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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable William A. McKinnon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL LINDSAY FAILE,

APPELLANT

APPELLATE CASE NO. 2023-001055

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the police department's use of photographs obtained from the Flock Safety database without a warrant constitute an unreasonable search and seizure under the Fourth Amendment of the United States Constitution and Article I, Section 10 of the South Carolina Constitution?

STATEMENT OF THE CASE

Appellant was indicted during the August 2022 term of the York County grand jury for shoplifting, value less than $2000, enhancement. R. 369-370. The State, represented by William Anderson and Dan Porter, called the case to trial on June 20, 2023, before the Honorable William A. McKinnon and a jury. Appellant was represented by Roger Stevens. R. 1. After a two-day trial Appellant was found guilty as indicted. R. 346, ll. 2-6. Judge McKinnon sentenced Appellant to fifty-four months incarceration. R. 362, ll.1 9-25; R. 371-372.

Initially, a brief pursuant to Anders v. California, 386 U.S. 738 (1967) was submitted on behalf of Appellant and undersigned counsel moved to be relieved as part of the briefing process. By an order filed on March 24, 2025, this Court denied the motion to be relieved and ordered briefing on the issue contained in the Statement of Issue on Appeal.

This brief of Appellant follows.

STANDARD OF REVIEW

"[W]hile the need for deference remains, particularly in determining issues of credibility, it is no longer necessary for us to defer to the trial court's overall ruling in every case." State v. Frasier, 437 S.C. 625, 632-34, 879 S.E.2d 762, 766 (2022). Hence, "appellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis. This dual inquiry means we 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." Id.

ARGUMENT

The police department's use of photographs obtained from the Flock Safety database without a warrant constituted an unreasonable search and seizure under the Fourth Amendment of the United States Constitution and Article I, Section 10 of the South Carolina Constitution.

Relevant Facts

On May 17, 2022, Monica Dotson, the asset protection manager at the Belk in Rock Hill, South Carolina, called 911 to report a shoplifting in progress. R. 112, ll. 7-20; R. 132, ll. 5-6. Dotson informed dispatch that the suspect was someone she recognized from previous incidents and described him as a white male in his fifties, average build, approximately five-seven with salt and pepper hair that was longer on the top. She noted he was wearing a medical mask and that he had bushy eyebrows and a prominent browbone. R. 114, ll. 17-24; R. 132, ll. 8-19.

The shoplifter cut the security tethers off two designer handbags and left the store without paying for them. Once outside he entered the driver side of a white Chevrolet pickup truck. Dotson was able to provide police with the first two letters of the plate as V M, but the rest of the plate number was obscured by what appeared to be black tape. R. 115, l. 2-R. 116, l. 19. The following morning Rock Hill Police Department research data analyst Damien Williams was reviewing incident reports from the prior day. He noted the description of the truck, the partially obscured license plate, and that the incident had occurred between 6:15 to 6:30 in the evening.

Using that information, he reviewed images from the Flock Safety (Flock) camera positioned on the southbound exit ramp at Dave Lyle and I-77. Williams located a photograph of the suspected vehicle exiting I-77 at Dave Lyle at approximately 6 p.m. on the day of the incident. R. 188, l. 23-R. 191, l. 17; State's Ex. 12. Williams continued to search the Flock database and located an image of the suspect vehicle without tape over the tag that had been taken approximately

fifty miles away in Camden, South Carolina the day after the incident. R. 194, l. 10-R. 195, l. 15; R. 242, ll. 6-14; State's Ex. 14. Williams determined the two photographs were of the same vehicle due to both vehicles being the same make and model truck with the same accessories and wheels. R. 222, ll. 1-3; R. 223, ll. 6-21. Williams could not say how many photographs were collected of the suspect vehicle at the time the incident occurred. R. 243, ll. 1-3. Police determined through the DMV that the suspect vehicle was registered to Appellant. R. 255, ll. 6-21. Police never physically located the suspect vehicle. R. 274, ll. 8-25.

There are approximately twenty-four Flock cameras in the City of Rock Hill that generate thousands of photographs a day of the vehicles in the Rock Hill area. R. 228, l. 20-R. 229, l. 3. Flock captures multiple characteristics of a vehicle that it photographs. R. 253, ll. 4-8. The system captures a time, date, and location stamped photograph of the make, model, color, and license plate number of a vehicle. It also captures distinctive aspects of a vehicle, including stickers, wheels, visible damage, and vehicle accessories. R. 222, ll. 1-3; R. 223, ll.14-15; R. 231, ll. 9-17; R. 238, ll. 20-22; R. 260, l. 24-R. 261, l. 2; R. 295, ll. 12-18. Flock system end users can share their camera information with other end users, be it between other law enforcement agencies or with private entities such as homeowner's associations or private citizens. R. 232, l. 19-R. 234, l. 14. Flock typically retains the images and data taken by its cameras for thirty-day periods. R. 244, ll. 1-14.

Prior to the start of trial, defense counsel moved to suppress the evidence obtained from the Flock database search as volitive of the prohibition against unreasonable searches and seizures in both the United States Constitution and South Carolina State Constitution. During a hearing on another pre-trial matter the lead investigator on the case, Detective Darin Swiger, testified that he was able to use the DMV records to determine the registered owner of the truck. R. 55, ll. 14-24. Swiger admitted that he could have searched through the DMV records for a Chevy Silverado with

the partial match of VM but "that takes a longer period of time." He continued "when I say a longer period of time, it could be as short as a week. It's just you're kind of up to the mercy of the DMV when you hand that to them." The trial court noted that it was "primarily a convenience would be the reason you went with the Flock." R. 55, l. 14- R. 56, l. 23. The use of the Flock database generated the only lead in the case and is what led to the identification and arrest of Appellant. R. 57, ll. 4-25.

Defense counsel informed the trial court that Flock has cameras in 2,500 communities across the United States, with at least twenty-three cameras covering most key avenues of approached into and out of Rock Hill. He provided an article[1] to the trial court where the police chief of the City of Tega Cay stated that there was no way to enter or leave Tega Cay in a motor vehicle without being detected by a Flock camera. Defense counsel likened the information obtained through the Flock database to cell site location information (CSLI) in its "depth, breadth, and comprehensive reach." R. 82, ll. 1-15. Defense counsel continued that the data collected by Flock was analogous to the CSLI data, because the information was not just license plate numbers but "all kinds of characteristics, damage on the truck, stickers on the window, color of the truck...so it's actually far more invasive. And this is all collected on private citizens every single day without a warrant, and it's maintained in that database for approximately thirty days." R. 84, l. 25-R. 85, l. 10. He further compared the data captured by Flock to GPS slap on trackers arguing that accessing Flock's database was an unconstitutional search because "of the breadth of location data that was being collected." R. 85, ll. 11-20.

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1 Defense counsel referenced the article as "Defense Court's Exhibit Four," however there is no record of the exhibit being officially entered or maintained by the Clerk of Court. R. 95, ll. 7-23.

Regarding the facts of this case, defense counsel argued that Flock was used to located Appellant fifty-seven miles away from the incident location a day after the shopping lifting occurred which demonstrated "that regardless of where you are, if we [the State] have one bread crumb, they can find you anywhere." R. 87, l. 22-R. 88, l. 4. He reiterated that the only lead police had in the case was the information from the Flock database and that was the information that led directly to the identification and arrest of Appellant. He maintained that the accessing of the Flock database without a search warrant was an unconstitutional search. R. 88, ll. 16-22.

Defense counsel also argued that Appellant's right to privacy under the South Carolina Constitution was violated as the state constitution provides a higher level of privacy protection than its federal counterpart. Defense counsel stated that "the focus in the state constitution is on whether the invasion of privacy is reasonable, regardless of the person's expectation of privacy to be searched." He maintained that to avoid a violation of Appellant's state constitutional rights, the police were required to have gotten a search warrant once they had probable cause to search the Flock database. R. 94, ll. 3-R. 97, l. 8.

The trial court ultimately denied the motion to suppress ruling,

> I'm going to deny the motion, and the basis for the Court's reasoning is that, Mr. Stevens, you raised very interesting issues regarding use of Flock cameras to determine people's location.
>
> ...
>
> That is not how this case used the data. This case was just a query for white Silverado's with VM as the first two license plate digits. It's the exact same data in the state DMV database. The only difference is in this case is it came back with a photo of a truck that had nothing to do with this case. It wasn't the same day; it wasn't in the Belks (sic) parking lot. So I just -- although there are interesting issues about using -- tracking people's location data, they're not -- in the Court's opinion, they are not implicated in this case where the State merely queried the Flock database for trucks matching this description with this license plate. And the fact that the picture came back as well. In the Court's view, there's no privacy interest in the exterior appearance of your vehicle. So for those reasons, the Court's going to deny the motion. R. 97, l. 9-R. 98, l. 10.

Discussion

This case raises the question of whether the data gathered and stored by the Flock Safety system can be accessed and used by law enforcement without first satisfying the warrant requirement. Critically, what is at issue is not the cameras themselves, but the information the Flock cameras capture and subsequently store. While marketed as mere automatic license plate readers (ALPR), the Flock system collects detailed time, date, and location information along with high-resolution photographs of the exterior of vehicles. It is significantly more intrusive than a standard ALPR and the use of such data should be subject to the requirements of the Fourth Amendment of the United States Constitution and to Article I, Section 10 of the South Carolina Constitution.

The Fourth Amendment

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. "[T]he underlying command of the Fourth Amendment is always that searches and seizures be reasonable." Wilson v. Arkansas, 514 U.S. 927, 931 (1995). Protection under the Fourth Amendment is afforded to those who have a legitimate expectation of privacy in the place searched. Rakas v. Illinois, 439 U.S. 128, 143 (1978). To demonstrate an expectation of privacy, the defendant must show he had a subjective expectation of privacy and the expectation was one that society recognized as reasonable. Katz v. United States, 389 U.S. 347, 351, (1967); Oliver v. United States, 466 U.S. 170, 177 (1984). The Fourth Amendment is a personal right and an individual must invoke its protections. Minnesota v. Carter, 525 U.S. 83, 88 (1998).

The basic purpose of the Fourth Amendment, as recognized repeatedly by the United States Supreme Court, is "to safeguard the privacy and security of individuals against arbitrary invasions

by government officials." Cady v. Dombrowski, 413 U.S. 433, 453 (1973) (Brennan, J. dissenting). Through its exclusionary rule, the Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. U.S. Const. Amend. IV. When evaluating a search through the framework of the Fourth Amendment, "[t]he ultimate standard set forth...is reasonableness." Dombrowski at 439.

"Whether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case." S. Dakota v. Opperman, 428 U.S. 364, 375 (1976). "Generally, a warrantless search is per se unreasonable and thus violative of the Fourth Amendment's prohibition against unreasonable searches and seizures." State v. Bultron, 318 S.C. 323, 331, 457 S.E.2d 616, 621 (Ct. App. 1995). Evidence seized in violation of the Fourth Amendment will be excluded in both state and federal court. See Mapp v. Ohio, 367 U.S. 643 (1961); State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001). "However, a warrantless search will withstand constitutional scrutiny where the search falls within one of a few specifically established and well delineated exceptions to the Fourth Amendment exclusionary rule." Id. at 331-32, 457 S.E.2d at 621. In such cases, the burden is upon the State to justify a warrantless search. State v. Bailey, 276 S.C. 32, 35, 274 S.E.2d 913, 915 (1981).

The United States Supreme Court has regularly grappled with the proper application of Fourth Amendment strictures to emerging technology. In Carpenter v. United States, 585 U.S. 296 (2018), the Court dealt with the third-party doctrine and whether a warrant was required to obtain historical cell site location data. The data at issue allowed the government "the ability to chronicle a person's past movements through the record of his cell phone signals." Relying heavily on Riley v. California, 573 U.S. 373 (2014), and United States v. Jones, 565 U.S. 400 (2012), the

Court held that "the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection." Carpenter, at 309. "Whether the Government employs its own surveillance technology as in Jones or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. The location information obtained from Carpenter's wireless carriers was the product of a search." Id. at 309-310. In reaching its decision the Court reiterated "some basic guidepost. First, that the Amendment seeks to secure 'the privacies of life' against 'arbitrary power.' Second, and relatedly, that a central aim of the Framers was "to place obstacles in the way of a too permeating police surveillance." Id. at 305 (cleaned up). "As technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to 'assure [] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." Id. at 305 citing Kyllo v. United States, 533 U.S. 27 (2001).

While citizens do not have a reasonable expectation of privacy while *actively* traveling in an automobile on public thoroughfares, United States v. Knotts, 460 U.S. 276 (1983), citizens do have a reasonable expectation of privacy in the whole of their physical movements. Carpenter at 310 (cleaned up). "A person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary, what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." Id. (cleaned up). As the Carpenter Court observed,

> Prior to the digital age, law enforcement might have pursued a suspect for a brief stretch, but doing so for any period of time was difficult and costly and therefore rarely undertaken. For that reason, society's expectation has been that law enforcement agents and others would not – and indeed, in the main, could not – secretly monitor and catalogue every single movement of an individual's car for a very long period. Id. at 310 (cleaned up).

The distinction is critical - while one may not have a reasonable expectation of privacy in their movements on public thoroughfares while they are occurring or in the exterior of the vehicle, an individual does have a reasonable expectation of privacy in the collection, storage, and use of data that can be used to document their past physical movements.

Flock is not a standard ALPR. The images collected are high-resolution images of vehicle exteriors that detail wheels, rims, running boards, other myriad accessories, stickers, decals, the make, model, and color of the vehicle, along with time, date, and location data. The data is collected daily on every vehicle that passes a Flock camera without any individualized suspicion and it is stored for a minimum of thirty days. Not only does a law enforcement agency have access to its own Flock database, but it can access any Flock database released for use by the database owner, be it another law enforcement agency or private entity. The coverage afforded by this system and the amount of information collected and stored implicates the privacy concerns enshrined in the Fourth Amendment, and in the South Carolina Constitution as discussed *infra*.

In the case, *sub judice*, Appellant had a subjective expectation of privacy not only in his license plate tag, which he took means to conceal, but also in the highly specific data that was collected about the movements of his vehicle. Society, as shown by Carpenter, has an objectively reasonable expectation of privacy in data that has the potential to reveal the history of a person's physical movements. Without the Flock system, the police would have been relegated to requesting information from the DMV about plates assigned to white trucks that start with VM. They then would have been required to manually inspect any potential suspect vehicles wherever those vehicles may have been located. However, by using Flock law enforcement was able to reach across jurisdictional lines and locate Appellant's truck over fifty miles away, a day after the incident. This was improper. The information contained within Flock is more than simply license

plate numbers. It is vast amounts of specific data on any citizen that drives along the cameras path. To access such information, law enforcement was required to obtain a warrant. The trial court erred in failing to suppress the evidence under the Fourth Amendment.

The South Carolina Constitution

Assuming the facts of this case do not implicate a search under the Fourth Amendment, the privacy issue is still ripe for consideration under the South Carolina Constitution. It is well settled that the interpretation of the state's constitution is a matter for the courts." Baddourah v. McMaster, 433 S.C. 89, 103, 856 S.E.2d 561, 568 (2021). "State courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution." State v. Easler, 327 S.C. 121, 131 n.13, 489 S.E.2d 617, 622 n.13 (1997), overruled on other grounds by State v. Greene, 423 S.C. 263, 814 S.E.2d 496 (2018). "This relationship is often described as a recognition that the federal Constitution sets the floor for individual rights while the state constitution establishes the ceiling." State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001). "Thus, [the appellate courts of this state] can interpret the state protection against unreasonable searches and seizures in such a way as to provide greater protection than the federal Constitution." Id.

Article I, Section 10, of the South Carolina Constitution states: "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. 1 § 10. Our Supreme Court has already held that the "South Carolina Constitution, with an express right to privacy provision included in the article prohibiting unreasonable searches and seizures, favors an interpretation offering a higher level of privacy protection than the Fourth Amendment." Forrester at 645, 541 S.E.2d at 841. "Even in the absence of a specific right to privacy provision, this Court

could interpret our state constitution as providing more protection than the federal counterpart. However, by articulating a specific prohibition against 'unreasonable invasions of privacy,' the people of South Carolina have indicated that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution resulting in the exclusion of the discovered evidence." Forrester at 644, 541 S.E.2d at 841. Our Court also 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. According to our Court, "[t]he focus in the state constitution is on whether the invasion of privacy is reasonable, regardless of the person's expectation of privacy" in the place searched. State v. Weaver, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007).

While the appellate courts of South Carolina have addressed issues related to electronic surveillance and privacy, the courts have never considered whether the use of ALPRs in general, or Flock in particular, violate our state Constitution. The ultimate question under our Constitution is whether the governments access of detailed time, date, and location information along with high-resolution photographs of the exterior of vehicles is an unreasonable invasion of privacy. While the use of traditional ALPRs may not rise to the level of an unreasonable invasion of privacy, the use of Flock, a specialized system with government and private users that is pervasive and ever growing which captures high-resolution images of citizen's vehicles and maintains that data for an extended period of time is an unreasonable invasion of privacy under South Carolina law.

In discussing the amendment of Article 1, section 10, now Chief Justice Kittredge stated in his dissent in Planned Parenthood S. Atl. v. State, 438 S.C. 188, 310-311, 882 S.E.2d 770, 835–36 (2023), reh'g denied (Feb. 8, 2023) (Kittredge, J Dissenting),

> "The genesis of the privacy provision related solely to modern technology and the ever-increasing volume and acquisition of data and personal information. The record of the September 1967 meeting framed the issue as follows: 'A democratic society is peculiarly receptive to the development of constitutional norms that will protect individual privacy from the omnipresent ear of modern surveillance equipment.'"

Chief Justice Kittredge continued to explore the history around the amendment and noted even the Attorney General at the time "favored adding a right to privacy to the constitutional section involving search and seizures, acknowledging that the committee's proposed revision "relate[d] to an interception of communication which [was] generally done by electronic means." Id.

The Attorney General at the time the amendment was made also "expressed concern that massive collection of data by governmental agencies may afford a basis for concluding that the citizens' right of privacy can be jeopardized." Id. He recognized that there was a trend toward securing *individual privacy* in the field of data processing and thoughtfully stated,

> We are considering now the establishment of a system of data processing which would make readily available vast amounts of information relating to the private affairs of citizens. *Unless thought is given to protection of the individual's privacy within the bank of information stored in the computers, there can be a potential invasion of that individual's right of privacy.* Id.

Ultimately, the amendment was written broadly to cover "not only electronic devices, but also....data processing banks." Id. As stated by Chief Justice Kittredge,

> The focus of the discussions regarding the privacy provision concerned matters of protection of personal information, circumstances that would allow law enforcement access to such information, probable cause, and search warrants. As the committee was concluding its work, one committee member remarked, "This is getting down to your mass computer data. It's getting to all electronic stuff." Id.

Article 1, section 10 was designed and intended to defeat precisely this type of mass-monitoring through electronic surveillance and databases by extending protections beyond those covered by the Fourth Amendment. Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895, at 15 (1969) ("This additional statement is designed to protect the

citizen from improper use of electronic devices, computer data banks, etc. Since it is almost impossible to describe all of the devices which exist or which may be perfected in the future, the Committee recommends only a broad statement on policy, leaving the details to be regulated by law and court decisions."). The Flock Safety system complies and retains vast amounts of data on private citizens every single time a person drives their vehicle past a Flock camera. The advanced ALPR system at issue in this matter is, as explained my Justice Brandeis in his dissent in Olmstead v. United States, 227 U.S. 438, 437-474 (1928), one of the "subtler and more far-reaching means of invading privacy" that has become available to the law enforcement. Allowing law enforcement unrestricted access to a database of thousands upon thousands of detailed high-resolution images with date, time, and location information of any citizen who passes a Flock camera is a bridge too far under the South Carolina Constitution. The creation and accessing of the database without a warrant was an unreasonable invasion of the privacy of Appellant. The trial court erred in failing to suppress the Flock evidence.

CONCLUSION

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

Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of May, 2025.

CERTIFICATE OF COUNSEL

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

May 5, 2025.

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APPELLATE CASE NO. 2023-001055

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above-referenced case has been served upon Joshua Edwards, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 5th day of May, 2025.

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