality of the circumstances. *State v. Missouri,* 337 S.C. 548, 525 S.E.2d 394 (1999). Although great deference must be given to a magistrate's conclusions a magistrate may only issue a search warrant upon a finding of probable cause. *State v. Bellamy,* 336 S.C. 140, 519 S.E.2d 347 (1999). 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).

Discussion

Appellant argues that there was not sufficient probable cause presented to the magistrate in order to have those search warrants issued. Appellant argues that the trial court erred in allowing the items seized into evidence due to them being "fruits of the poisonous tree." The Respondent argues that there was sufficient probable cause provided to the magistrate in order to raise suspicion that the Appellant was hiding something and perhaps revealing he was involved in the Victim's murder.

On the face of Court's Exhibit #2 it was revealed to the magistrate that,

> "Through witness statements and video surveillance it was discovered that Gabriel Dantray Curry was with Dakota just prior to his murder. When deputies went 707 MR. Zion Rd. to locate Gabriel Curry to ask him about Dakota missing, 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. Khalo Calhoun brother of Dakota told I/O that he located Gabriel at his girlfriend's residence on MR. Zion Rd."

(Court's Exhibit #2).

This information reveals that the Appellant could be somehow involved in the Victim's murder. He lied to law enforcement about being at his residence when they came to question him, and through surveillance video, statements from witnesses, and his own admission he was the last person seen with Appellant prior to his murder. This was sufficient probable cause in order to search the home where law enforcement was informed that the Appellant resides a majority of the time, Ms. Dixon's residence. The term "probable cause" does not import absolute certainty. *Dupree,* 354 S.C. at 683, 583 S.E.2d at 441.

Identical or similar language was used in 5 of the 6 six warrants submitted to the magistrate. This information demonstrated that the Appellant was the last person with the Victim while he was alive. It was obvious the Appellant was at least a person of interest with information that could assist law enforcement in investigating this murder. In order to get a search warrant there does not have to be certainties just sufficient evidence to raise suspicions. In determining whether a search warrant should be issued, magistrates are concerned with probabilities and not certainties. *Id.* In *State v. Dunbar,* the South Carolina Supreme Court revealed the task of a magistrate in making a determination of probable cause. In *Dunbar* it states,

> "The magistrate's task in determining whether to issue a search warrant is to make a practical, common-sense decision concerning whether, under the totality of the circumstances set forth in the affidavit, there is a fair probability that evidence of a crime will be found in the particular place to be searched."

State v. Dunbar, 361 S.C. 240, 246, 603 S.E.2d 615, 618 (2004), *quoting, State v. Tench,* 353 S.C. 531, 534, 579 S.E.2d 314, 316 (2003).

Court Exhibit #5 was without the above referenced language so Appellant argues there was not sufficient probable cause to issue this search warrant. Affidavits are not meticulously drawn by lawyers but are normally drafted by non-lawyers in the haste of a criminal investigation and should therefore be viewed in a common sense and realistic fashion. *State v. Sullivan,* 267 S.C.

610, 230 S.E.2d 621 (1976). Although a paragraph was missing, Judge McLaurin testified pre-trial that he was told by the affiant that there was surveillance video revealing that the Appellant was with the Victim prior to his murder, and that the Appellant was driving the Victim's mother's vehicle alone. Oral testimony may also be used in this state to supplement search warrant affidavits which are facially insufficient to establish probable cause. *State v. Jones,* 342 S.C. 121, 127, 536 S.E.2d 675, 679 (2000). Even though that one paragraph was missing there was information regarding the murder and the fact the cellphone that belonged to Ms. Bargeron which the Victim had had in his possession at the time of the murder was now missing. This along with the oral testimony given by the affiant officer was sufficient to establish probable cause.

The testimony by Judge McLaurin was clear he was not only given information on the face of the warrant that established the Appellant as a possible suspect, but he was given sworn testimony by the affiant relaying more information regarding the possible involvement of the Appellant in this murder. There was obviously sufficient probable cause for the magistrate to grant each search warrant issued in this case. This Court should affirm the decision of the trial court regarding the denial of the Appellant's motion to suppress. The trial court followed the law in allowing great deference regarding the finding of probable cause made by the magistrate. A reviewing court should give substantial deference to a magistrate's determination of probable cause. *Dunbar,* 361 S.C. at 246, 603 S.E.2d at 618, 619.

2. The trial court did not err in allowing into evidence cell phone mapping related to the information gathered from the cell phones that was given to Appellant almost two years earlier in discovery, and Assistant Solicitor informed them that these maps exist and would be introduced into evidence two weeks before the start of trial.

Relevant Facts

On the Friday before the trial, the Solicitor's office received from the FBI phone mapping information that was awaiting peer review. Once that information was received it was sent over to Appellant's counsel. Prior to trial Appellant moved for this mapping information to be suppressed. Their argument was that the Solicitor's office gave them this information at the last minute, and they were unable to hire an expert to view this information during the weekend; therefore, it should be suppressed. At first the trial judge agreed that the information should be suppressed. Then once the trial judge was given a better idea about the information that was being displayed on these maps, and the fact this was from the evidence retrieved from the Victim's and Appellant's phone that was given to Appellant in discovery two years earlier, trial judge decided to defer her final ruling until later. (R. p. 59 l. 20 – p. 64 l. 2).

Standard of Review

In criminal cases the appellate court sits to review errors of law only. *State v. Wilson,* 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose discretion will not be reversed on appeal absent an abuse of discretion. *State v. Tucker,* 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995). An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law. *State v. King,* 422 S.C. 47, 54, 810 S.E.2d 18, 22 (2017). Upon request of a defendant the prosecution shall permit defendant to inspect and copy any results or reports of physical or mental

examinations and of scientific test or experiments, or copies thereof, which are within the possession, custody, or control of the prosecution. Rule 5(a)(1)(D) SCRCrim.Proc.

<u>*Discussion*</u>

Appellant claims that the trial court erred when the mapping evidence was allowed to be presented before the jury. At 5:12pm Appellant received the mapping evidence from the solicitor's office via e-mail entitled "additional discovery." (R. p. 52 l. 4-7) During pre-trial Appellant argued that this information should be suppressed due to the fact he received this information the Friday before trial and he had no way to get an expert to view this evidence during the weekend.

During this motion the Assistant Solicitor informed the court that they informed the Appellant on June 16, 2022, eleven days prior to the beginning of trial that she was planning to introduce the cell phone mapping. (R. p. 53 l. 19-22). The Assistant Solicitor also told opposing counsel that she hoped to have them either the Tuesday or Wednesday, the week before trial. (R. p. 53 l. 22-25). However, according to FBI policy all evidence that would be introduced must be peer reviewed. The peer review was not completed until the Friday prior to trial. (R. p. 53 l. 23-24). Once the mapping was received it was relayed to the Appellant's counsel. *Brady* disclosure rule requires the prosecution to provide the defendant with any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment, and favorable evidence is either favorable exculpatory or favorable impeachment evidence. *State v. Anderson,* 407 S.C. 278, 286, 754 S.E.2d 905, 909 (2014). Once the information was given to the State it was immediately forwarded to the defense. There exists no violation of *Brady* or Rule 5 in the actions of the Assistant Solicitor.

The Respondent argues that there was no violation of Rule 5 by allowing the Appellant to see this information once it was received. There was also no prejudice in allowing this mapping

into evidence. The Appellant knew of this mapping eleven days prior to the trial beginning. At that time, they could have researched, found, and gotten funding for an expert so when the mapping was available, they could have easily relayed it to their hired expert for review. During the pre-trial hearing the Assistant Solicitor also informed the trial court that this mapping was from cell tower pings that were given to Appellant through discovery on October 9, 2018, almost two years prior to the trial beginning. At that time Appellant was given cell phone mapping evidence that was going to be introduced during trial. They could have gotten funding and hired an expert at that time to at least review this information prior to the mapping. However, the Appellant's counsel failed to do either, but decided to wait until this information was given and then seek suppression.

Prior to trial the Appellant sought a suppression of the evidence, not a continuance. The main reason for seeking suppression was due to the lateness of the evidence being provided, thereby, not being able to obtain an expert. If Appellant seriously thought that he needed an expert to review this mapping he should have requested a continuance in order to hire an expert and have him review the evidence. Continuation was the easiest remedy at the time, if he requested a continuance and was denied then the next remedy would be suppression. However, Appellant went straight to requesting a suppression when this could have been easily remedied with a short continuance in order for the Appellant to hire an expert and have him review the evidence.

The Appellant also argues that the trial court erred in first ruling that the evidence would be suppressed then later once she was aware that the mapping was simply from evidence the Appellant had for over a year, she deferred her final ruling. Rule 5 is clear; the Solicitor must give the defense an opportunity to review any report they are going to introduce into evidence. This information was given to the Appellant almost two years earlier, and they were made aware of the mapping eleven days prior to the beginning of trial. The Appellant could have easily hired an expert

in that amount of time so once the mapping was available they would already have an expert ready to review this evidence. The unavailability of an expert is not due to any fault of the Respondent.

The trial court made the correct decision in allowing the mapping to be introduced as a court's exhibit. The Appellant was given the information that was contained in the mapping almost two years earlier and was made aware of the maps existence and that it would be used by the Assistant Solicitor almost two weeks before trial. The fact the Appellant failed to get an expert to review this information is not the fault of the Assistant Solicitor. Ample notice and evidence were provided to the Appellant prior to this evidence being introduced. There exists no violation of Rule 5, the trial court did not err in allowing this evidence to be viewed by the jury. *State v. Davis,* 309 S.C. 56, 419 S.E.2d 820 (1992)(Davis was permitted to view and copy the State's file on this matter. He never requested a continuance or recess in order to review the file. We find no abuse of discretion in the trial judge's denial of Davis's motion to suppress).

3. **If the Court of Appeals found that the trial judge committed any error it should be considered harmless, since ample evidence was presented by the State proving the Appellant committed this crime beyond a reasonable doubt.**

<u>Relevant Facts</u>

Appellant seeks a reversal of the decision of the trial court in allowing into evidence items that were seized pursuant to a search warrant. The items that were seized were five cell phones, and information from these phones as well as the phone of the Victim's mother which he had in his possession at the time of his death. The Appellant also argues that the trial court erred in allowing the cell phone mapping into evidence, due to a violation of Rule 5.

The Respondent will argue that there was sufficient circumstantial evidence for the State to obtain a conviction without the evidence obtained through these search warrants. So, if any error exists it should be considered harmless.

Standard of Review

Error is harmless when it could not reasonably have affected the result of trial. *State v. Simmons,* 423 S.C. 552, 566, 816 S.E.2d 566, 573 (2018).

Discussion

Although the Respondent is not conceding that the trial court made any error in allowing the evidence seized from the search warrant or the cellular mapping into evidence. If this Court finds that any possible error might have occurred in the trial court's introduction of such evidence is should be considered harmless.

Information regarding the surveillance videos revealed that the Appellant was with the Victim all throughout the day before his murder. The Appellant was also found driving the Victim's mother's vehicle at a time when he said that he was not with the Victim. The Appellant also lied to law enforcement telling them that he was not at Burger King that day when he was seen driving Victim's mother's vehicle alone at the Burger King drive-thru. This is information that was gathered without the search warrants. There was also testimony from an Effran Nipper who stated that earlier that year the Appellant attempted to sell him a small handgun. The Appellant's girlfriend also testified that the Appellant told her that he threw a gun into the woods. This is information that was not obtained through those search warrants nor the cell phone tower pings.

Without the information from the search warrants or the cell phone pings there was still sufficient circumstantial evidence to obtain a conviction. Therefore, this Court should determine any error that might have occurred harmless.

CONCLUSION

The trial court made the proper decisions regarding this matter. The State respectfully requests this Court affirm the decisions of the trial court.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

TOMMY EVANS, JR.
Assistant Attorney General

S.R. HUBBARD, III
Solicitor, Eleventh Judicial Circuit

By: *<u>/s Tommy Evans, Jr.</u>*
Tommy Evans, Jr.
Office of the Attorney General
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT

January 3, 2024

RECEIVED
Jan 03 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
The Honorable Courtney Clyburn-Pope, Circuit Court Judge
Appellant Case No. 2022-000966

THE STATE,……………………………………………………………………RESPONDENT

v.

GABRIEL DANTRAY CURRY,…………………………………………………..APPELLANT

CERTIFICATE OF COMPLIANCE

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

This 3rd day of January 2024.

s/Tommy Evans, Jr.
Tommy Evans, Jr.
Assistant Attorney General

ATTORNEY FOR RESPONDENT