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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable G.D. Morgan, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RANDY DEAN GRAINGER,

APPELLANT.

APPELLATE CASE NO. 2023-000598

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err by denying Appellant's motion to suppress evidence from a cell phone "tower dump" obtained by law enforcement from Verizon Wireless in violation of Appellant's rights under the Fourth Amendment of the United States Constitution and his right to privacy under Article 1, Section 10 of the South Carolina Constitution where the affidavit in support of the search warrant failed to establish probable cause?

STATEMENT OF THE CASE

A Horry County grand jury indicted Appellant on October 20, 2021 for two counts of murder, two counts of criminal conspiracy, third degree arson, and possession of a weapon during the commission of a violent crime. R. 507 – 518. His case was called to trial on April 3, 2023 before the Honorable G.D. Morgan, Jr., and a jury. R. 1. Assistant Solicitor Mary Ellen Walter represented the state. R. 1. Jonathan Hiller and Martin Spratlin represented Appellant. R. 1.

On April 6, 2023, the jury found Appellant guilty as indicted. R. 493, ll. 7-25. He was sentenced to life without parole for each count of murder pursuant to S.C. Code Ann. § 17-25-45, fifteen years for third degree arson, and five years for each count of criminal conspiracy. No sentence was imposed for the weapons offense pursuant to S.C. Code Ann. § 16-23-490(A). R. 498, l. 1 – 499, l. 24.

This appeal follows.

STATEMENT OF FACTS

On August 18, 2018, Horry County Police responded to an abandoned vehicle parked in the middle of a farming field off Highway 917 and Cookes Circle. The vehicle was surrounded by tall vegetation making it difficult to see from the roadway. The windows, including the windshield, were "blacked out." The responding officer opened the door, which was unlocked, to see if anyone was inside. He discovered extensive fire damage to the passenger compartment and soot all over the windows. It looked like someone had tried to set the vehicle on fire. The officer ran the tag and obtained an address for the registered owner. He requested "an attempt to locate" the owner to see if the owner knew their vehicle was abandoned in a field. R. 56, l. 11 – 63, l. 21.

While the first officer stood by the vehicle, another officer responded to 4591 Highway 19 in Conway. As he pulled into the driveway, the officer saw two vehicles parked outside the carport. As he continued to pull forward, the officer saw a man lying under the carport near the rear steps of the home. He immediately parked his car and got out. As he walked around his vehicle, the officer saw a second man lying in the grass outside the carport. Both men were deceased. R. 68, l. 15 – 70, l. 23. They were later identified as Robert Marion Ford, Jr. and his twenty-five year old son, Robbie Stetson Ford.

It appeared that Robbie's "pockets had been riffled through." R. 88, ll. 4-7. He had a close range gunshot wound to the back of his head and a gunshot wound to his left flank. R. 207, l. 6 – 208, l. 12. Robert, his father, also had two gunshot wounds: one to the forehead and another under the chin. The wound to the forehead was an intermediate range wound while the wound to the chin was a close contact wound. R. 211, ll. 2-19.

Investigators processed the scene at the residence as well as the vehicle found in the field. The vehicle was identified as a Ford Escape that belonged to Robbie Ford. The keys to the vehicle were in the ignition. R. 130, ll. 18-20. Of significance, investigators collected a "partially burned skull cap from the front driver's floorboard" of the car. R. 100, ll. 4-5. They also collected three cigarette butts from the ground just outside the driver's door of the car where it was parked in the field. R. 124, ll. 8-20. The "skull cap" and the cigarette butts were transported to the South Carolina Law Enforcement Division for DNA analysis.

A DNA profile was developed from the three cigarette butts and from swabs of the skull cap. It was determined that the profile developed from all four items was the same. R. 326, ll. 2-17; R. 328, l. 4 – 329, l. 25. However, law enforcement was unable to match the DNA profile developed to a specific person. Consequently, they used "forensic genetic genealogy" to "generate investigative leads based on relationships to" the unknown DNA profile developed. R. 330, ll. 1-11.

Horry County Police was eventually provided with several names from an ancestry DNA company. Investigators began "surveillance on those people" and attempted "to recover abandoned DNA from them." This included items such as discarded cigarette butts or coffee cups. One of these people was Appellant. On August 6, 2020, investigators observed Appellant discard a cigarette butt as he was driving down Highway 66. They collected this cigarette butt and transported it to SLED for DNA analysis. The DNA profile developed from the discarded cigarette butt matched the previously unknown profile developed from the three cigarette butts discovered near Robbie Ford's vehicle and the "skull cap" collected from inside the car. R. 365, l. 1 – 367, l. 2. Appellant was arrested on August 18, 2020 and investigators collected a buccal swab from him pursuant to a search warrant. R. 367, ll. 3-21. Appellant's known DNA profile

developed from the buccal swab likewise matched the DNA profile developed from the three cigarette butts and the "skull cap." R. 347, l. 5 – 356, l. 1.

After Appellant was developed as a suspect, investigators reviewed "tower dump" data it had received in September 2018 from Verizon Wireless pursuant to a search warrant. Data from a tower that services the location where Robbie Ford's vehicle was found showed the phone number associated with Appellant called Teresa Martin at 9:56 pm on August 17, 2018 and that Martin called the phone number associated with Appellant at 10:15 pm on August 17, 2018.

Teresa Martin, who was Appellant's girlfriend in August 2018, testified against Appellant at trial. She pled guilty to accessory after the fact related to this case on the first day of Appellant's trial. R. 249, ll. 3-9. However, her sentencing was deferred until after she testified against Appellant. Martin claimed she overheard Samantha Rabon, Robert Ford's daughter and Robbie Ford's half-sister, solicit Appellant to kill her father and brother "so she [Rabon] could inherit everything." Martin claimed she dropped Appellant off near the Fords' residence on the evening of August 17, 2018. Appellant was allegedly wearing black pants, a black shirt, and a "black toboggan" and was carrying a "little tool bag."

Later that night, Appellant called Martin and asked her to pick him up. He was walking down Highway 917 in the pouring rain. Martin found Appellant and drove him back to her house. The next morning, Martin heard about the killings on the news and knew Appellant "had done it." According to Martin, Rabon was supposed to pay Appellant twenty thousand dollars for the killings, but never did. R. 232, l. 15 – 243, l. 20.

STANDARD OF REVIEW

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) (citing State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001)). "This Court is bound by the trial court's factual findings unless they are clearly erroneous." Id. (citing State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000)). "The trial judge's factual findings on whether evidence should be suppressed due to a Fourth Amendment violation are reviewed for clear error." Id. at 48-49, 625 S.E.2d at 220 (citing State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 665-666 (2000)).

<u>**ARGUMENT**</u>

<u>The trial court erred by denying Appellant's motion to suppress evidence from a cell phone "tower dump" obtained by law enforcement from Verizon Wireless in violation of Appellant's rights under the Fourth Amendment of the United States Constitution and his right to privacy under Article 1, Section 10 of the South Carolina Constitution since the affidavit in support of the search warrant failed to establish probable cause.</u>

Relevant Facts

Appellant moved pretrial to suppress any evidence obtained from a "tower dump" because the search warrant used to obtain the records from Verizon Wireless was not supported by probable cause.[1] The search warrant listed three locations from which the police sought cell tower data from. The first location was 7200 Cookes Circle, Nichols, South Carolina, which was where the vehicle was found. The time period requested for this location was August 17, 2018 from 9:00 pm until August 18, 2018 at 12:00 am. The second location was 4591 Highway 19, Conway, South Carolina, which is where the bodies were located. The time period requested for this location was August 17, 2018 from 8:00 pm until August 18, 2018 at 11:00 pm. The final location was 2532 Magnolia Highway, Aynor, South Carolina, which was the residence of Samantha Rabon. The time period requested for this location was August 17, 2018 from 7:00 pm until August 18, 2018 at 12:00 am. R. 13, ll. 10-21; R. 16, ll. 10-20; R. 500-503.

The affidavit in support of the search warrant stated:

> On August 18, 2018, police began an investigation into a homicide that occurred at 4591 Hwy 19 in the Conway section of Horry County. During the incident, two victims were shot and succumbed to their injuries. During the investigation, it was determined that one of the victim's vehicle was missing and

[1] A "tower dump" is "a relatively novel law enforcement tool that provides investigators with the cell site location information (CSLI) for all devices that connected to specific cell towers during a particular time." <u>Commonwealth v. Perry</u>, 184 N.E.3d 745, 751 (Mass. 2022).

> presumed that the suspect(s) stole the vehicle after the fact. The vehicle was located approximately 100 yards from the intersection of Cookes Circle and Hwy 917 in the Nichols section of Horry County. The vehicle had been abandoned and set on fire. It is my belief that a search of cellphone towers in the area of both crimes will assist with identifying individuals who were in the same areas at the time of both the homicide and the vehicle fire, which based on the distance between the crimes would be very suspicious.

R. 500-503.

Defense counsel argued Appellant had a "protectible privacy interest" in his historic cell site location information stored on cell towers and routinely stored by his cell phone provider pursuant to the Fourth Amendment and Article 1, Section 10 of the South Carolina Constitution. Counsel acknowledged that whether an individual has a "protective privacy interest in tower dump records" is "an unsettled area of law" and has not been addressed by the appellate courts in South Carolina. He explained that the leading case is Carpenter v. United States, 585 U.S. 296 (2018), which was published shortly before the search warrant was obtained in this case. In Carpenter, the United States Supreme Court held law enforcement must obtain a search warrant when "seeking targeted cell site location information," meaning cell site location information for a specific cell phone number. R. 17, l. 17 – 18, l. 11.

However, counsel explained that that is "not what we have here." In this case, law enforcement used a search warrant to obtain the cell site location information for all phones connected to all towers that service the three different locations listed in the warrant. Defense counsel acknowledged that the Supreme Court in Carpenter "declined to extend the requirement of a search warrant to cell phone tower dumps" and "South Carolina has never decided whether or not a privacy interest exists in tower dump records." Nevertheless, he argued that such a privacy interest does exist and the government must obtain a search warrant before obtaining cell tower dump records. R. 18, l. 12 – 19, l. 20.

In support of his argument, counsel cited to Commonwealth v. Perry, 184 N.E.3d 745, 751 (Mass. 2022), in which the Supreme Judicial Court of Massachusetts held a search warrant was required to obtain tower dump records. R. 19, l. 21 – 20, l. 2.

Here, law enforcement obtained a search warrant, which counsel argued meant "they also felt it prudent to get a warrant." However, counsel argued the warrant was not supported by probable cause. R. 20, ll. 3-6. He asserted, "First off, the one glaring omission is site number three, Samantha Rabon's house. Nowhere in any of that probable cause does it say a word to establish why they needed to get the information from cell towers at Samantha Rabon's house. That is a complete and total lack of any probable cause showing that site." Regarding the other locations, counsel argued law enforcement did not have "any evidence, not a shred of evidence to show a magistrate and to put in a probable cause affidavit that they were going to find anything. They wanted to see what they could find, not, oh we think it's going to be here. It might be here, let's just look and see." Counsel accused the police of "going on a fishing expedition." R. 14, l. 16 – 15, l.

As far as the time period specified for each location, counsel argued law enforcement included "nothing" in the affidavit that established what, if anything, occurred during that timeframe. He asserted, "They simply say a crime occurred here, another crime occurred here. We want to look at the cell phone tower data for both [locations]. That's not probable cause." R. 16, ll. 10-21.

Counsel concluded that the search warrant was not supported by probable cause and the data law enforcement obtained as a result of the warrant should be suppressed as well as "anything that came out of this data." R. 16, l. 22 – 17, l. 5.

The assistant solicitor argued a search warrant is not required to obtain data from tower dumps. She explained that the holding in Carpenter was "narrowly tailored" and it did not address whether a warrant is required for tower dumps. She stated that law enforcement only obtained a warrant in this case because the cell phone provider required a warrant before it would release the data. Even if a warrant were required, the solicitor argued the affidavit in support of the search warrant established probable cause. R. 21, l. 11 – 25, l. 2.

In reply, defense counsel again asserted that whether a search warrant is required is a question of first impression in South Carolina. He argued a search warrant is required to obtain cell phone tower dump data "because the cell phone data that is being collected from these towers is nothing more than the same data in Carpenter only much more piecemeal." R. 32, ll. 4-14. He later continued, "[T]he state, the government is really trying to put together United States citizens' movements using many, many cell phone towers that service these cell site locations." R. 33, ll. 12-16.

The search warrant was marked as Court's Exhibit No. 1. However, the trial court refused to allow defense counsel to proffer testimony in support the motion to suppress. Counsel sought to proffer testimony from the affiant regarding whether he orally supplemented the affidavit before the magistrate and what evidence was obtained as a result of the warrant. R. 4, l. 2 – 13, l. 9.

The trial court ultimately found Appellant had no expectation of privacy in the tower dump data and, therefore, a search warrant was not required. R. 39, l. 5 – 40, l. 2.

Discussion

The trial court erred by denying Appellant's motion to suppress all evidence obtained from the tower dump received by law enforcement from Verizon Wireless in violation of

Appellant's rights under the Fourth Amendment of the United States Constitution and his right to privacy under Article 1, Section 10 of the South Carolina Constitution since the affidavit in support of the search warrant failed to establish probable cause.

Expectation of Privacy Under the Fourth Amendment

The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. "The underlying command of the Fourth Amendment is always that searches and seizures be reasonable." Wilson v. Arkansas, 514 U.S. 927, 931 (1995). Protection under the Fourth Amendment is afforded to those who have a legitimate expectation of privacy in the place searched. Rakas v. Illinois, 439 U.S. 128, 143 (1978). To demonstrate an expectation of privacy, the defendant must show he had a subjective expectation of not being discovered and the expectation was one that society recognized as reasonable. Katz v. United States, 389 U.S. 347, 351, (1967); Oliver v. United States, 466 U.S. 170, 177 (1984). The Fourth Amendment is a personal right and an individual must invoke its protections. Minnesota v. Carter, 525 U.S. 83, 88 (1998).

In United States v. Carpenter, 585 U.S. 296 (2018), law enforcement used the Stored Communications Act to obtain from Carpenter's wireless carrier historic information and data establishing the location of his cell phone for nearly one hundred and thirty days. Carpenter grew out of an arrest of four men suspected of robbing a series of Radio Shack and T-Mobile stores in Detroit. Id. at 302. One of the men confessed that the group had robbed nine different stores in Michigan and Ohio. Id. The suspect identified fifteen accomplices who had participated in the robberies and gave the FBI some of their cell phone numbers. Id. Based on that information, prosecutors applied for and received a court order under 18 U.S.C. § 2703 of

the Stored Communications Act to obtain cell phone records for Carpenter and several other suspects. Id. That statute permitted "the Government to compel the disclosure of certain telecommunications records when 'it offers specific and articulable facts showing that there are reasonable grounds to believe' that the records sought 'are relevant and material to an ongoing criminal investigation.'" Id. (quoting 18 U.S.C. § 2703(d)).

Prior to trial, Carpenter moved to suppress the cell site location information provided by the wireless carriers arguing that the government's seizure of the records violated the Fourth Amendment because they had been obtained without a warrant supported by probable cause. Id. At trial, the government presented expert testimony about the cell site location information. Id. The expert explained that each time a cell phone taps into the wireless network, the carrier logs a time stamped record of the cell site and the particular sector that were used. Id. With this information, the expert produced maps that placed Carpenter's phone near four of the charged robberies. Id. at 302-03. In the government's view, the location records settled the case since they confirmed that Carpenter was right where the robberies occurred at the exact time they occurred. Id. at 303.

The Supreme Court held Carpenter had an expectation of privacy in the record of his physical movements as captured through cell site location information. While the Supreme Court acknowledged "the fact that the individual continuously reveals his location to his wireless carrier implicates the third party principle," the Court rejected the application of the third party doctrine to historical cell site location information. Id. at 309. The Court reasoned, "Given the unique nature of the cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection." Id. Cell site location information is able to create a detailed chronicle of a person's physical presence

compiled every day, every moment over a period of several years. See Id. at 311-12. For these reasons, the Supreme Court ultimately held "that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI" and that "location information" obtained from wireless carriers is "the product of a search." Id. at 310. Accordingly, the Court concluded that gathering CSLI is a Fourth Amendment search and when police are collecting CSLI under these circumstances, the Fourth Amendment requires a search warrant supported by a judicial finding of probable cause. Id.

The Supreme Court emphasized in Carpenter that its decision was "a narrow one." It refused to "express a view on matters not before [it]," including "'tower dumps' (a download of information on all the devices that connected to a particular cell site during a particular interval)." Id. at 316. However, the rationale behind Carpenter applies to tower dumps like the ones that occurred here. The information obtained from tower dumps is "private and personal." See Commonwealth v. Perry, 184 N.E.3d 745, 759 (2022). It can reveal highly intimate and personal details of a person's life. Id. Just like targeted cell site location information obtained for a specific phone number, data obtained from tower dumps allows the government to track and reconstruct a person's past movements, "a category of information that *never* would be available through the use of traditional law enforcement tools of investigation." Id. at 760 (emphasis in original) (internal citation omitted). Consequently, like targeted cell site location information, individuals maintain a legitimate expectation of privacy in the information obtained from tower dumps and a search warrant is required under the Fourth Amendment before the government may receive the data from a wireless carrier.

In this case, investigators used the data they received from Verizon Wireless to historically track the location of Appellant's phone on the night of the murders. The data also

revealed who Appellant's phone was communicating with at the time (Teresa Martin). Appellant certainly had an expectation of privacy in the location of his phone and to whom he was communicating with. Accordingly, law enforcement was required under the Fourth Amendment to get a warrant before obtaining the tower dump data from Appellant's wireless carrier.

Expectation of Privacy Under Article I, Section 10 of the South Carolina Constitution

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. U.S. Cont. amend. IV. "In parallel with the protection of the Fourth Amendment, the South Carolina Constitution also provides a safeguard against unlawful searches and seizures." State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001) (citing S.C. Cont. art. I, § 10). "In addition to language which mirrors the Fourth Amendment, S.C. Cont. art. 1, § 10 contains an express right to privacy: The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and *unreasonable invasions of privacy* shall not be violated." Id. at 644, 541 S.E.2d at 840-841 (emphasis in original).

"The relationship between the two constitutions is significant because 'state courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution.'" Id. at 643, 541 S.E.2d at 840 (quoting State v. Easler, 327 S.C. 121, 131 n. 13, 489 S.E.2d 617, 625 n. 13 (1997)). "Therefore, state courts can develop state law to provide their citizens with a second layer of constitutional rights." Id. "This relationship is often described as a recognition that the federal Constitution sets the floor for individual rights while the state constitution established the ceiling." Id.

In State v. Forrester, our Supreme Court concluded, "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." Id. at 645, 541 S.E.2d at 841. "By articulating a specific prohibition against 'unreasonable invasions of privacy,' the people of South Carolina have indicated that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution." State v. Weaver, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007) (citing Forrester, 343 S.C. at 644-645, 541 S.E.2d at 841).

Several cases in South Carolina discuss the right to privacy contained in Article I, § 10 of our state constitution. The most comprehensive discussions of the right to privacy are contained in State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001), State v. Weaver, 374 S.C. 313, 649 S.E.2d 479, (2007), and State v. Counts, 413 S.C. 153, 776 S.E.2d 59 (2015). See Counts, 413 S.C. at 167, 776 S.E.2d at 67.

In Forrester, the defendant was approached by law enforcement for questioning after an officer observed her exhibiting suspicious behavior at a local train station. According to the officer, he identified himself to Forrester who agreed to let him search her luggage. Because Forrester was clutching her purse tightly, the officer asked to search the purse. Without surrendering possession, Forrester opened the purse to allow the officer to look inside. The officer took the purse and tore open the lining at which time he found crack cocaine. Forrester, 343 S.C. at 640-641, 541 S.E.2d at 839. On appeal, Forrester argued she had not given the officer consent to search her purse, and thus, the crack cocaine was discovered in violation of the right to privacy provision found in Article I, § 10 of our state constitution. She also argued that the officer's failure to inform her of her right to refuse consent to a search of her purse invalidated the search. Id. at 641, 541 S.E.2d at 839.

Our Supreme Court reversed Forrester's conviction after finding the officer "exceeded the scope of Forrester's consent when he proceeded beyond visual inspection of the purse granted by Forrester to an intense physical examination of the purse." Id. at 648, 541 S.E.2d at 843. The Court emphasized that "[u]nder our state constitution, suspects are free to limit the scope of the searches to which they consent." Id. However, the Court found the state right to privacy does not require informed consent prior to government searches. Forrester, 343 S.C. at 647-648, 541 S.E.2d at 842-843. Specifically, the Court stated, "[W]hile our state constitution may provide a higher level of protection in the search and seizure context, it does not go so far as to require informed consent prior to government searches." Id.

Six years later, in State v. Weaver, our Supreme Court again acknowledged the higher level of privacy protection afforded by our state constitution. Weaver was convicted of murder following a shooting at a nightclub. Weaver, 374 S.C. at 317, 649 S.E.2d at 480. The investigation led law enforcement to the home of Weaver's cousin where they discovered the vehicle that had been driven by Weaver parked in the backyard. Id. at 317, 649 S.E.2d at 481. According to Weaver's cousin, Weaver had recently been at the home and asked for a change of clothes, some bleach, and a garbage bag. Weaver then left the home. Id. Upon finding the vehicle driven by Weaver, the investigating officer opened the door and discovered the inside of the vehicle was wet and smelled of bleach. Id. at 317-318, 649 S.E.2d at 481. Based on this evidence, the officers impounded the vehicle and processed it. They found blood in the vehicle that matched that of the shooting victim. Id. at 318, 649 S.E.2d at 481. On appeal, Weaver argued the evidence found in the vehicle should have been suppressed as it was the product of an impermissible warrantless search. Id.

The Court rejected Weaver's argument, holding the warrantless search met the automobile exception to the Fourth Amendment. Id. at 319-321, 649 S.E.2d at 482. However, the Court also analyzed whether the search and seizure violated Weaver's right to privacy pursuant to the South Carolina Constitution. Id. at 321, 649 S.E.2d at 483. Citing Forrester, the Court noted the South Carolina Constitution affords a higher level of privacy protection than the Fourth Amendment. Id. Nevertheless, the Court held the privacy provision did not require a warrant before the search and seizure of a vehicle located in the backyard of a private residence. Id. at 322, 649 S.E.2d at 483. In so holding, the Court explained that "[t]he focus of the state constitution is on whether the invasion of privacy is reasonable, regardless of the person's expectation of privacy in the vehicle to be searched. Once the officers have probable cause to search a vehicle, the state constitution's requirement that the invasion of one's privacy be reasonable will be met." Id.

However, as later highlighted by our Supreme Court in State v. Counts, former Chief Justice Pleicones, in a concurring opinion in Weaver, emphasized that "[o]ur state constitution's provision protecting unreasonable invasions of privacy necessarily requires some analysis of the privacy interests involved when a warrantless seizure is made on private property." Weaver, 374 S.C. at 326, 649 S.E.2d at 485; See Counts, 413 S.C. at 170, 776 S.E.2d at 68-69. Under the facts in Weaver, Justice Pleicones found no state constitutional violation because Weaver was not the owner of the vehicle that was seized and the vehicle was not parked at Weaver's residence. Counts, 413 S.C. at 170, 776 S.E.2d at 69 (citing Weaver, 374 S.C. at 326, 649 S.E.2d at 485).

Most recently, in State v. Counts, our Supreme Court again reaffirmed the higher level of privacy protection afforded by our state constitution. In Counts, the police "received two

separate anonymous tips from citizens who alleged that Counts was selling drugs. These tips also identified vehicles driven by Counts, his phone number, and his use of multiple identities." 413 S.C. at 173, 776 S.E.2d at 70. The police also "confirmed that Counts had two false identification cards on record and had prior drug convictions." Id. Based on this information, officers conducted a "knock and talk" at Count's residence. When Counts opened the door, the officers "immediately smelled 'the strong odor of marijuana'" and noticed "a 'rolled blunt' on the coffee table in the living room." Id. at 158, 776 S.E.2d at 62. One of the officers then observed a silver automatic gun in Counts' hand. The officers drew their guns and approached Counts who dropped his gun and was immediately detained. Id. Law enforcement then conducted a protective sweep of the residence during which they found a bag of marijuana and a scale in plain view. Id. A search warrant was later obtained. The search revealed approximately 800 grams of marijuana, a large sum of cash, and other incriminating evidence. Id. at 158-159.

Counts moved to suppress the evidence arguing law enforcement's search of his home violated the Fourth Amendment of the United States Constitution and Article I, § 10 of the South Carolina Constitution. Id. at 157, 776 S.E.2d at 61. Counts further asserted that, pursuant to the right to privacy provision in our state constitution, law enforcement must have reasonable suspicion before they conduct a "knock and talk" at a person's residence. Id. at 161-162, 776 S.E.2d at 64. Our Supreme Court agreed. Recognizing that "the privacy interests in one's home are the most sacrosanct," the Court held "that law enforcement must have reasonable suspicion of illegal activity at a targeted residence prior to approaching the residence and knocking on the door." Id. at 172, 776 S.E.2d at 69-70. The Court noted, "Otherwise, we foresee the potential for abuse if law enforcement targets a neighborhood and indiscriminately knocks on doors with hope of discovering contraband without a search warrant." Id.

Applying this rule to the facts presented in Counts, the Supreme Court held law enforcement had reasonable suspicion of illegal activity prior to conducting the "knock and talk" at Counts' residence. Id. at 173, 776 S.E.2d at 70. The Court held the specificity of the anonymous tips and the corroboration by law enforcement of the tips indicated "the officers were not randomly knocking on Counts' door but had reasonable suspicion to support their decision to approach Counts' residence and conduct the 'knock and talk.'" Id.

As demonstrated by our Supreme Court's opinions in Forrester, Weaver, and Counts, the Court has sought to guard the broader state constitutional right to privacy, but still give credence to the government's interest in conducting legitimate searches.

Significantly, in Forrester, our Supreme Court explained, "[T]he drafters of our state constitution's right to privacy provision were principally concerned with the emergence of new electronic technologies that increased the government's ability to conduct searches." Forrester, 343 S.C. at 647, 541 S.E.2d at 842.[2] Without question, South Carolinians consider cell phone records, including call detail records and historical cell site location information, maintained by wireless carriers to be private information. Obtaining such information without a warrant is an invasion of that privacy.

The ability of law enforcement to obtain phone records, including historical cell site location information, from tower dumps falls squarely within our state constitution's prohibition against unreasonable invasions of privacy and the concerns of the drafters regarding new technologies used by the government to conduct searches of its citizens. Therefore, Appellant

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[2] In her dissent in State v. Dykes, Justice Hearn provided an eloquent analysis and assessment of the growing threat of technological advances to individual liberty. She explained that "the very concept of what we as citizens view as private is called into question by technology which facilitates unprecedented oversight of our lives." State v. Dykes, 403 S.C. 499, 511-522, 744 S.E.2d 505, 511-517 (2013) (Hearn, J. dissenting).

had an expectation of privacy in the tower dump records based upon this state's protection of individuals against governmental invasions of privacy.

Affidavit in Support of Search Warrant Was Not Supported by Probable Cause

Appellant's rights under the Fourth Amendment and Article 1, Section 10 of the South Carolina Constitution were violated because the affidavit in support of the search warrant used to obtain the tower dump data from Verizon Wireless was not supported by probable cause.

"Generally, a warrantless search is *per se* unreasonable and violates the Fourth Amendment prohibition against unreasonable searches and seizures." Weaver, 374 S.C. at 319, 649 S.E.2d at 482. The United States Constitution and the South Carolina Constitution provide that a search warrant may not issue except upon probable cause. U.S. Const. amend IV; S.C. Const. art. I, §10.

"The duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed." State v. Baccus, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006). In Illinois v. Gates, 462 U.S. 213, 238 (1983), the United States Supreme Court adopted a "totality-of-the-circumstances" test for probable cause determinations: "The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Baccus, 367 S.C. at 50, 625 S.E.2d at 221.

"In South Carolina, search warrants may be issued 'only upon affidavit sworn to before the magistrate . . . establishing the grounds for the warrant.'" Id. (quoting S.C. Code Ann. § 17-13-140); See State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987). "The affidavit must set

forth particular facts and circumstances underlying the existence of probable cause to allow the magistrate to make an independent evaluation of the matter." Id. at 50-51, 625 S.E.2d at 221 (citing Franks v. Delaware, 438 U.S. 154 (1978)).

In this case, as defense counsel emphasized at trial, the affidavit in support of the search warrant wholly failed to mention any connection between Samantha Rabon's residence, which was the third address listed on the warrant, to the investigation. Nowhere in the affidavit did the affiant establish why law enforcement sought tower dump data from the towers that serviced Samantha Rabon's house. Regarding the other two locations (where the vehicle was located and the decedents' residence), the affidavit failed to establish why law enforcement believed evidence of the crime would be found in the tower dump data. As defense counsel argued, the police were simply "going on a fishing expedition." See R. 14, l. 16 – 15, l. As far as the time period specified for each location, the affidavit failed to establish what, if anything, occurred during that timeframe or why law enforcement believed the time period was relevant. The affidavit simply stated a crime occurred at the specified locations. Given these circumstances, the affidavit failed to provide the magistrate with a substantial basis upon which to conclude that probable cause existed.

The United States Supreme Court created the exclusionary rule to safeguard Fourth Amendment rights. United States v. Calandra, 414 U.S. 338 (1974). The exclusionary rule prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure under the fruits of the poisonous tree doctrine. See Wong Sun v. United States, 371 U.S. 471, 484 (1963); See also State v. Nelson, 336 S.C. 186, 519 S.E.2d 786 (1999) (finding evidence is not admissible under the "fruit of the poisonous tree" doctrine when the police exploit an unlawful search to seize evidence that would not have otherwise come to light). The Fourteenth

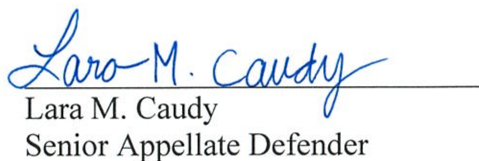
Amendment of the United States Constitution incorporates the rule excluding evidence obtained through an illegal search or seizure and makes it applicable to the states. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

Here, the affidavit in support of the search warrant failed to establish probable cause. Consequently, any evidence obtained as a result of the warrant should have been suppressed. Respectfully, this Court should hold the trial court erred, reverse Appellant's convictions, and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,



Lara M. Caudy
Senior Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of October, 2024.

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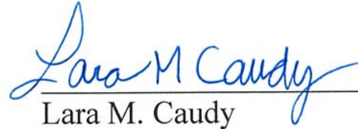
CERTIFICATE OF COUNSEL

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."

This 24th day of October, 2024.



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable G.D. Morgan, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RANDY DEAN GRAINGER,

APPELLANT

APPELLATE CASE NO. 2023-000598

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above-referenced case has been served upon W. Joseph Maye, Esquire, at his primary e-mail address listed in the Attorney Information System (AIS), this 24th day of October, 2024.

Lara M. Caudy
Senior Appellate Defender

ATTORNEY FOR APPELLANT