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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
The Honorable G.D. Morgan, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

v.

RANDY GRAINGER,

APPELLANT.

Appellate Case No. 2023-000598

FINAL BRIEF OF RESPONDENT

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APPELLANT'S ISSUE PRESENTED

I.

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?

RESPONDENT'S ISSUE PRESENTED

I.

Was the trial court within its discretion to admit the cell phone tower dump evidence in light of the fact that there is no state or federal constitutional law which establishes a protected privacy right to tower dump data, and where officers nevertheless obtained a valid search warrant supported by probable cause in this case in the process of complying with a private corporation's protocol for submitting a records request?

STATEMENT OF THE CASE

Following the deaths of victims Robert Ford, Jr. (hereinafter "Robert") and Robbie Ford (hereinafter "Robbie"), Randy Dean Grainger (hereinafter "Appellant") was indicted on two counts of murder, two counts of criminal conspiracy, third degree arson, and possession of a weapon during the commission of a violent crime. (2021-GS-26-04427; 04428; 04429; 04430; 04440; and 04441). (R. p. 493). Appellant proceeded to a jury trial before the Honorable Judge G.D. Morgan, Jr. on April 3, 2023 through April 6, 2023. Appellant was represented by attorneys Jonathan M. Miller, Esq. and Martin D. Spratlin, Esq. The State was represented by Senior Assistant Solicitor Mary Ellen Walter of the 15th Circuit. (R. p. 1).

At the conclusion of the trial Appellant was found guilty on all charges. (R. p. 493). Judge Morgan sentenced Appellant to consecutive life without parole sentences for the two murder convictions, concurrent 5-year sentences for the two criminal conspiracy convictions, and in light of his LWOP sentence, no sentencing for the possession of a firearm during the commission of a violent crime. (R. p. 498). This appeal now follows.

STATEMENT OF FACTS

The Crime

Samantha Rabon (hereinafter "Samantha") is the daughter of her father Robert, and is Robbie's step-sister. With a desire to claim her father's inheritance as his sole remaining child, she conspired with Appellant to kill both Robert and Robbie.

On August 18, 2018, Sergeant Steven Grainger (no relation to Appellant) noticed what appeared to be an abandoned vehicle in a field off Cookes Circle, in Horry County. He investigated further and found a 2005 Ford Escape smoldering from an attempted burning. He ran the plates for the vehicle, determined the owner's address, and had another officer perform an "attempt to

locate" wellness check of the home and the car's owner. (R. p. 57-62). Sergent Tomlin responded. Upon his arrival at the home he found both Robert and Robbie murdered by gunshots to their heads just outside their home at 4591 Highway 19, in Conway, South Carolina. (R. p. 68-74).

The Investigation

Both Robert and Robbie were found with gunshot wounds to the head, and while their resulting autopsies provided fired projectiles consistent with .38 or .357 ammunition, no shell casings were recovered and no matching murder weapon was ever found. (R. p. 88-93; 291). A canvas of the neighbors revealed that Joseph Holliday, who lived near victim's residence, heard gunshots and screaming on August 17, 2018 at around 8:30 or 8:45 pm while on his porch. He informed law enforcement that hunting and recreational shooting in the area was not uncommon, and as a result he did not become alarmed at the time. (R. p. 147-149). Neither victim had ID on their person, but Robbie's pockets appeared to have been rifled through and turned inside out. (R. p. 88; 90). To that end, the keys to Robbie's car were not found on Robbie, but were found in the ignition of his abandoned and partially burned vehicle approximately 10 miles away. (R. p. 130; 421). The State's expert opined that the car's interior had been set ablaze with an accelerant, but with the windows and doors closed, the fire extinguished itself for lack of oxygen. (R. p. 186; 193; 131-132).

The crime scene around and inside the car provided critical DNA evidence. Cigarette butts were found discarded just outside of the driver's side door in the field and a "skull cap" was found inside the vehicle. (R. p. 63; 99-100). DNA analysis was performed and a DNA profile suitable for comparison was obtained from each of these items, but at the time, law enforcement did not have a database match to allow for identification. Law enforcement therefore sought to conduct a

genetic genealogy investigation through the Ancestry DNA company to develop a list of potential suspects. (R. p. 330; 365-366).

Appellant was one of the suspects that could feasibly match the DNA profile. Law enforcement began to conduct surveillance of Appellant in the hope of recovering some abandoned DNA for comparison. Officer Christopher Edwards testified that while observing Appellant driving on Hwy 66, Appellant discarded a cigarette out the door of his Suburban. Officer Edwards responded by stopping traffic and securing the cigarette butt for collection. (R. p. 365-366). This alternate standard was then provided for DNA analysis. In comparison to the DNA profile obtained from the three cigarette butts found at the crime scene, the State's experts concluded that the likelihood ratios, respectively, show that it was 180 septillion, 170 septillion, and 180 septillion times more likely that Appellant contributed to the DNA profiles of the cigarette butts, than would an unknown individual. (R. p. 349-352). When compared to the DNA analysis of the skull cap, there was a likelihood ratio indicating that it was 10 septillion times more likely that Appellant contributed to the DNA profile, than would an unknown individual. [1] (R. p. 355).

The State also presented the testimony of Teresa Martin, a codefendant who pled guilty to a reduced charge of accessory after the fact, in exchange for testifying on behalf of the State. (R. 249). Ms. Martin testified that she was the on-again-off-again girlfriend of Appellant during the time of the crimes, is the cousin of Sheila Ford Burris (Robert's ex-wife), and has known Samantha Rabon since Samantha was a toddler. (R. p. 232-234). Ms. Martin testified that she was present

[1] The DNA evidence collected demonstrated a single source for DNA contribution. (R. p. 326-328). The State's expert noted that they generally do not do comparisons of DNA profiles between two different pieces of crime scene evidence. However, she noted that with visual comparison the alleles from the profiles of each collected item appeared to match. (R. p. 329). In light of the comparison to the same known standard, they clearly do match. Prior to the conclusion of the DNA analysis, Appellant was arrested and a known standard was also obtained via buccal swab. (R. p. 342-343).

for the beginnings of a conversation between Samantha and Appellant that took place on the front porch of Sheila's home. She heard Samantha tell Appellant that she had a job for him; she needed him to "take care of her daddy and her brother and it had to be done before he went back to school so she could inherit everything." (R. p. 237). She testified that she understood Samantha's proposition to be one of hiring Appellant to "get rid of" her father. Upon hearing this, she left the porch and went inside. Ms. Martin testified that Appellant did not give any noticeable reaction to Samantha's comments prior to her leaving. (R. p. 237-238).

On the night of victims' murders, Ms. Martin agreed to give Appellant a ride to the victims' home around 5:30pm. She testified that he was wearing "black pants, black t-shirt with a pocket on it, and a black toboggan." She also noted that he had a closed "tool bag" with him, and that Appellant said he needed to fix the washer and dryer. Ms. Martin confessed that she believed it was "coded speech", and that when she dropped Appellant off, she knew what he was preparing to do. She even testified that she texted a coded message of her own to Samantha: "I'm home alone." She did this at Samantha's request to let her know when she was back home from dropping Appellant off. (R. p. 240-241).

Surveillance footage shows victim's car passing by Allbrook Grocery and Grill, at 9:13pm, which was approximately 6 miles away from victims' home. The 7200 Cookes Circle location where the car was dumped and burned, is approximately 4 miles further in the same direction. (R. p. 421-422). Ms. Martin testified that Appellant contacted her around 9:30 or 10:00pm, asking if she could come pick him up off the of the roadside on Hwy 917. She testified that she agreed to do so, but had to call him back because she could not find him in the rain at dark. When she picked him up, he was no longer wearing the toboggan she had seen him in earlier. (R. p. 241-242). Though Appellant initially denied doing the job, Ms. Martin later had a conversation with

Appellant where he was angry and wanted to go to Sheila's home. Ms. Martin asked why he was angry with Sheila and Appellant responded: "I'm not mad[] with her. . . it's her f'ing daughter. . . it wasn't no washer dryer, she paid me to take care of her daddy and brother." (R. p. 243, lines 5-14). He explained to Ms. Martin that "she told him if he would do it, she would pay him $20,000." To Ms. Martin's knowledge, Appellant never received any money for his actions. (R. p. 243, lines 15-20).

The State then offered corroborative evidence in the form of records from the cell phone tower dumps they received from Verizon and AT&T[2], as well as from cell phone extractions taken from the phones themselves, pursuant to warrants. The State's expert, Karl Kangas, testified that the "shelf life" for tower dump data can vary, but is usually around one year. (R. p. 416). Texts demonstrate that the victims were at CW wings until 8:33 pm and were communicating with Samantha about their whereabouts. Mr. Kangas confirmed that Samantha's phone received a text from Ms. Martin stating "I'm at home." (R. p. 418-421). Mr. Kangas testified that a voice call was made to Ms. Martin from the phone associated with Appellant at 9:56pm on August 17, 2018, and it used the Verizon Tower that is Northeast of 7200 Cookes Circle.[3] (R. p. 422, lines 14-15; 422-423). Shortly after, another call between these two phones was made at 10:15pm. (R. p. 424). These calls corroborate the testimony from Ms. Martin indicating an initial call asking to be picked up, and a subsequent call when she had difficulty finding him.

ISSUE AS IT WAS PRESENTED AT TRIAL

Appellant argued to the court during pretrial motions that he possessed a 4th amendment and state constitutional right to privacy concerning his cellular data, and that the search warrant

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[2] The State ultimately admitted AT&T data dump records corresponding to Ms. Teresa Martin's phone use.

[3] There was some confusion regarding whether it was an incoming or outgoing call.

used to obtain Verizon Wireless's[4] tower dump data from the towers servicing three locations did not establish probable cause. He therefore argued that the information obtained from those records should be suppressed. Appellant further argued that any evidence that was later obtained through the use of the tower dump data should likewise be suppressed as fruit of the poisonous tree. (R. p. 4). The three locations in question for which corresponding tower dumps were requested included: 7200 Cooke Circle, between 9pm and 12am (where the car was left to burn); 4591 Highway 19, between 8am and 11pm, (where victims were found murdered); and 2532 Magnolia Highway, between 7pm and 12am (Samantha Rabon's residence). (R. p. 13; 16).

Defense counsel read the pertinent portion of the search warrant into the record, stating:

> On August 18th, 2018 police began an investigation into a homicide that occurred at 4591 Highway 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 presumed that the suspect stole the vehicle after the fact. The vehicle was located approximately 100 yards from the intersection of Cooke Circle and Highway 19 in the Nichols section of Horry County. The vehicle had been abandoned and set on fire. It is my belief that a search of cell phone towers in the area of both crimes will assist with identifying individuals who were in these same areas at the time of both the homicide and the vehicle fire, which based on the distance between the crimes will be very suspicious.

(R. p. 14-15). Appellant first asserted that the tower dump associated with Samantha's residence was entirely lacking in probable cause, as the warrant does not mention any basis for which it was sought. He continued by arguing that the justification for the search warrant that was provided for the other two locations was insufficient such that the locations of crimes does not establish

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[4] The State ultimately had tower dump records from Verizon Wireless, AT&T, and T-Mobile. However, Appellant noted at the time of pretrial motion hearing that the solicitor was intending to introduce only records from Verizon Wireless, and therefore narrowed the hearing to a question of admissibility of those records specifically. (R. p. 4). While AT&T records were also introduced during trial, they corresponded to Ms. Martin's records, not Appellant's.

probable cause of finding evidence related to those crimes in the tower dump. Appellant argued that the suspicious nature of a potentially correlated phone number at both locations fails to establish probable cause, and that the effort was nothing more than a fishing expedition. (R. p. 14-16).

While Appellant insisted that the tower dump data involved a protected privacy interest, he conceded that the issue is unsettled under South Carolina jurisprudence. (R. p. 18). In truth it is not just unsettled, but unvisited in any published case. (R. p. 32). He further conceded that *U.S v. Carpenter*, which was handed down shortly before this crime was committed, *explicitly excludes tower dumps* from its holding. Nevertheless, Appellant argued that CSLI (taken from a specific subscriber) and tower dumps are the same information that allows law enforcement to reconstruct complicated movements of a suspect. In reliance upon the Massachusetts case of *Commonwealth v. Perry*, Appellant argued that the court should extend the constitutional privacy protections contemplated by *Carpenter* and find the existing search warrant invalid. (R. p. 18-19).

The State responded with a multifaceted argument for denying the motion to suppress. First, in referencing *Carpenter*, the State asserted that under both state and federal law there is no search warrant requirement established for seeking tower dump data. He also explained the distinguishing facts of *Carpenter* that led to a search warrant requirement. Specifically, the court order led to law enforcement receiving 127 days of records and nearly 13,000 data points specific to defendant Carpenter. (R. p. 21-22). He also noted that the type of information gathered was different, wherein GPS information provides a timestamped intimate window into the person's life, such as their visits to houses of worship, hospitals, doctors, or lawyers' offices. In contrast, investigators seeking tower dump data pertaining to victims' murder sought only a few hours of

tower/sector data servicing each location, and received *only the cellphone numbers*[5] which utilized the towers in question – subscriber information, text messages, and GPS data were provided. In the case at hand, the extent of any one individual's data was drastically reduced both in quantity and in type in comparison to *Carpenter*. (R. p. 22-23). In opposition to Appellant's supposed concerns with fruit of the poisonous tree, the State characterized the tower dump as an investigative tool that only became relevant *after* officers were able to develop a focus on a specific suspect in which to compare the data. (R. p. 70). Surprisingly, Appellant's own arguments conceded this fact. (R. p. 20, line 20 through p. 21, line 6; p. 34-35). The State thoroughly informed the court on how Appellant became a suspect in this case, not from tower dump records, but from analysis of trace DNA left on multiple pieces of evidence at the scene. (R. p. 2-3).

The State also challenged Appellant's assertion that law enforcement sought a search warrant out of concern that they were violating privacy rights. Instead, the trial court was made aware that cell service companies require a documented request for data, and a search warrant is the only means of satisfying the servicer's demand. Subpoena power does not exist in the absence of an existing case, leaving search warrants the only standard form for the request. To that end, law enforcement's acquisition of a court issued search warrant supported by probable cause was satisfying a private company protocol, not a state or federal law. (R. p. 23).

Next, the State argued that the search warrant was valid and established probable cause to receive the data in question, even in the absence of a warrant requirement. The burden for establishing probable cause is not a difficult one to meet, especially considering the "pervasiveness of cell phones" in today's society. The State argued that probable cause was established given the

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[5] Appellant raised concern that more than cell phone numbers was requested. While there was dispute as to whether Verizon ever provides subscriber information or text messages by way of a tower dump, such information was ultimately not provided here. (R. p. 37-38).

fact that the inquiry could be narrowed to the areas in question, the high likelihood that the suspect owned and operated a cell phone over the course of committing the crimes, and the probative value of evidence would be enhanced by cross comparing the data between two towers as they correspond to the two crime scenes. (R. p. 24). Without conceding the absence of a law requiring a search warrant, the State argued that the tower dump related to Samantha's residence (which lacked the clear indication of a crime being committed) would not be fatal to the entire search warrant, and noted that if the trial court were to find a search warrant required but probable cause lacking to that specific tower dump, the appropriate remedy would be to simply preclude the State from using data from that tower.[6] (R. p. 25-26).

Ultimately, the trial court concluded that a search warrant was not required for purposes of obtaining the tower dump data and allowed the State to admit the evidence in question. (R. p. 39). Notwithstanding that controlling determination, the trial court also noted that it found the warrant sufficient as it pertained to the two crime scenes referenced. (R. p. 26).

STANDARD OF REVIEW

When an Appellate Court decides an appeal from a criminal conviction, it's power "is limited to correcting errors of law." *State v. Beaty*, 423 S.C. 26, 41, 813 S.E.2d 502, 510 (2018). "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. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 57–58 (2011) (quoting *State v. Williams*, 386 S.C. 503, 509, 690 S.E.2d 62, 65 (2010)). "An abuse of discretion occurs when the trial court's ruling is based on an error of

[6] Clarification is provided to the court that there is an error in Officer Dudley's report (which was not offered into evidence) which attributes one of calls between Appellant and Ms. Martin to the towers servicing Samantha's residence. It instead utilized the towers that service 7200 Cookes Circle where the vehicle was left on fire. (R. p. 29).

law." *Id.*, (quoting *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000)). To warrant reversal based on the wrongful admission of evidence, the complaining party must prove resulting prejudice. *Id.* In considering the proper issuance of a search warrant "the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis' for ... conclud[ing] that probable cause existed." *State v. Keith*, 356 S.C. 219, 223, 588 S.E.2d 145, 147 (Ct. App. 2003) (quoting *State v. Weston*, 329 S.C. 287, 291, 494 S.E.2d 801, 803 (1997). "This review, like the determination by the magistrate, is governed by the 'totality of the circumstances' test." *Id.*, (quoting *State v. King*, 349 S.C. 142, 148, 561 S.E.2d 640, 643 (Ct.App.2002). On review, great deference should be given to a magistrate's determination of probable cause. *Id.*

"Most errors that occur during trial, including those that violate a defendant's constitutional rights, are trial errors that are subject to harmless error analysis. *State v. Jenkins*, 412 S.C. 643, 651, 773 S.E.2d 906, 909 (2015)." "Harmless error analyses are fact-intensive inquiries and are not governed by a definite set of rules." *Id.* An error is considered harmless when it could not have reasonably affected the result of the trial. *State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012).

ARGUMENTS

The trial court was correct to find no protected privacy interest establishing a warrant requirement to obtain tower dump data. There is no controlling authority establishing the privacy right Appellant has sought to assert. Our state jurisprudence is silent to the issue and *Carpenter* addresses large scale CSLI data *specific to the subscriber*, and *purposefully* excludes tower dump data from its holding. CSLI can, and in the case of *Carpenter*, did provide to law enforcement "a detailed chronicle of a person's physical presence" over an extended period of time. But, in contrast, the tower dump in this case provided only two snapshots in time of the presence of

Appellant's cell phone in the general area of the crime scenes during the few hours timeframe the crimes were committed. During that time, they were not even aware that it was Appellant's cell phone; further investigation was needed to develop a suspect and connect that suspect to these records. This was a matter of preservation of evidence, not case building against Appellant, and certainly not an intimate window into the privacies of his life. In the total absence of any controlling authority which would prohibit the tower dump evidence, and in light of the circumstances of the evidence presented, the trial court was wholly within its discretion to deny Appellant's motion to suppress.

Carpenter's relevance to the case at hand is limited to two points: 1) the fact that its holding explicitly instructs that the imposed search warrant requirement for CSLI *does not extended* to tower dump data, and 2) to serve as a juxtaposition for why the Court narrowed its holding in the first place. The Supreme Court distinguished between the requested seven-day span of CSLI and tower dump data in limiting the scope of their ruling, and though they did not elaborate, the practical reasons for such are clear. At the very outset of the opinion, the Court frames the question of "whether the Government conducts a search under the Fourth Amendment when it accesses historical cell phone records *that provide a comprehensive chronicle of the user's past movements*." *Id.*, 585 U.S. 296, 300, 138 S. Ct. 2206, 2211, 201 L. Ed. 2d 507 (2018) (emphasis added). The vast scope of the information, and its ability to provide law enforcement a detailed ledger of all of the suspect's on-goings, was the prevailing theme behind why the Court found a constitutionally privacy right. To put it simply, when the government obtains a week or more of an individual's data that allows "near perfect surveillance" and catalogs "an all-encompassing record of the holder's whereabouts," the privacy right attaches and a warrant is needed to invade that privacy for purposes of obtaining admissible evidence. (*Id.*, at 310-12, n.3; *State v. Carter*,

438 S.C. 463, 472, 884 S.E.2d 195, 199 (Ct. App. 2022), reh'g denied (Mar. 22, 2023), cert. granted (Jan. 9, 2024) (citing *Carpenter's* holding as finding a privacy interest in the request of seven days of CSLI).

But the tower dump data in Appellant's case falls staggeringly short of such a threshold. Not only does the State limit its timeframe to, at most, a five-hour period of a single evening (the timeframe is only three hours for two of the three locations), the tower dump does not provide a level of detail about Appellant's locations and movements that would offend the sensitive privacy concerns expressed by the Court. As was argued to the trial court, subscriber information, GPS, and text message were not included in the tower dump. (R. p. 22-23; 37). The data only provided law enforcement with the tower, sector, and azimuth data for two phone call records of Appellant taking place at 9:56pm and 10:15pm on August 17, 2018. In providing only one contacted phone number and confirming Appellant's presence in the general area of victim's burned out car at the time the car was believed to have been stolen, the information does not provide an intimate window to look into the life of Appellant. Nor would the limited nature of tower dump data for such a short period of time ever rise to such. As is conceded by Appellant at trial, the tower dump data was of such limited detail and utility that it sat unused for two years until other investigative efforts developed a suspect that the records could simply be cross-referenced with.

Carpenter is not controlling because it does not create a protected privacy interest in tower dump data requests. Similarly, Appellant's reliance upon *Commonwealth v. Perry* is likewise not controlling authority, and upon closer inspection is not even persuasive for purposes of Appellant's argument. The court in *Perry* noted that its finding of a protected privacy interest was based, not upon the inherent nature of tower dump data, but upon a mosaic theory of what that data tended to show when viewed in the aggregate. The court set forth the following:

> The aggregation principle we used in *Augustine I* developed into what is now known as the mosaic theory. See *Commonwealth v. McCarthy*, 484 Mass. 493, 503, 142 N.E.3d 1090 (2020). "The mosaic theory requires that we consider the governmental action as a whole and evaluate the collected data when aggregated." *Henley*, 488 Mass. at 109, 171 N.E.3d 1085. Thus, rather than "asking if a particular act is a search, the mosaic theory asks whether a series of acts that [may not be] searches in isolation amount to a search when considered as a group." Kerr, The Mosaic Theory of the Fourth Amendment, 111 Mich. L. Rev. 311, 320 (2012). Because "the whole reveals far more than the sum of the parts," a series of acts may be a search even where each step in isolation is not. In determining whether a series of acts constitutes a search under the mosaic theory, courts have considered "whether the surveillance was so targeted and extensive that the data it generated, in the aggregate, exposed otherwise unknowable details of a person's life." *Commonwealth v. Mora*, 485 Mass. 360, 373, 150 N.E.3d 297 (2020).

Commonwealth v. Perry, 489 Mass. 436, 444–45, 184 N.E.3d 745, 757 (2022). No such theory or method of analysis has been developed in South Carolina jurisprudence. However, even if the state were to adopt this theory, its application to the facts of this case would substantially disfavor Appellant's assertion of a protected privacy interest. Law enforcement in *Perry* sought seven tower dumps over the course of seven different days, throughout the course of a month. Appellant in contrast has 5 hours, over one single evening, which produced extremely limited data. The single case relied upon by Appellant at trial and in brief, would fail to afford him any constitutionally protected privacy interest for the tower dump data obtained by law enforcement. The trial court was correct to not be swayed by *Perry*.

Next, as was argued at trial, even if a warrant requirement existed to protect a privacy interest in tower dump records, the requirement was satisfied in this case. "A warrant is supported by probable cause if, given the totality of the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *State v. Kinloch*, 410 S.C. 612, 617, 767 S.E.2d 153, 155 (2014). Our Supreme Court has held that this is

not a high standard to satisfy. *State v. Jones*, 435 S.C. 138, 145, 866 S.E.2d 558, 562 (2021). In review of a magistrate's finding of probable cause, the reviewing court must simply confirm that a "substantial basis" for the finding of probable cause existed and great deference should be given to the magistrate's finding. *State v. Keith*, 356 S.C. 219, 223, 588 S.E.2d 145, 147 (Ct. App. 2003). "If no supplemental testimony is taken, a magistrate's probable cause determination is limited to the four corners of the search warrant affidavit." *Kinloch*, 767 S.E.2d at 155–56 (2014).

The record demonstrates that the consideration of probable cause in this case was limited to four corners of the warrant. Applying the substantial basis standard to the information that was provided to the magistrate, there was easily "a fair probability that . . . evidence of a crime" would be found within the tower dump records that correspond to the locations of the discovered crime scenes. Specifically, there is a fair probability that the culprit responsible for going to victims' home, murdering both victims outside their house, stealing victim's car, driving it to a separate location, and leaving it to burn in a field would use his cell phone over the course of these actions and that the tower records would provide a unintrusive lead as to who that suspect might be. Not only was there a fair probability of this, the prevalence of cell phone use in the United States makes it a near certainty.

Though the trial court's primary ruling was that a warrant was not required, it did articulate to the parties that it believed the probable cause standard had been met. (R. p. 26). In consideration of the totality of the circumstances, that finding was correct, and under appellate review the substantial basis for the finding is clear. Additionally, even if a warrant were to be required despite any law setting forth the requirement, and even if a reviewing court were to find that probable cause is lacking therefrom despite the evidence of criminality and correlation to the evidence sought, the warrant was obtained in good faith and was not so lacking in indicia of probable cause

that the law enforcement officers' belief in its validity was unreasonable. It should therefore be upheld, alternatively, under the good faith exception rule. *United States v. Leon*, 468 U.S. 897, 919–20, 104 S.Ct. 3405, 3419, 82 L.Ed.2d 677, 696–97 (1984). In addition to the good faith exception rule, the record also reveals that the request for the tower dump records would be protected under the imminent destruction of evidence exception. The record demonstrates that generally speaking, tower dump records are only maintained for approximately one year. However, the development of a likely suspect in this case (such that *more* information could have been provided within the warrant affidavit) took a considerable amount of time through forensic analysis compared to Ancestry.com DNA databases. Requesting the tower dump records was ultimately bolstered as a simple matter of evidence preservation. The record demonstrates that law enforcement were not able to return back to the records for analysis purposes until two years after the crime, and had they waited until that time to request the tower dump data, it would not have been available.

Lastly, any error in the acquisition of the tower dump records would be harmless in light of the evidence presented at trial. As is conceded by Appellant at trial, this evidence was obtained by police, but left unutilized for two years due to the limited details it contained. It was not analyzed until after law enforcement used DNA evidence found at the scene to identify Appellant as the suspect responsible. This renders the evidence of Appellant's minimal tower/section location data cumulative to the DNA proof that he was at the car and left clothing in the car. Secondly, because Appellant was developed as a suspect independently of the tower dump data, any reliance upon "fruit of the poisonous tree" arguments is nullified. It cannot be said that the tower data led to the most independently conclusive evidence that incriminated him. Additionally, the tower dump evidence does not extend just to Appellant's phone number, but also Ms. Teresa Martin's

number. Notwithstanding Appellant's constitutional challenge to the evidence, "[t]he 'fruit of the poisonous tree' doctrine provides that evidence must be excluded if it would not have come to light but for the illegal actions of the police, and the evidence has been obtained by the exploitation of that illegality." *State v. Copeland*, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996). It is entirely possible that upon Appellant's arrest pursuant to the DNA evidence, they could have discovered Ms. Martin's involvement through the confiscation and search of Appellant's phone or upon a request for subscriber data from Verizon.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments, convictions, and sentences of the trial court should be affirmed.

Respectfully submitted,

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Appellate Case No. 2023-000598

CERTIFICATE OF SERVICE

I, **Donna D'Alessio**, an employee of the Respondent and legal assistant to W. Joseph Maye, of counsel for the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Final Brief of Respondent has been forwarded to Appellant's counsel, Lara Caudy, Esq., via email today, November 20, 2024 to lcaudy@sccid.sc.gov., and to her assistant at smcinnis@sccid.sc.gov.

I further certify that all parties required by Rule to be served have been served.

This 20th day of November, 2024.

s/ Donna D'Alessio
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