ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

J. C. Buddy Nicholson, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DARRYL L. DRAYTON,

APPELLANT

APPELLATE CASE NO. 2012-213295

INITIAL BRIEF OF APPELLANT

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III. In violation of Appellant's right to present a complete defense and to due process of law, the trial judge erred in limiting Appellant's cross-examination of the pathologist concerning the toxicology report relating to the deceased, which demonstrated the deceased had high levels of drugs in her system at the time of her death.

STATEMENT OF THE CASE

During its December 2010 term, a Charleston County grand jury indicted Appellant for murder (2010 – GS – 10 – 8551). R.* (Indictment). The state represented by Jennifer Shealy and Timothy Finch called the case to trial before the Honorable J.C. Nicholson, Jr. and a jury on October 1, 2012. Ashley Pennington and Michael Cooper represented Appellant. Tr. 1-2. The jury found Appellant guilty as charged. Tr. 901, lines 19 – 23. Pursuant to S.C. Code Ann. § 17 – 25 – 45, Judge Nicholson sentenced Appellant to life imprisonment without the possibility of parole. Tr. 911, lines 8 – 11; R.*(Sentence sheet). On October 10, 2012, Appellant filed a motion for a new trial. R. * (Motion for New Trial). On October 17, 2012, Judge Nicholson denied the motion. R. * (Order).

Appellant filed a timely notice of appeal. This brief follows.

STATEMENT OF FACTS

On August 9, 2010, Michael Bartley reported his fiancée, Alexis, missing to the police in Beaufort County. Tr. 315, lines 10-11. Bartley admitted that Alexis took prescription medications that had not been prescribed for her. Tr. 307, lines 1-3. Bartley explained that while he and his children were visiting with his parents on August 8, 2010, Alexis stayed at home due to an allergic reaction. Tr. 309, lines 4-25. Later, Alexis called Bartley to say she planned to take "D" to Charleston to get prescription pills. Alexis explained that she would receive pills and gas money in exchange for driving. Tr. 311, lines 20-25. Alexis and Bartley last spoke at 8:19 p.m. when she said that she was on the road and would be home soon. Tr. 312, lines 1-16. However, the following day, Alexis had not returned home. Tr. 315, lines 4-11.

During the early morning hours of Monday, August 9, 2010, Jackie Seward found a body along a dirt road in Charleston County. Seward reported his findings to the police. Tr. 359, line 21 – Tr. 361, lines 13. An examination of the body found in Charleston County revealed it was Alexis [hereinafter referred to as "the deceased"]. An autopsy revealed the deceased died as a result of incisions to her neck which transected her carotid artery. Tr. 776, lines 12-14. On August 10, 2010, the Bluffton Police Department located a car and later learned the car belonged to the deceased. Tr. 438, lines 15-24.

Steven Edwards, Appellant's cousin, testified that on August 10, 2010, Appellant arrived at his door during the early morning hours. Tr. 370, lines 3-11; Tr. 371, lines 8-22. Appellant needed a ride to the hospital because he had injured his finger. Tr. 371, line 24 – Tr. 372, line 1; Tr. 374, lines 1-6. Edwards took Appellant to the hospital. Tr. 374, lines 18-22. After Appellant received treatment for his injured finger, Edwards took him to a jewelry

store. Tr. 376, lines 12-18.[1] Edwards and Appellant spent the next two nights in a hotel in Hardeeville. Tr. 377, lines 17-25; Tr. 379, lines 14-21. When Edwards returned home, he found trash that did not belong to him. He called the police who responded and collected the items. Tr. 382, line 1- Tr. 398, line 25.

Although numerous items of evidence were collected from the car and trash recovered from Edwards' home, very few were tested forensically. Of the numerous swabs taken from the car, two from the car contained DNA consistent with Appellant's DNA profile and one contained a mixture of at least two profiles and Appellant could not be excluded as a minor contributor. Tr. 653, line 8 – Tr. 654, line 5; Tr. 656, lines 1-9; Tr. 656, line 17 – Tr. 657, line 3; Tr. 657, lines 20-23. Of the trash recovered from Edwards' residence, a swab from a CVS plastic bag contained a mixture of at least two people's DNA. The state's analyst determined the major contributor of the DNA was Appellant, but the remaining profiles were insufficient for reliable interpretation. Tr. 662, line 21 – Tr. 663, line 4. Additionally, a DNA profile developed from a swab taken from the left shoe recovered from the deceased's body was consistent with Appellant's DNA profile. Tr. 662, lines 7-14.

Kenneth Aycock, an employee for the Army National Guard counter-drug task force, testified for the prosecution. He explained he was assigned to the FBI safe streets task force, which required him to conduct cell phone tracking and analysis. Tr. 727, line 18 –Tr.

[1] Christopher Golis, an employee of the Golis Family Jewelers, testified that on August 9, 2010, he purchased a ring from Appellant. Tr. 427, lines 14-18; Tr. 429, lines 11-19; Tr. 432, lines 20-23. This ring was identified by Bartley as belonging to the deceased. Tr. 305, lines 2-12.

728, line 13. His review of the deceased's cell phone records indicated her phone was in the Bluffton area until then evening on August 8, 2010. Tr. 734, lines 2-12; Tr. 737, lines 1-9. Calls made between 8:19 p.m. and 9:49 p.m. used cell tower 310 located in Ravenel. Tr. 737, line 23.

The records indicated Appellant's phone used towers in the Bluffton area between 9:08 a.m. and 6:36 p.m. on August 8, 2010. Tr. 739, line 20 – Tr. 740, line 4. Then, the phone used towers along Highway 17 between Bluffton and Charleston. Tr. 741, lines 15-23; Tr. 742, lines 11-13. Thereafter, the phone used towers in Charleston until 11:38 p.m. Tr. 743, lines 4-10. At 6:48 a.m., the next morning, the phone used a tower in Bluffton again. Tr. 744, line 24 – Tr. 745, line 2.

In summary, the prosecution presented evidence that the deceased told another of her intent to go to Charleston with Appellant, that Appellant's DNA was found on items belonging to the deceased, that Appellant was in possession of the deceased's ring shortly after her death, and that his cell phone was in the area of where the deceased's body was found during the evening of August 8, 2010.

ARGUMENT

I. The trial court's refusal to charge the jury with an explanation concerning how to use circumstantial evidence violated Appellant's state and federal constitutional rights requiring the prosecution prove his guilt beyond a reasonable doubt because the charge given confused the jury regarding how to evaluate circumstantial evidence.

Relevant facts

Without question, the state's case against Appellant was purely circumstantial. At the conclusion of the trial, Judge Nicholson instructed the jury as follows concerning circumstantial evidence:

> There are two types of evidence which are generally presented during trial. Direct evidence is the testimony of a person who claims to have actual knowledge of a fact, such as an eyewitness. It is evidence which immediately establishes a fact to be proven. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred. Circumstantial evidence is based on inference and not on personal knowledge or observation. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all of the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find the defendant not guilty.

Tr. 881, line 10 – Tr. 882, line 3.

Appellant objected to the trial judge's instruction regarding circumstantial evidence. Appellant explained, "it is incumbent on the jury to sift the circumstances to see if the circumstances are proven beyond a reasonable doubt and are they consistent with each other, taken together, and pointing conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis." Additionally, Appellant provided a proposed jury instruction. Specifically, Appellant requested the court to instruct the jury as follows:

> Every circumstance relied upon by the state [must] be proven beyond a reasonable doubt; and ... all of the circumstances so proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every reasonable hypothesis. It is not sufficient that they create a probability, though a strong one and if, assuming them to be true they may be accounted for upon any reasonable hypothesis which does not include the guilt of the accused, the proof has failed.

Tr. 891, line 1 – Tr. 894, line 15; R.*(Court's Exhibit 14). The judge denied Appellant's request. Tr. 894, line 16.

Discussion

On August 14, 2013, the South Carolina Supreme Court addressed the circumstantial evidence charge as given in criminal cases in South Carolina.[2] In State v. Logan, Op. No. 27296 (S.C. Sup. Ct. filed Aug. 14, 2013), the Court "revisited [its] past discussions regarding the circumstantial evidence charge, and articulate[d] for the benefit of the bench and bar a circumstantial evidence charge reflecting the proper balance between the state's burden and the jury's responsibility." As the Court explained, the purpose of a clear jury instruction concerning analyzing circumstantial evidence is paramount. Id. Although direct and circumstantial evidence may carry the same weight, "a jury cannot accurately analyze these two types of evidence using identical approaches." Id.

Specifically, circumstantial evidence, unlike direct evidence, "requires jurors to find that the proponent of the evidence has connected collateral facts in order to prove the proposition propounded." Id. Thus, "[a]nalysis of circumstantial evidence is plainly a more intellectual process." Id. In light of the differing analysis required when examining direct

[2] Trial counsel foresaw the Supreme Court's ruling in Logan when he argued to the trial court that "[t]he Supreme Court, therefore is poised to overrule [State v.] Cherry[, 361 S.C. 588, 606 S.E.2d 475 (2004)] when presented with the appropriate case." R. * (Court's Exhibit #14).

versus circumstantial evidence, the Court provided a proper jury instruction for trial courts to use. Important for Appellant's case, the instruction directs jurors that "to the extent the state relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt." The instruction also provided that "[i]f these circumstances merely portray the defendant's behavior as suspicious, the proof has failed." Id.

Although the Court held that a trial judge may instruct the jury as to circumstantial evidence as provided in State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997) and State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2005), the Court held that a trial judge may not rely exclusively on that charge over a defendant's objection. Id.

As an initial matter, Appellant benefits from the Logan ruling as his case was pending on direct review and the issue was preserved for review. See State v. Belcher, 385 S.C. 597, 612-613, 685 S.E.2d 802, 810 (2009) (citing Griffith v. Kentucky, 479 U.S. 314, 328 (1987) ("hold[ing] that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases ... pending on direct review or not yet final), Harris v. State, 543 S.E.2d 716, 717-718 (Ga. 2001) (reversing a murder conviction and overruling precedent that had approved inference of intent to kill from use of a deadly weapon and applying the new rule "to all cases in the 'pipeline' – i.e., cases which are pending in direct review or not yet final")).

Second, clear, cogent, and concise instructions directing the jury on how to analyze the circumstantial evidence before it were necessary in Appellant's case. The jury instruction concerning how a jury must evaluate circumstantial evidence was necessary in Appellant's trial due to the nature of the evidence presented by the prosecution.

Without question, a proper evaluation of circumstantial evidence requires connection of collateral facts to reach a conclusion, which is not required for evaluating direct evidence. According to our Supreme Court, the traditional circumstantial evidence language informs jurors regarding how to analyze circumstantial evidence – inferring main facts by making connections among collateral facts. The trial judge's refusal to charge the jury with an explanation concerning how to use circumstantial evidence violated Appellant's right to require the prosecution to prove his guilt beyond a reasonable doubt.

II. In violation of Appellant's state constitutional right to privacy and statutory right to protection against defective search warrants, the trial judge erred in admitting the historical cell service location information obtained from Appellant's cellular service provider by a search warrant lacking probable cause where Appellant had standing to challenge the search warrant and the trial judge required only a showing of a reasonable grounds to obtain the records.

Relevant facts

During a pre-trial hearing, Appellant moved to exclude his cell phone records, including the historical cell site location information, based upon the Fourth Amendment to the United States Constitution, Article I, section 10 of the South Carolina Constitution, and sections 17-13-140 and 17-30-10 of the South Carolina Code of Laws. Tr. 23, lines 10-20; R. * (Court's Exhibit #2). For purposes of the hearing, the parties agreed to certain facts. Tr. 26, line 18 – Tr. 28, line 12; R. *(Court's Exhibit #1).

On the evening of August 10, 2010, the police obtained a search warrant for Appellant's cell phone records. The warrant sought:

> Any and all information in reference to the Verizon cellular telephone number 843-368-9422 to include, but not limited to, subscriber information, account comments, billing records, outbound and inbound calls to include blocked call information from August 6, 2010 to August 10, 2010. Subscriber information on other numbers listed in the report, call origination location, physical address of cell sites and coverage map, all stored communications, or files including voice mail, email, digital images, text messages, buddy lists, and any other files associated with the cellular target number 843-368-9422.

The search warrant was based upon the following information contained within an affidavit:

> That on July 9, 2010, Charleston County Sheriff's Office responded to Old Jacksonboro Rd near Hwy. 174 in reference to a deceased person. Upon

> arrival deputies discovered the body of a female victim on the side of Jacksonboro Rd. On August 9, 2010, Alexis J. Lukaitis was reported missing to the Beaufort County Sheriff's Office. The body of the deceased was later positively identified as being Alexis J. Lukaitis. Mike Bartley the fiancée of the victim stated that he last spoke to the victim on August 8, 2010 and she informed him that she was traveling to Charleston SC with Darryl Drayton AKA "D".
>
> A separate witness came forward and provided information about a conversation between Darryl Drayton and a friend and neighbor of the victim named Shannon in which they discussed the murder of the victim.
>
> Bartley provided the Verizon cellular telephone number 843-368-9422 as a contact number for Darryl Drayton. It is believed that the call log and information contained therein will provide information that is pertinent to the death investigation. All evidence being sought will be compared with evidence already obtained in the investigation.

Tr. 28, line 13 – Tr. 29, line 6; R. * (Court's Exhibit #2).[3]

As an initial matter, the judge ruled South Carolina's Interception of Wire, Electronic, or Oral Communications was not applicable to the instant matter. The judge determined the Act dealt with interceptions only, and law enforcement's acquisition of Appellant's historical cell-site location information was not an interception. Tr. 51, line 24 – Tr. 51, line 11.[4]

Turning to Appellant's challenge to the search warrant based upon the United

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[3] The Court rightly discounted the statement contained in the affidavit regarding a separate witness. The parties agreed that a neighbor and friend of the deceased had spoken to Appellant regarding the deceased's death, but there was no "separate witness." Further, the parties agreed that the substance of the conversation was a denial by Appellant of any involvement in the deceased's disappearance and death. Tr. 62; R. * (Court's #1). Clearly, law enforcement used false information – "a separate witness" – in an attempt to shore up its very weak case of probable cause. See generally, Franks v. Delaware, 438 U.S. 154 (1978); United States v. Colkley, 299 F.2d 297 (4th Cir. 1990); State v. Missouri, 337 S.C. 548, 524 S.E.2d 394 (1999).

[4] Appellant does not challenge the trial judge's ruling regarding the application of the Act.

States Constitution and the South Carolina Constitution, the judge ruled as follows regarding the standing issue: "this warrant was against Verizon, not the defendant in this particular case. Although it was subject to his own records and I do think he has standing." The judge explained that he was following "the long line of federal cases that have stated there's no expectation of privacy as to records." Tr. 65, lines 9-22.

The judge then explained the standard he was using to evaluate the search warrant. He found the federal cases interpreting the Stored Communications Act[5] to be persuasive authority for how South Carolina would address the issue. He announced that he was "not talking about probable cause in this search warrant, [he was] talking about reasonable grounds to believe that the records and other information sought [were] relevant and material to an ongoing and criminal investigation." Based upon the persuasive authority, the judge said that because no statute or case explained whether law enforcement must obtain a warrant or court order to obtain the records, the judge would treat the "warrant as obtaining an order from the magistrate to obtain the records." The judge concluded that the order obtained from the magistrate was sufficient to obtain the records and reasonable grounds were proven under the warrant. He ultimately concluded that probable cause was not necessary. Tr. 65, line 9 – Tr. 67, line 24. Appellant made clear his argument was that probable cause was necessary, but the judge rejected this argument. Tr. 68, lines 6-7.

Discussion

The Fourth Amendment of the United States Constitution guarantees "[t]he right

[5] The Stored Communications Act was enacted as Title II of the Electronic Communications Privacy Act and may be found at 18 U.S.C. §§ 2701 – 2712.

of the people to be secure . . . [from] unreasonable searches and seizures." U.S. Const. amend. IV. South Carolina's Constitution provides: "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." S.C. Const. Art. I, Section 10.

Standing

Appellant had standing to challenge the search warrant for his telephone records, including the historical cell site location information, based upon (1) his expectation of privacy emanating from South Carolina's Constitution and (2) South Carolina's warrant statute. Although some federal courts interpreting the federal constitution have concluded that an individual does not have an expectation of privacy in historical cell site location information, "[t]he 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." See State v. Forrester, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001). Our Supreme Court explained, "the 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." Id. at 647, 541 S.E.2d at 842.[6]

The ability of law enforcement to obtain historical cell site location information falls squarely within our state constitution's prohibition against unreasonable invasions of

[6] In her dissent, Justice Hearn provided an eloquent analysis and assessment of the growing threat of technological advances on 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).

privacy and the concerns of the drafters regarding new technologies used by the government to conduct searches of its citizens. Therefore, Appellant had a reasonable expectation of privacy in the records based upon this state's protection of individuals against governmental invasions of privacy.

Additionally, Appellant had standing to challenge the search warrant based upon South Carolina's statutory provision governing search warrants. Our Supreme Court made clear that "the rights afforded by Section 17-13-140 are not dependent upon a showing of an expectation of privacy in the searched premises." State v. McKnight, 291 S.C. 110, 115, 352 S.E.2d 471, 474 (1987). The Court explained "one contesting the legality of a search because of a defect under Section 17-13-140 need only show that the state is attempting to introduce evidence against him." Id. The officers sought and obtained a search warrant to acquire Appellant's historical cell site location information from his cellular service provided; therefore, the officers were required to satisfy South Carolina's statutory requirements, and Appellant had the authority to challenge the warrant.

Therefore, Appellant had standing to challenge the search warrant based upon his constitutional right to privacy found in the South Carolina Constitution and the statutory provision governing search warrants. The trial judge erred in concluding Appellant lacked standing to challenge the search warrant to obtain his historical cell site location information.

Probable cause

The trial judge construed the search warrant as a court order and found it contained "reasonable grounds" for the order to issue. In short, the judge applied the requirements of

the Stored Communications Act, which he determined to be persuasive authority, to determine the search warrant – construed as a court order – was sufficient to obtain Appellant's historical cell site location information. The Stored Communications Act permits the government to acquire certain information from cellular service providers through a court order where the government "offers specific and articulable facts showing that there are reasonable grounds to believe that ... the records or other information sought, are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(c)(1)(B); 18 U.S.C. § 2703(d). The trial judge erred by (1) construing the search warrant as a court order; and (2) applying the standard of "reasonable grounds."

The officers obtained a search warrant, not a court order, and must be held accountable to the chosen method for pursuing the historical cell site location information. Additionally, the officers did not follow the requirements of the Stored Communications Act; and therefore, should not benefit from the lower threshold afforded under the Act. Further, in light of the protections afforded individuals pursuant to the South Carolina Constitution, a search warrant, not a court order, was required to obtain the records.

The South Carolina Code mandates that a search warrant "shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record." S.C. Code Ann. § 17-13-140 (1985); State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). "The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause." State v. Dupree, 354 S.C. 676, 684, 583 S.E.2d 437, 441 (Ct. App. 2003) (citing State v. Philpot, 317 S.C. 458, 454 S.E.2d 905 (Ct. App. 1995)).

The magistrate should determine probable cause based on all of the information

available to the magistrate at the time the warrant was issued." Dupree, 354 S.C. at 684, 583 S.E.2d at 441 (citations omitted). In terms of a court's review of the magistrate's decision, "[t]he 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 determining whether a substantial basis exists, the crucial element is not whether the target of the search is suspected of a crime, but whether it is reasonable to believe that the items to be seized will be found in the place to be searched. Zurcher v. Stanford Daily, 436 U.S. 547, 556 & n. 6 (1978).

> This determination requires the magistrate to make a practical, common-sense decision of whether, given the totality of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying the information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

State v. King, 349 S.C. 142, 150, 561 S.E.2d 640, 644 (Ct. App. 2002).

As explained, supra, a search warrant issues only upon probable cause. South Carolina's search warrant statute permits a search warrant to search for and seize "property constituting evidence of crime or tending to show that a particular person committed a criminal offense." S.C. Code Ann. § 17-13-140. Appellant assumes the prosecution proceeded under the theory that Appellant's historical cell-site location information was evidence tending to show that Appellant committed a criminal offense. However, the affidavit supporting the search warrant was devoid of any facts to support the theory.

An affidavit that is submitted in support of the issuance of a search warrant 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. Baccus, 367 S.C. at 52, 625 S.E.2d at 222; Dupree, 354 S.C. at 684, 583 S.E.2d at 441; State v. Philpot, 317 S.C. 458,

461, 454 S.E.2d 905, 907 (Ct. App. 1995).

In State v. Smith, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990), the South Carolina Supreme Court held a search warrant affidavit was defective where the affidavit set forth no facts as to why the police believed the defendant robbed the motel. The affidavit provided a conclusory statement that the defendant had robbed the motel and the police sought to search his room at another motel for a knife used in the robbery. Id. at 372, 392 S.E.2d at 183. The Court found "[m]ere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient. Id. at 373, 392 S.E.2d at 183.

In Baccus, the Court found the affidavit in support of the search warrant failed to set forth any facts as to why police believed the defendant had committed the crime. The search warrant sought clothing and forensic evidence possibly connected to the homicide of the victim. The basis for the search warrant was that at the time of the defendant's arrest, a pile of what appeared to be clothing was lying on the ground beside the residence smoldering and the defendant's bloodstained vehicle was located a quarter mile from his residence. Baccus, 367 S.C. at 51-52, 625 S.E.2d at 221-222. The Court found the affidavit failed to set forth any facts as to why police believed the defendant committed the crime. The Court explained that "[t]he language in the affidavit lack[ed] specificity and contain[ed] conclusory statements." Id. at 52, 625 S.E.2d at 222. Thus, the Court held the magistrate did not have a substantial basis to find probable cause for a search of the defendant's residence. Id.

Similarly, the South Carolina Supreme Court found a search warrant defective where the affidavit "failed to set forth any facts as to why police believed [the defendant] committed the Crumlin crime." State v. Weston, 329 S.C. 287, 291, 494 S.E.2d 801, 803

(1997). The affidavit provided that Crumlin was the victim of an armed robbery at a certain date, time, and location. It further provided that the defendant was a suspect and the registered owner of the vehicle to be searched. A witness stated that the defendant was driving the vehicle at the time of the incident. Id. at 289, 494 S.E.2d at 802. The Court found the first three sentences to be "mere conclusory statements." Although the forth sentence linked the defendant to his car at the time of the incident, it failed to link the defendant or his car to the crime itself. Id. at 291-292, 494 S.E.2d at 803.

Furthermore, it is necessary to examine the reliability and credibility of an informant for determining the existence of probable cause. Illinois v. Gates, 462 U.S. 213, 230-235 (1983). In determining whether the information relied upon by law enforcement is reliable, no one factor is necessary or sufficient to establish probable cause. Instead, probable cause arises from the totality of the circumstances, and "[a] deficiency in one [factor] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." Id.

As previously noted by our Supreme Court,

> [t]he 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.

Weston, 329 S.C. at 290-91, 494 S.E.2d at 802-03 (quoting Illinois v. Gates, 462 U.S. 213, (1983)).

The affidavit used to obtain the search warrant for Appellant's historical cell site location information failed to set forth any facts to establish probable cause that Appellant's

historical cell site location information constituted evidence of the deceased's death or tended to show that Appellant was responsible for the deceased's death. Inexplicably, the affidavit stated that a body was found on July 9, 2010, which was identified as that of the deceased.[7] Then, a month later, the deceased was reported missing. The only non-conclusory statement in the affidavit was that Bartley stated that he last spoke with the deceased on August 8, 2010 and "she informed him that she was traveling to Charleston SC with [Appellant]." Court's Exhibit #2. In a conclusory statement, the affiant stated "[i]t is believed that the call log and information contained therein will provide information that is pertinent to the death investigation." The affiant provided absolutely no basis for this statement. There was no indication that the deceased and Appellant had communicated using Appellant's cell phone prior to the deceased's death, that the phone had been used in the commission of a crime, or that the phone contained evidence of a crime. The affidavit provided no reason to believe Appellant's historical cell site location information was related at all to the deceased's death or disappearance.

The affidavit failed to establish that the hearsay information provided by Bartley was reliable. Although the affidavit identified Bartley, and therefore, he was not a confidential informant, Bartley was an informant nonetheless. It was necessary to establish his reliability relative to the information he was providing and on which law enforcement was relying. The affidavit provided no reason to believe Bartley – no indication that law enforcement checked Bartley's phone records to corroborate his story that he had spoken to the deceased

[7] At first blush, it appears this was merely a typographical error; however, it was repeated in each of the search warrant affidavits signed by the magistrate on August 10, 2010. The prosecution presented no evidence to indicate this error was corrected by the affiant to the magistrate. See Court's Exhibits #3, #4, #5, #6.

at a certain time or attempted to corroborated his story with other witnesses or records.

The trial judge erred in construing the search warrant as a court order and allowing the acquisition of Appellant's historical cell site location information to stand based upon a showing of a reasonable basis where the police obtained a search warrant and were required to follow the statutory requirements and the affidavit failed to provide probable cause that Appellant's historical cell site location information contained evidence of a crime associated with the deceased's death.

III. In violation of Appellant's right to present a complete defense and to due process of law, the trial judge erred in limiting Appellant's cross-examination of the pathologist concerning the toxicology report relating to the deceased, which demonstrated the deceased had high levels of drugs in her system at the time of her death.

Relevant facts

On cross-examination, the pathologist testified that as part of the autopsy, the deceased's bodily fluids were analyzed for drugs and alcohol. Tr. 779, lines 10-20. When Appellant attempted to elicit the results of the toxicology report concerning the deceased, the state objected based upon relevancy. Tr. 779, lines 23-24. During an in-camera hearing, Appellant explained that the toxicology report showed the deceased "had a blend of different drugs that included not just the kind of opiates that that she was allegedly going to look for, but that she had somehow acquired a significant quantity of amphetamine that were in her system at the time and other depressants like - - which is Prozac and marijuana or the residual traces of marijuana that we call THC." Tr. 781, lines 4-11. Appellant argued the evidence was relevant to refute the prosecution's theory that the deceased was looking for depressants and that in doing so, Appellant "somehow kill[ed] her." The toxicology report refuted the prosecution's theory by showing that the deceased "found multiple kinds of drugs that were in her system at the time of her death that are unexplained and which conflict with the state's theory that it's a simple case of a woman who's hungry for drugs, hadn't found them, and goes and puts herself in a situation of harm's way." Tr. 781, line 21 – Tr. 782, line 3.

The prosecution maintained its objection as to relevancy, but added that the evidence was an attempt to turn the jury against the deceased. She argued the evidence

would "make the jury start trying to figure what that has to do with what happened that evening." She admitted the prosecution had "no idea where she got those drugs from." The evidence would "inject[] something in the record that [would] allow the jury to speculate." Tr. 782, line 13 – Tr. 784, line 14.

Appellant argued that the toxicology report refuted the state's theory that the deceased and Appellant were together to get drugs. The report demonstrated the deceased "was able to actually obtain a variety of drugs on - - in her system at that time at high-dosage levels." Tr. 785, lines 13-16.

Outside the presence of the jury, the pathologist testified that the report showed the deceased had buprenorphine, an opioid, in her system and it was still active in her system at death. Tr. 789, line 3 – Tr. 790, line 3. Additionally, the deceased had a high level of Prozac and its metabolite in her system, an amphetamine, and the inactive metabolite of marijuana. Tr. 790, lines 4-17. Finally, the pathologist testified that other than the marijuana, all of the drugs were active in the deceased's system. Tr. 791, lines 16-24. However, in response to questions by the prosecution, the pathologist testified she would not be comfortable testifying regarding <u>when</u> certain medication was ingested by a person based upon laboratory results. Tr. 787, line 22 – Tr. 788, line 1. Additionally, she explained that the blood used for the toxicology analysis was cardiac blood, which is subject to "postmortem redistribution, meaning that you can get falsely elevated levels." However, she was unable to determine if "that happened or not in that instance." Tr. 788, lines 14-20.

Nevertheless, the judge ruled the evidence was inadmissible because "the probative value [was] not substantially outweigh[ed by] the danger of unfair prejudice.

And the unfair prejudice means the undue tendency suggests a decision on an improper basis; i.e., the use of drugs." Based upon Rule 403 of the South Carolina Rules of Evidence, the judge found the evidence concerning the toxicology report was inadmissible, "especially in light of the fact that the doctor said those values will be elevated as a result of where the blood was taken from." Tr. 790, line 23 – Tr. 791, line 8.

Discussion

Rule 403 of the South Carolina Rules of Evidence provides that even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Unfair prejudice means an undue tendency to suggestion a decision on an improper basis, commonly, but not necessarily, an emotional one. State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991). This Court's analysis of Rule 403 in State v. Collins, 398 S.C. 197, 727 S.E.2d 751 (Ct. App. 2012) provides a four-step guide for analyzing whether the danger of unfair prejudice resulting from proffered evidence outweighs the probative value. The first step requires a determination of the probative value of the evidence. The second requires an evaluation of the danger of unfair prejudice resulting from the introduction of the evidence. Third, a court must balance the probative value and unfair prejudice. And finally, the appellate court reviews the decision of the trial court for an abuse of discretion. Id.

The probative value of the toxicology report indicating the deceased had high levels of drugs in her system at the time of death was very high. The prosecution's theory of the case was that the deceased travelled with Appellant to acquire prescription drugs. The presence of drugs in the deceased's system undercut the state's theory that the

deceased had travelled with Appellant to obtain drugs on the evening of her death where she already had possession of drugs. The evidence established a complete picture of what occurred on the night of the deceased's death as well. Rather than allowing the jury to believe that the deceased and Appellant traveled together to acquire prescription pills and then were returning to Beaufort County when Appellant inexplicably killed the deceased, the toxicology report established that the deceased had ingested a large quantity of drugs, which remained active at the time of her death. The danger of unfair prejudice was very low because the jury had been informed that the deceased abused and dealt in prescription drugs. There was little danger that the jury would base its decision on an unfair basis – the deceased's drug use – as a result of the toxicology report because the jury was well aware of the deceased's drug addiction. The balance of probative value and unfair prejudice is obvious – the probative value was not substantially outweighed by the danger of unfair prejudice due to the very high probative value of the evidence and the low danger of unfair prejudice.

CONCLUSION

Appellant respectfully requests this Court reverse his conviction and sentence and remand the matter for a new trial.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of September, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
J. C. Buddy Nicholson, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DARRYL L. DRAYTON,

APPELLANT

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) Trial transcript pages: 1, 2, 23-68; 106-113; 281-282; 304-339; 357-362; 369-400; 402-413; 427-484; 488-510; 522-569; 643-670; 708-761; 763-792; 796-799; 802-803; 841-841-894; 901; 907-911
(2) State's exhibits #227 through #233;
(3) Court's exhibits #1 through #6;
(4) Court's exhibit #14;
(5) Motion for new trial;
(6) Order denying motion for new trial;
(7) Indictment (2010 – GS – 10 – 8551); and
(8) Sentence sheet

I certify that this designation contains no matter which is irrelevant to this appeal.

September 18th, 2013

Susan B. Hackett

Susan B. Hackett
Appellate Defender

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Darryl L. Drayton, #238403, Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 18th day of September, 2013.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 18th day of September, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.