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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KARSEEM NICHOLAS HARDAWAY,

APPELLANT

APPELLATE CASE NO. 2024-001245

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

STATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

STANDARD OF REVIEW 7

ARGUMENT 8

I. The trial court erred in concluding "proximity [is] enough to establish probable cause." 8

a. The trial court applied the wrong standard. 8

b. The affidavits do not establish probable cause because they recite only evidence unrelated to Hardaway or a man performing his ordinary business 11

II. The fruits of the invalid warrants were critical to the state's case, and the denial of the motion to suppress was not harmless beyond a reasonable doubt. 13

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Brinegar v. United States, 338 U.S. 160 (1949)....9

Brown v. Texas, 443 U.S. 47 (1979)....9

Illinois v. Gates, 462 U.S. 213 (1983)....11

Illinois v. Wardlow, 528 U.S. 119 (2000)....9

Kitchen Planners, LLC v. Friedman, 440 S.C. 456, 892 S.E.2d 297 (2023)....9

Reid v. Georgia, 448 U.S. 438, 100 S. Ct. 2752, 65 L. Ed. 2d 890 (1980)....10

State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006)....8

State v. Dill, 423 S.C. 534, 816 S.E.2d 557 (2018)....8, 15

State v. Gentile, 373 S.C. 506, 646 S.E.2d 171 (Ct. App. 2007)....8, 12

State v. Philpot, 317 S.C. 458, 454 S.E.2d 905 (Ct. App. 1995)....8

State v. Pradubsri, 420 S.C. 629, 803 S.E.2d 724 (Ct. App. 2017)....9

State v. Smith, 301 S.C. 371, 392 S.E.2d 182 (1990)....8

State v. Taylor, 401 S.C. 104, 736 S.E.2d 663 (2013)....10

State v. Warner, 436 S.C. 395, 872 S.E.2d 638 (2022)....8, 9

State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997)....11

State v. Willard, 374 S.C. 129, 647 S.E.2d 252 (Ct. App. 2007)....10

Terry v. Ohio, 392 U.S. 1 (1968)....10

United States v. Black, 707 F.3d 531 (4th Cir. 2013)....13

Whitfield v. Schimpf, Op. No. 28250 (S.C. Sup. Ct. filed Jan. 8, 2025)
(Howard Adv. Sh. No. 2 at 31)....10

Other Authorities

56 Corpus Juris, *Searches and Seizures* § 119, at 1214 (1932)....11

STATEMENT OF ISSUE ON APPEAL

Did the trial court err in ruling that leaving an apartment near a murder scene is sufficient to establish probable cause to search a person's phone, read his text messages, and track his location history, particularly where the trial court stated and applied the wrong standard?

STATEMENT OF THE CASE

Karseem Hardaway was arrested on September 8, 2021, on charges for murder and possession of a weapon during the commission of a violent crime. R. p. *. He was indicted by the Charleston grand jury in February of 2024. R. p. *. His trial was from March 25 to 28, 2024, before Judge Deadra Jefferson and a jury. Trial Tr. 1. He was represented by Rachel Arora and Megan Ehrlich, and B. Chad Simpson and Kelly Barber represented the state. Trial Tr. 1. The week before trial there was a hearing before Judge Jefferson to address several pretrial motions. Pretrial Tr. dated 3/20/2024 at 1. Ultimately, the jury found Hardaway guilty on both charges, and the trial court sentenced him to forty years in prison for murder and a concurrent five years for the possession. Trial Tr. 719:7-21, 738:3-11.

STATEMENT OF FACTS

Prior to trial Hardaway filed three motions to suppress evidence obtained pursuant to several search warrants. Pretrial Tr. 49:23-50:2. He argued the affidavits attached to the warrants did not demonstrate probable cause. Pretrial Tr. 63:12-64:15, 76:1-25, 90:2-24.

At this hearing Hardaway argued evidence obtained from the seizure of his phone must be suppressed because the attached affidavit proved nothing "beyond [him] being present at an apartment." Pretrial Tr. 81:16-22, 82:2-4. Judge Jefferson responded: "They don't have to prove anything more than that. It's basically a scintilla standard." Pretrial Tr. 82:5-6. The court then stated the standard for probable cause to obtain a warrant is "a reasonable and articulable suspicion that criminal activity is afoot." Pretrial Tr. 82:10-11. Hardaway repeated there was not probable cause because the state cannot "pinpoint what specifically would tie Mr. Hardaway [to the crime] other than just living at that apartment . . . ." Pretrial Tr. 82:14-17. Again the trial court reasoned the state "do[es]n't have to prove anything more than that." Pretrial Tr. 82:18-19. It explained:

> He's on a Ring camera. He's in proximity. That's enough to establish probable cause to get his phone. That's enough to get his phone and track his movements. That's enough to get his phone and download his text messages. That's enough to get his WhatsApp. That's enough to find out what he was saying on Facebook Messenger. It's enough to do whatever they -- yeah.

Petrial Tr. 82:19-25. The court then stated that the standard for a warrant is not beyond a reasonable doubt but "only reasonable and articulable suspicion." Pretrial Tr. 83:1-6. The trial court then denied the motion. Pretrial Tr. 83:23-24. In doing so it did state the correct standard for probable cause: "The affidavits . . . more than adequately meet the element of probable case, which is based on a fair probability that evidence of a crime will be found in the particular place to be searched." Pretrial Tr. 84:3-6.

These warrants arose out of the death of David Conner, who was killed in his apartment on July 13, 2021, by a gunshot to the back of the neck. He returned to his apartment in West Ashley just after 5:30 p.m., and his roommate discovered his body at approximately 6:00 p.m. Trial Tr. 92:11-93:19, 136:4-137:3. In the following weeks multiple detectives from the Charleston Police Department submitted several warrant requests and affidavits outlining the investigation. Google Warrant dated July 19, 2021, at 3-6, R. p. *; Warrant to Seize Phone dated July 20, 2021, at 3-6, R. p. *; Verizon Warrant dated July 26, 2021, at 3-6, R. p. *; Warrant to Search Phone dated July 30, 2021, at 3-7, R. p. *.[1] They all reported Conner's time of death and that according to his roommate nothing was stolen from the apartment. Warrant to Seize Phone, at 3, R. p. *.

In their initial investigation on July 13 and the following morning, detectives spoke with appellant's sister, Tiffany Hardaway, who lived in an apartment neighboring Conner. Warrant to Seize Phone, at 4, R. p. *. She gave them videos from her Ring doorbell camera. Warrant to Seize Phone, at 4, R. p. *. In one video a young black man is seen walking out of Tiffany's apartment at 5:04 p.m. on July 13. Warrant to Seize Phone, at 4, R. p. *. On July 14, apartment management reported to investigators Conner had called the leasing office around 9:00 p.m. on July 12 "to report that he had just had a confrontation with 'a guy' who was causing a disturbance outside of his apartment by talking too loudly on his telephone." Warrant to Seize Phone, at 4,

[1] The warrants were made Court's Exhibits 1 through 4 at the March 20, 2024 pretrial hearing. Despite being signed by different detectives, the affidavits attached to the warrants are identical except that (1) the later affidavits also describe information obtained from the prior searches, and (2) they describe different property to be searched and seized, with limited additional explanation for why the officers believed evidence could be found in those places. For simplicity, citation will be made only to the warrant to seize Hardaway's phone where the other affidavits and warrants are not materially different.

R. p. *. Conner was "worried that it was not a good situation." Warrant to Seize Phone, at 4, R. p. *.

While at the apartments on July 14, Detective William Crockett saw Karseem Hardaway in his car, a red Honda. Warrant to Seize Phone, at 4-5, R. p. *. Crockett showed Hardaway the Ring video, and Hardaway confirmed it was him leaving the apartment at 5:04 and informed Crockett he left for John's Island.[2] Warrant to Seize Phone, at 5, R. p. *. The detectives then returned to Tiffany's apartment and asked her if the Ring captured video from Conner's confrontation. Warrant to Seize Phone, at 5, R. p. *. Detective Crockett then watched her open the Ring app and appear to delete recordings. Warrant to Seize Phone, at 5, R. p. *. She was arrested for obstruction of justice two days later. Warrant to Seize Phone, at 6, R. p. *. A warrant to search her phone "revealed that Tiffany regularly communicates with" her brother via phone. Warrant to Seize Phone, at 6, R. p. *. Also on July 14, detectives found July 12 surveillance videos showing a car that looks like Hardaway's red Honda leaving the apartment complex at 5:34 p.m. and on John's Island at 5:42 p.m. Warrant to Seize Phone, at 5, R. p. *.

After obtaining the warrant to seize his phone, officers stopped Hardaway while he was driving in order to serve the warrant. Pretrial Tr. 77:2-20. They seized it and then obtained the warrant to search the phone. Warrant to Search Phone, at 2, R. p. *. In the affidavit to that warrant, Detective Daniel Wilson stated that, in his "over ten years of law enforcement training and experience, that cell phones are nearly ubiquitous in today's society." Warrant to Search Phone, at 7, R. p. *. He then described the evidence he hoped to obtain from Hardaway's phone:

> [T]he affiant believes that the requested examination may (1) positively identify the device's owner or user, (2) confirm the

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[2] This interaction was captured on Crockett's body cam and was ultimately introduced at trial as State's Exhibit 8–F. Trial Tr. 279:16-280:16.

> device was active during the time frame of the homicide, (3) may contain GPS data or location history contained on the device, (4) show communications, to include calls, texts, MMS messages, and application data between the device and any other associates before, during and after the incident, (5) identify the phone numbers stored on the device, (6) show any photographs taken by or stored by the user associated with the device, (7) provide search history of the user associated with the device, and (8) any other pertinent data, documents, or device interactions associated with the target account during the time before, during, and after the incident under investigation.

Warrant to Search Phone, at 7, R. p. *.

The trial court ultimately denied all of Hardaway's motions to suppress the evidence obtained from the search warrants. Pretrial Tr. 74:9-75:25, 82:14-84:9, 91:18-92:9.

STANDARD OF REVIEW

"[A]ppellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis. This dual inquiry means [appellate courts] review the trial court's factual findings for any evidentiary support, but the ultimate legal conclusion . . . is a question of law subject to de novo review." *State v. Frasier*, 437 S.C. 625, 633-34, 879 S.E.2d 762, 766 (2022).

ARGUMENT

Hardaway now challenges the trial court's denial of his motion to suppress evidence obtained with the warrant to seize his phone and warrants to search that phone, Verizon, and Google. The trial court erred in finding the affidavits attached to those warrants established probable cause because it applied the wrong standard and the affidavits did not present facts amounting to probable cause. As the court stated, they did little more than report that he was in the vicinity of the murder around the time it occurred.

I. The trial court erred in concluding "proximity [is] enough to establish probable cause."

In ruling on the motion to suppress the evidence from Hardaway's phone, Judge Jefferson stated that probable cause is "basically a scintilla standard" and Hardaway's proximity to the murder established probable cause. Pretrial Tr. 82:19-20. Specifically, the trial court believed Hardaway "just living at the apartment" and being nearby on the Ring camera was sufficient to obtain a warrant. Pretrial Tr. 82:14-20. The standard used is clearly incorrect. Moreover, if proximity alone is enough then the warrant requirement and probable cause standard imposed by the Fourth Amendment would be mere formalities.

a. The trial court applied the wrong standard.

While "probable cause . . . is not a high bar, it is by no means a toothless standard." *State v. Warner*, 436 S.C. 395, 404, 872 S.E.2d 638, 642 (2022) (cleaned up); *see, e.g.*, *State v. Dill*, 423 S.C. 534, 543, 816 S.E.2d 557, 562 (2018) (finding affidavit did not establish probable cause); *State v. Baccus*, 367 S.C. 41, 52, 625 S.E.2d 216, 222 (2006) (same); *State v. Smith*, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990) (same); *State v. Gentile*, 373 S.C. 506, 514-15, 646 S.E.2d 171, 175 (Ct. App. 2007) (same), *State v. Philpot*, 317 S.C. 458, 454 S.E.2d 905 (Ct. App. 1995) (same). Walking by the neighbor's apartment around the time he is murdered is not

sufficient because probable cause "has come to mean more than bare suspicion." *Warner*, 436 S.C. at 404, 872 S.E.2d at 642 (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949). It "exists where 'the facts and circumstances . . . [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Warner*, 436 S.C. at 404, 872 S.E.2d at 642 (quoting *Brinegar*, 338 U.S. at 175) (alteration in original). Mere presence in an area with crime is insufficient to meet even the reasonable suspicion standard, let alone probable cause. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (citing *Brown v. Texas*, 443 U.S. 47, 52 (1979)).

To believe that a mere "scintilla" of evidence amounts to probable cause is incorrect, and it "leave[s] law-abiding citizens at the mercy of the officers' whim or caprice." *Brinegar*, 338 U.S. at 176. The scintilla standard has no place at all in South Carolina law, let alone as the standard for probable cause. *See Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 463, 892 S.E.2d 297, 301 (2023) (overruling prior case that had established "mere scintilla" as the standard for defeating a motion for summary judgment). Hardaway walked by Conner's apartment like any other of his sister's neighbors or their visitors might have. That is not "enough to get his phone and track his movements," as the trial court believed. Pretrial Tr. 82:21. While left unstated, it is certainly not "enough to do whatever they [want]." Pretrial Tr. 82:24-25.

The trial court also misstated the standard when it asserted probable cause means "a reasonable and articulable suspicion that criminal activity is afoot." Pretrial Tr. 82:10-11. That is not the standard for probable cause but the lower requirement for a warrantless stop and frisk. *State v. Pradubsri*, 420 S.C. 629, 635, 803 S.E.2d 724, 727 (Ct. App. 2017) ("Reasonable suspicion is more than a general hunch but less than what is required for probable cause."

(quoting *State v. Willard*, 374 S.C. 129, 134, 647 S.E.2d 252, 255 (Ct. App. 2007))); *State v. Taylor*, 401 S.C. 104, 108, 736 S.E.2d 663, 665 (2013) ("An investigative detention is constitutional if supported 'by a reasonable and articulable suspicion that the person seized is engaged in criminal activity.'" (quoting *Reid v. Georgia*, 448 U.S. 438, 440, 100 S. Ct. 2752, 2754, 65 L. Ed. 2d 890 (1980)); *see generally Terry v. Ohio*, 392 U.S. 1, 30 (1968).

Although at other points at the pretrial hearing the trial court recited the correct standard for probable cause, the only time it *explained* why the affidavits amounted to probable cause was in this discussion stating and applying the wrong standard. Pretrial Tr. 74:9-16, 75:2-6, 84:3-9. For example, in earlier rulings when discussing the Google warrant, the court stated that "clearly" the circumstances described amount to probable cause. Pretrial Tr. 74:25-75:21, 83:23-84:9, 92:4-6. But instead of explaining what in the affidavits amounted to probable cause—other than proximity—the court appears to have relied on how "thorough" it believed the warrant to be. Pretrial Tr. 75:7-9, 83:7-84:9, 92:4-6. While these affidavits are more detailed than many courts have considered, length does not equate to probable cause because the affidavit must establish probable cause *as to Hardaway*. Circumstances that are unrelated to Hardaway or not in themselves suspicious cannot satisfy the state's burden, such as his sister deleting videos. Nonetheless, the majority of the assertions in the affidavits do no more. Moreover, because the trial court nowhere else explained its reasoning, it is likely the court believed a "fair probability" is "basically a scintilla standard" even if it stated the correct standard at other places in the record. That is not correct, and the trial court therefore erred as a matter of law. *Cf. Whitfield v. Schimpf*, Op. No. 28250 (S.C. Sup. Ct. filed Jan. 8, 2025) (Howard Adv. Sh. No. 2 at 31) (reversing trial court's exclusion of evidence under Rule 403, SCRE because "[t]he trial court's failure to apply the correct legal standard . . . was itself an abuse of discretion").

b. The affidavits do not establish probable cause because they recite only evidence unrelated to Hardaway or a man performing his ordinary business.

The proper standard for probable cause is well established: "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, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Weston*, 329 S.C. 287, 290-91, 494 S.E.2d 801, 802-03 (1997) (quoting *Illinois v. Gates*, 462 U.S. 213, 214 (1983)); *see also* 56 Corpus Juris, *Searches and Seizures* § 119, at 1214 (1932) (defining probable cause "as the existence of such facts and circumstances as would excite an honest belief in a reasonable mind, acting on all the facts and circumstances within knowledge of the magistrate, that the charge made by the applicant for the warrant is true"). Critically here, the affidavits needed to "excite an honest belief" Hardaway committed the murder because that is the only reason to believe evidence of the crime could be found on his phone or in his digital information.

The affidavits fail to meet that standard because they report merely someone living his life and do not connect the bases for suspicion to Hardaway. For example, there is a video of him "walking from Ms. Hardaway's apartment toward the incident location at 1704 hours."[3] Warrant to Search Phone, at 4, R. p. *. But that is all it shows: a young man walking out an apartment door and heading right toward the parking lot where the detectives knew he parks his car.[4] It is an apartment breezeway; there are two paths in and out. To find that suspicious is to make a mountain out of a molehill. Hardaway walking to his car does not become suspicious

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[3] While the video was only described in the affidavit, it was made State's Exhibit 52-F at trial and was transported to the Court for review. Trial Tr. 261:14-24.

[4] In closing argument the solicitor even recognized that it did not appear Hardaway was carrying a gun at this point in time: "Do you see a gun in his left pocket? I don't, but use your own eyes and see if you see a shape in his pocket . . . ." Tr. 658:10-12.

just because Conner's apartment is in the same direction. The detectives did the same in reporting that after searching Tiffany Hardaway's phone they discovered a text from Karseem Hardaway: "at approximately 5:36 pm . . . he instructed Ms. Hardaway to tell her children to lock the apartment door because he had forgotten to do so after he left." Warrant to Search Phone, at 6, R. p. *. That text is not suspicious, even if it was "minutes after Detectives believe the homicide to have occurred." Warrant to Search Phone, at 6, R. p. *. Hardaway left the apartment and he forgot to lock the door, so he asked someone lock it. If anything, the text should belie suspicion.

On the other hand, parts of the affidavits do report activities that could be suspicious, but they are not connected to Hardaway. For example, Conner's voicemail described "a guy" talking on the phone outside his apartment, but it offered no identifying information beyond gender. That does not add to the probable cause analysis because virtually every other male in that apartment complex or visiting it could fit the description of "a guy" talking on the phone. To draw any conclusions from that interaction about Hardaway in particular is pure speculation. For another example, Hardaway recognizes that Tiffany's behavior is suspicious. Detectives asked to look for Ring videos, and in the detective's view "she appeared to delete at least one." Warrant to Search Phone, at 5, R. p. *. Critically, however, that is *her* behavior. It was sufficient for the detectives to arrest her for obstruction, as they did, but it was not reason to believe Hardaway killed Conner. This circumstance is analogous to one in *Gentile* where officers obtained a warrant to search the home of a suspected drug dealer. 373 S.C. at 510, 646 S.E.2d at 172-73. One of the facts in the affidavit there was that an individual was seen entering the home and that when he was arrested after leaving it, he was carrying marijuana. *Gentile*, 373 S.C. at 510, 646 S.E.2d at 173. That fact "add[ed] nothing to the probable cause determination" because the

officers "had no knowledge of whether the [individual] purchased the marijuana from Gentile." 373 S.C. at 518, 516, 646 S.E.2d at 177, 176. Just the same here, the detectives had no knowledge to connect Tiffany's suspicious activity to Hardaway. *United States v. Black*, 707 F.3d 531, 540 (4th Cir. 2013) (stating it would "refuse to find reasonable suspicion merely by association").

The detectives were on a fishing expedition by inflating the apparent suspicion of Hardaway's activity and the facts of the case. Without a particular connection to Hardaway, they wanted to search the phone for "GPS data or location history," "calls, texts, MMS messages, and application data between the device and any other associates before, during and after the incident," "any photographs taken by or stored by the user," and "search history of the user." Warrant to Search Phone, at 7, R. p. *. To request access to such a broad swath of Hardaway's private information without any more particular purpose or target reveals that the detectives had little more than a hunch. Literally every single smart phone would contain this potential "evidence."

The vast majority of the facts stated in the affidavits are either not suspicious or not related to Hardaway. For the trial court to conclude they amounted to probable cause required it to rely on the lesser standard it incorrectly believed applied. Instead, the facts stated describe the ordinary activities of life, not someone with a fair probability of having killed a man.

II. The fruits of the invalid warrants were critical to the state's case, and the denial of the motion to suppress was not harmless beyond a reasonable doubt.

At trial the state used evidence obtained pursuant to the warrants to show Hardaway owned a 10-millimeter handgun, made a phone call around when Conner left the voicemail at the apartment complaining about "a guy" on the phone, and searched for Conner's employer online in the time before the murder.

A key part of the state's case was the 10-millimeter casing found in Conner's apartment. Trial Tr. 70:19-71:19. It argued that was the caliber of gun used to kill Conner, and an ATF agent testified such guns constitute less than 2% of the firearms that law enforcement officers trace. Trial Tr. 225:12-226:15, 228:15-231-25. To prove Hardaway had such a weapon and thus was likely to have committed the murder, the state played two videos of him holding a 10-millimeter handgun that it obtained from his phone. Trial Tr. 452:21-454:15, 456:4-10, 646:1-10; State's Ex. 54. The ATF expert was able to read the serial number from the video and confirm its caliber. Trial Tr. 234:20-236:11. In closing the state emphasized these videos because they were "from his phone [and] taken by his phone." Trial Tr. 646:1-12. It emphasized how rare the gun is, "that [Hardaway] possessed a very uncommon gun that has a caliber of 10 millimeters." Trial Tr. 647:7-648:16, 648:19-20. The state also used messages obtained from his phone and Facebook Messenger to show him attempting to sell the weapon after the date of the murder. Trial Tr. 666:2-22; State's Ex. 62-64, 68. Finally, search records from Google showed Hardaway searched YouTube for videos about 10-millimeter guns on July 13, 2021. Trial Tr. 560:2-561:16; State's Ex. 76.

The state also argued Hardaway was the "guy" Conner argued with on July 12. It asserted this was his motive for the killing. Trial Tr. 651:1-16, 675:13-16. It used Hardaway's cell site location information and call logs to argue he was at the apartments and on the phone just prior to when Conner left the voicemail. Trial Tr. 504:11-506:24, 542:12-19, 652:4-9; State's Ex. 77-A, 80. To further demonstrate motive, the state used his search history—taken from his phone[5]—to show that he repeatedly searched online for Conner's employer on the evening of July 12 and leading up to the murder on July 13. Trial Tr. 562:2-564:17, 564:8-12,

[5] Trial Tr. 444:20-446:5, 561:17-562:11.

662:15-664:1; State's Ex. 58, 59. As the state emphasized, the searching stopped after the time of Conner's death. Trial Tr. 665:1-11.

These two parts of the state's theory—the murder weapon and motive—depended entirely upon evidence obtained with the faulty warrants. The trial court's failure to suppress that evidence severely prejudiced Hardaway, and his convictions should be reversed. *See State v. Dill*, 423 S.C. 534, 545, 816 S.E.2d 557, 563 (2018) ("Since the search warrant was invalid, the trial court erred in admitting the evidence obtained during the search of Dill's residence.").

CONCLUSION

Hardaway respectfully requests this Court reverse his convictions and hold the trial court erred in denying his motions to suppress the fruits of these search warrants.

Jordan Wayburn
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of February, 2025.