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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Colleton County
The Honorable Robert J. Bonds, Circuit Court Judge
Appellant Case No. 2024-000722

THE STATE, RESPONDENT,

v.

JUSTIN COLE CARROLL, APPELLANT.

INITIAL BRIEF OF RESPONDENT

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RESPONDENT'S COUNTER-STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in ruling that the Appellant did not have "standing" to challenge the evidence located on the victim's phone that was obtained through a valid search warrant and the victim's boyfriend opened the phone for law enforcement, thereby, consenting to the search?
2. Did the trial court err by refusing to suppress evidence obtained from the Appellant's cellphone since the affidavit was supplemented by sworn testimony giving it sufficient probable cause and it was signed by a magistrate which made this search warrant valid?
3. Did the court err in allowing evidence obtained from a valid search warrant for cell tower records, even though the affidavit was not signed by the law enforcement officer, however, this scrivener's error did not invalidate search warrant under the good faith doctrine? Since this warrant was just for seven hours of cell phone records, was a warrant even needed since it was under the seven-day limit established under *Carpenter*?

STATEMENT OF THE CASE

On May 22, 2021, Justin Cole Carroll (Appellant) was arrested and charged with the offenses of murder, and possession of a weapon by a person convicted of a felony. On January 17, 2023, the Colleton County Grand Jury indicted Appellant for the offense of murder. (R*).

On April 22, 2024, the Appellant along with his counsel appeared before the Honorable Robert J. Bonds for pre-trial motions. Appearing representing the State of South Carolina was Assistant Solicitor, Hunter Swanson. During this hearing Appellant moved for the suppression of evidence obtained from three search warrants. The first related to the phone of the victim, recovered inside her vehicle by law enforcement during their murder investigation. During this hearing the Appellant argued that he was entitled to make an argument regarding the validation of this search warrant. At the conclusion of this motion the trial judge denied this motion, due to the fact the Appellant did not have "standing" to argue the legitimacy of a search warrant for property belonging to the victim. (Pre-trial Tr. p. 17 l. 23 – p. 18 l. 4).

Appellant also argued that the search warrants for the his cell phone records, as well as the Verizon cell tower records were invalid; therefore, the evidence obtained through these warrants was inadmissible. The court found the affidavit for the cell phone records was not sufficient for probable cause, until Detective Charles Shipp testified as to what was told to the magistrate under oath that supplemented the affidavit. The court then declared that the oral supplementation given under oath to the magistrate was sufficient to provide probable cause. (Pre-trial Tr. p. 47 l. 4-20). The Appellant argued that the search warrant for the cell tower records was not valid due to the fact the affidavit was not signed by law enforcement. The trial court ruled that this was a scrivener's error. The search warrant was obviously signed by a magistrate making the warrant lawful. The trial court allowed the cell tower information into evidence. (Pre-trial Tr. p. 48 l. 24 – p. 49 l. 3).

On April 23, 2024, the Appellant along with his trial counsel appeared before the trial judge for the purposes of a jury trial. Appearing representing the State of South Carolina was Assistant Solicitors, Hunter Swanson, and Julie Kate Keeney of the Fourteenth Circuit Solicitor's office. After two days of testimony, a jury of his peers found the Appellant guilty of murder. (Tr. p. 495 l. 21 – p. 496 l. 1). After the reciting of the verdict, Appellant appeared before the trial judge for sentencing. The trial judge sentenced Petitioner to a sixty-year period of incarceration. The Appellant was given credit for one thousand and sixty-six (1066) days of pre-trial incarceration. (Tr. p. 508 l. 23 – p. 509 l. 4).

STATEMENT OF FACTS

On May 22, 2021, Domasia Holloway (victim) went to visit her mother Shameka Holloway. While driving back to her apartment complex, she was followed by the Appellant. (Tr. p. 203 l. 7-11; 203 l. 19-20). At the apartment complex, Appellant parked on the other side of the parking lot away from the victim. He approached the victim's vehicle and fired shots into her vehicle. (Tr. p. 209 l. 25 – p. 210 l. 3). Appellant got back into his truck and left the complex. (Tr. p. 211 l. 6-10).

Sergeant Ross Hantz of the Walterboro Police Department lived in that apartment complex. His apartment was right above the incident location. Sergeant Hantz was in his apartment watching TV when he heard several gunshots between 10:00 pm and 10:30 pm. (Tr. p. 198 l. 8-12). Sergeant Hantz got dressed, grabbed his police gear, dialed 911, and ran outside. (Tr. p. 198 l. 14-17). It was dark and all he had in his possession was the flashlight from his cell phone. Sergeant Hantz got inside his police cruiser to retrieve his flashlight. Once inside he saw that the car parked next to his had several bullet holes in the driver's side window. (Tr. p. 200 l. 8-12).

Officer Carmen Hartley of the Walterboro police department arrived at the scene. She saw a silver Lexus with a female slumped over the steering wheel. (Tr. p. 223 l. 21-25). Emergency Medical Services were called; they found no signs of life. (Tr. p. 180 l. 23-25). Officer Hartley collected shell casings and photographed the scene. (Tr. p. 224 l. 18-20).

During the police investigation, they obtained surveillance video which revealed the Appellant's truck entering the apartment complex following the victim. (Tr. p. 203 l. 7-11). During their investigation, law enforcement also learned about a prior incident between the Appellant and the victim. After they had the Appellant's name, law enforcement obtained a picture of the Appellant from the Department of Motor Vehicles. (Tr. p. 287 l. 10-14). They compared the height

and weight of the driver's license from the video of the assailant in the apartment complex surveillance video. (Tr. p. 287 l. 17-19). This is when the Appellant became a person of interest. (Tr. p. 287 l. 20-22). A be on the lookout (BOLO) was issued for the Appellant's truck. (Tr. p. 288 l. 17-21). The Appellant was later found driving a truck matching the one seen on the surveillance video. Appellant was pulled over by law enforcement, detained, and a gunshot residue (GSR) test was performed on the Appellant. The Appellant was then allowed to leave. (Tr. p. 289 l. 24 – p. 290 l. 1).

While searching the victim's vehicle, her cell phone was discovered. Officer Whitlee Fisk took the victim's phone to her current boyfriend to find out if he knew the passcode. He knew the passcode, and opened the phone for Officer Fisk. (Tr. p. 245 l. 9-12). A search warrant was later obtained for the contents of the victim's phone. Within the victim's phone was a snapchat video of someone matching the Appellant's height and weight approaching the victim's vehicle. (Tr. p. 460 l. 16-24). The Appellant was arrested two days later.

During the trial, Dylan Hightower, investigator for the Fourteenth Circuit Solicitor's office testified. During his testimony Investigator Hightower was found qualified as an expert in the field of historical cell site analysis. (Tr. p. 331 l. 23-25). Investigator Hightower testified that he helped agencies with cell phone mapping. (Tr. p. 328 l. 23-25). He testified that he received cell tower records of the Appellant's phone number between May 22, 2021, at 7:08 pm and May 23, 2021, at 1:56 am (Tr. p. 333 l. 7-10). Investigator Hightower stated that the Appellant's phone pinged at 10:16 pm around the location were the incident took place. (Tr. p. 337 l. 8-10).

Agent Paul Greer of the South Carolina Law Enforcement Division (SLED) also testified. Agent Greer was found qualified as an expert in the field of firearms and tool marks. (Tr. p. 367 l. 25 – p. 368 l. 3). Agent Greer testified that he received six cartridge cases for examination. Based

on his examination, Agent Greer determined that each of these cartridges were fired by the same gun, a 40 caliber Smith & Wesson. (Tr. p. 376 l. 6-13). SLED Agent Jennifer Nates also testified. Agent Nates was found qualified as an expert in trace analysis. (Tr. p. 394 l. 15-16). Agent Nates received a GSR kit from law enforcement. After examination, she found one round particle that contained three elements required to call something gunshot residue. (Tr. p. 393 l. 8-13).

Forensic pathologist Dr. Nick Batalis also testified. Dr. Batalis was found qualified as an expert in the field of forensic pathology. (Tr. p. 404 l. 15-17). On May 28, 2021, Dr. Batalis performed the autopsy on the victim. (Tr. p. 405 l. 6). Dr. Batalis testified that the victim suffered four gunshot wounds, one in the left ear, one on the left side of her neck, and two in the left elbow. (Tr. p. 405 l. 9-11). Dr. Batalis determined that the victim's cause of death was a gunshot wound to the left side of her neck which resulted in a rupture of two major blood vessels. The bullet also fractured her spine. (Tr. p. 408 l. 23 – p. 409 l. 3). Dr. Batalis determined that the victim's manner of death was a homicide. (Tr. p. 409 l. 6-7).

ARGUMENTS

1. The court did not err in ruling that Appellant did not have "standing" to challenge evidence the state located on the victim's phone since it was obtained with a valid search warrant, as decided by the court, and Appellant relied on the South Carolina Supreme Court case of *State v. McKnight,* which is not relevant to the present case. The boyfriend of the victim also opened the victim's phone for law enforcement; therefore, it was a consensual search, a search warrant was not necessary.

Relevant Facts

During the investigation, the victim's phone was found in her car. (Tr. p. 240 l. 22-23). This phone was taken by to her current boyfriend who knew the passcode. (Tr. 245 l. 9-12). He voluntarily used the victim's passcode to open the phone. After opening the phone, the current boyfriend gave it back to the law enforcement officers. Officer Whitlee Fisk received the phone

and went through the camera roll. (Tr. p. 245 l. 22-23). After this Law enforcement went to a magistrate to obtain a search warrant.

During pre-trial, Appellant made a motion for the trial court to find that the search warrant was obtained unlawfully. Appellant argued that any evidence obtained though this search warrant should be inadmissible. The Appellant argued that the return was not signed by a law enforcement officer and the affidavit did not establish probable cause. The State argued that since the search warrant was concerned items owned by the victim, Appellant did not have dominion or control over this phone.[1] The court ruled that since it was the victim's cell phone, she was the one with the interest in the phone. Appellant did not have "standing" to question the search warrant, or to have the evidence suppressed. (Pre-trial Tr. p. 17 l. 23 – p. 18 l. 4).

Standard of Review

In criminal cases the appellate court sits to review errors of law only. *State v. Wilson,* 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). On appeal, the trial court ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law. *State v. Smicklevich,* 268 S.C. 411, 234 S.E.2d 230 (1977). The admission or exclusion of evidence is within the discretion of the trial court will not be disturbed on appeal absent an abuse of discretion. An abuse of discretion occurs when the trial court's conclusions either lack evidentiary support or are controlled by an error of law. *State v. Winkler,* 388 S.C. 574, 583, 698 S.E.2d 596, 601 (2010). A search warrant may be issued only upon the finding of probable cause, and it is the duty of the reviewing court to ensure the issuing official had a substantial basis upon which to conclude that probable cause existed. *State v. Chisholm,* 395 S.C. 259, 267, 717 S.E.2d 614, 618 (Ct. App. 2011). The established

[1] The Appellant was not on the plan with the victim, nor did he pay the phone bill for this phone. (Tr. p. 17 l. 13-14).

principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. *Alderman v. U.S.*, 394 U.S. 165, 171-72, 89 S.Ct. 961, 965 (1969). Fourth Amendment rights are personal rights' and cannot be "asserted vicariously" by a defendant merely because he or she may be aggrieved by the introduction of damaging evidence. *State v. Patino,* 93 A.3d 40, 51-52 (2014), *quoting, State v. Quinlan,* 921 S.2d 96, 109 (R.I. 2007).

Discussion

The Appellant argues that the trial judge erred in deciding that he did not have "standing" to challenge the search warrant of the victim's phone. The Fourth Amendment of the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

Appellant claims that the trial court erred and that he had "standing" to challenge the search of the victim's phone. During pre-trial and within his brief the Appellant relied heavily on the South Carolina Supreme Court decision of *State v. McKnight,* 291 S.C. 110, 352 S.E.2d 471 (1987). In *McKnight,* the Supreme Court decided that each defendant whose evidence was offered had standing to object to the validity of the search. The Respondent argues that *McKnight* does not apply to the current case. In *McKnight,* the Supreme Court ruled that the search warrant violated Section 17-13-140 of the South Carolina Code of Laws which states:

> A warrant issued hereunder shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of the court of record establishing

> the grounds for the warrant. If the magistrate, municipal judge, or other judicial officer abovementioned is satisfied that the grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched.

S.C. Code Ann. §17-13-140 (1976).

In *McKnight,* the Magistrate never was shown an affidavit from the Sheriff. *McKnight,* 291 S.C. at 112, 352 S.E.2d at 972. In *McKnight,* the only thing that was presented to the Appellant was a search warrant form signed by the Sheriff. There was never an actual search warrant signed by a Magistrate. The Supreme Court correctly ruled that this violated South Carolina law. This is not what has happened in the present case. In this case an affidavit was presented to the magistrate in which he found probable cause and signed the search warrant. *McKnight* was a violation of South Carolina law not the Fourth Amendment which is what Appellant claimed occurred in this case. At the conclusion of the *McKnight* opinion the South Carolina Supreme Court wrote:

> The State argues that all of the respondents lack standing to challenge the legality of the search, asserting none of the respondents had a legitimate expectation of privacy in the searched premises. **Had this case been decided on constitutional grounds, this would be the appropriate inquiry.** Since the trial judge's ruling was based on the stricter, statutory grounds, each of the respondents against whom the evidence was offered had standing to object to the validity of the search.

McKnight, 291 S.C. at 115, 352 S.E.2d at 474. (emphasis added).

The *McKnight* decision was based on a violation of South Carolina law not the Fourth Amendment of the United States Constitution. The Appellant has failed to reveal to this Court that law enforcement failed to apply all the necessary prerequisites in order to obtain a valid search warrant. This search warrant was not in violation of South Carolina law; therefore, *McKnight* does not apply.

During the pre-trial hearing the trial court found that the Appellant did not have standing to oppose the search warrant, the trial court was correct. The search warrant was for the contents

of a phone that belonged to the victim. This was a phone that was not in the dominion nor control of the Appellant. Nor was he on any joint plan or paying for this phone. Therefore, there exists no expectation of privacy. The capacity to claim the protection of the Fourth Amendment depends upon whether the person who claims the protection has a legitimate expectation of privacy in the invaded place. *U.S. v. Castellanos,* 716 F.3d 828, 833 (4th Cir. 2013). Appellant cannot say that his Fourth Amendment rights were infringed upon just because evidence against him was found. There must be some expectation of privacy belonging to the Appellant of the thing that was searched. When attempting to determine whether a defendant has a reasonable expectation of privacy in property that is held by another, we consider such factors as, "whether that person claims an ownership or possessory interest in the property, and whether he has established a right or taken precautions to exclude others from the property." *Id, quoting, United States v. Rusher,* 966 F.2d 868, 875 (4th Cir. 1992). There was no evidence that the Appellant established any right to the victim's phone or took any precautions for others to see this phone. The phone belonged to the victim and was found inside her vehicle after her murder. Therefore, the Appellant has no expectation of privacy to the contents of that phone. The Appellant seems to think that since this phone had damaging evidence, he is entitled to an expectation of privacy. However, he cannot claim this when he had absolutely no control over this phone and it was found in the victim's car next to the victim's dead body. The evidence is clear that the Appellant did not have an expectation of privacy regarding the victim's phone, therefore, he did not have a Fourth Amendment claim. The trial court was correct in determining that he did not have "standing" to object to the search warrant or the contents of the phone being introduced into evidence.

The Respondent also argues that law enforcement was given consent to the contents of the phone when the victim then current boyfriend opened the phone and gave it to law enforcement.

The Fourth Amendment prohibition against a warrantless entry does not apply to situations in which voluntary consent has been obtained either from the individual whose property is searched or from a third party who possesses common authority over the premises. *Illinois v. Rodriguez,* 497 U.S. 177, 181, 110 S.Ct. 2793, 2797 (1990)(internal cites omitted). It is obvious that the boyfriend had authority to access the victim's phone because she gave him the passcode. Once this was given to him, he had the right to give consent to law enforcement to search the contents.

Since the victim was deceased she did not have the ability to consent or not consent to the search of her phone. Therefore, the ability to consent rested on a party that had control and the access to the contents. That was given to her current boyfriend who had knowledge of the passcode and the ability to enter her phone upon the request by law enforcement. Consent to a warrantless search by one who possesses common authority or other sufficient relationship to the premises or effect sought to be inspected is valid absent a nonconsenting person with whom that authority is shared. *U.S. v. Matlock,* 415 U.S. 164, 170, 94 S.Ct. 988, 994 (1974).

The Appellant did not have an expectation of privacy with the phone of the victim, therefore, there was no violation of his Fourth Amendment right to obtain a search warrant in order to search the contents. Consent to search the phone was given by her current boyfriend who did have dominion and control over the victim's phone since he was given the passcode. Therefore, the search warrant was not even necessary since consent to search was given which is one of the warrantless search exceptions under the Fourth Amendment. The decision of the trial court was lawful and should be upheld.

2. **The court did not err by refusing to suppress evidence obtained from the Appellant's cellphone since the affidavit was supplemented by sworn testimony and the warrant was signed by a magistrate which made the search warrant lawful.**

Relevant Facts

During pre-trial the Appellant argued that the search warrant for his phone and its contents was not valid due to the fact the affidavit did not obtain sufficient probable cause, and the affidavit was not signed by the presenting law enforcement officer.

During the pre-trial hearing Detective Charles Shipp testified. Detective Shipp was the lead investigator on his case and he was the one that presented the search warrant to the magistrate. During his testimony Detective Shipp testified that the affidavit stated:

> "There was a white male seen during the time of the incident that had left the area of the 100 building walking towards the victim's vehicle. This white male is seen in the breezeway of her apartment building prior to making contact with her at her vehicle. A short time later, he's seen running from her victim back toward the area where the truck was parked" (Pre-trial Tr. p. 26 l. 23 – p. 27 l. 5).

The trial court felt that this affidavit was very vague and would have failed if this was the only information presented, however, Detective Shipp added that sworn testimony was given to the Magistrate prior to the signing the search warrant. Detective Shipp informed the trial court that he informed the magistrate that while he was on the scene it was brought to his attention that they had a prior report of an incident occurring between the victim and Appellant. (Pre-trial Tr. p. 27 l. 8-12). They took the information from the report to the Department of Motor Vehicles (DMV), and compared the surveillance video from the apartment complex with the Appellant's current driver's license. (Pre-trial Tr. p. 27 l. 12-13). Detective Shipp also testified that they discovered that the truck that the perpetrator was seen in leaving the scene was registered to the Appellant's father. (Pre-trial Tr. p. 14-17). Detective Shipp informed the trial judge, that this was when the Appellant became a suspect, "because of the prior incident at that location involving the two parties, along

with the DMV info matching his height and weight and his DMV photo too to the video footage on scene." (Pre-trial Tr. p. 28 l. 19-23). The trial court finally concluded,

> "'The supplementation and oral testimony may be used to supplement search warrant affidavits which are facially insufficient to establish probable cause.' However, it goes on, 'But sworn oral standing alone does not satisfactory.' So I think that basically – that's the *State v. Jones* case. I believe that, as a result of the that case, it's permissible for there to be oral supplementation. I believe the officer – he testified under oath as to the supplementation and what he told the magistrate he supplemented. And if, in fact, that's what he did – I have no reason to doubt him. But if, in fact, that's what he did, clearly at that point there was more than adequate probable cause based on the supplementation. I don't see anywhere where they're required to write anything down." (Pre-trial Tr. p. 47 l. 4-20).

The court made the decision that since Detective Shipp testified that he supplemented the affidavit with sworn testimony that established probable cause, the warrant was valid. The trial judge allowed the information from the Appellant's cell phone into evidence.

Standard or Review

The Appellant court is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Quattlebaum,* 338 S.C. 441, 527 S.E.2d 105 (2000). A search warrant that is insufficient in itself to establish probable cause may be supplemented by sworn oral testimony. *State v. Johnson,* 302 S.C. 243, 249, 395 S.E.2d 167, 170 (1990). "The duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis' for concluding that probable cause existed." *State v. Weston,* 329 S.C. 287, 291, 494 S.E.2d 801, 803 (1997), *quoting, Illinois v. Gates,* 462 U.S. 213, 238-39, 103 S.Ct. 2317, 2332 (1983). Searches based on warrants will be given judicial deference to the extent that an otherwise marginal search may be justified if it meets a realistic standard of probable cause. *State v. Dupree,* 354 S.C. 676, 683-84, 583 S.E.2d 437, 441 (2003). "The South Carolina Assembly has enacted a requirement that search warrant may be issued 'only upon affidavit sworn to before the magistrate...establishing the grounds for the warrant." *State v. Dupree,* 354 S.C. 676, 683, 583 S.E.2d 437, 441 (2003), *quoting, State v.*

Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). When reviewing a Magistrate's decision to issue a search warrant, we must consider the totality of the circumstances. *State v. Missouri,* 337 S.C. 548, 525 S.E.2d 394 (1999).

Discussion

The Appellant argues that the search warrant for his phone was unlawful due to the fact it did not establish probable cause. The Appellant also states that the supplemental information that was testified to was not reliable due to the fact that Detective Shipp could not remember which Magistrate actually signed the warrant.

In *Illinois v. Gates* the Supreme Court established a totality of the circumstances test for Magistrates to make a probable cause determination. In *Gates* the Supreme Court also informed the reviewing court on what they should be focusing on when making decisions regarding the determination of probable cause. In *Gates* the United States Supreme Court determined,

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of the reviewing court is simply to ensure that the magistrate had a "substantial basis for concluding" that probable cause.

Gates, 462 U.S. at 238-39, 103 S.Ct. at 2332.

The Appellant argues that the affidavit itself did not present sufficient probable cause and the testimony given by Detective Shipp was not reliable due to the fact he could not remember the name of the Magistrate who signed the search warrant. The reliability of a witness is determined by the trial judge. Credibility findings are treated as factual findings and therefore, the appellate inquiry is limited to reviewing whether the trial court's factual findings are supported by any evidence in the record. *State v. Johnson,* 413 S.C. 458, 467, 776 S.E.2d 367, 371 (2015). In his

decision the trial judge stated, "I believe the officer – he testified under oath as to the supplementation and what he told the magistrate he supplemented. And if, in fact, that's' what he did – **I have no reason to doubt him**. But if, in fact, that's what he did, clearly at that point there was more than adequate probable cause based on the supplementation." (Pre-trial Tr. p. 47 l. 12-19). The job of the Appellant court is not to doubt the decision of the trial judge when it comes to credibility. The determination of credibility must be left to the trial judge who saw and heard the witnesses and is therefore in a better position to evaluate their veracity. *Id.*, 413 S.C. at 468, 776 S.E.2d at 372. This court has previously determined that it does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence. *State v. Dunbar,* 361 S.C. 240, 253, 603 S.E.2d 615, 622 (Ct. App. 2004). The appellate court should give great deference to a Magistrate's determination of probable cause. *Weston,* 329 S.C. at 290, 494 S.E.2d at 803. The trial judge made a decision regarding the veracity of Detective Shipp that was supported by the evidence. There was no reason given to the trial court that would have led to the conclusion that Detective Shipp was lying under oath during his testimony before the Magistrate or during the pre-trial hearing. The fact that he could not remember the name of the Magistrate that issued the warrant has no bearing on his credibility regarding what was said to the Magistrate while obtaining the search warrant.

The trial court admitted that the warrant was signed by a Magistrate, and this signature was hard to read. (Pre-trial Tr. p. 46 l. 17-19). The warrant was issued three years prior to the trial, and even though the trial court was correct, there should have been some better practices by Detective Shipp in order to remember the Magistrate, however, that is not a valid reason to grant the Appellant's motion. The evidence discovered should be determined to be admissible. According to the case law it is clearly the trial judge's decision to determine the credibility of witnesses. The

trial judge committed no error in relying on the testimony of Detective Shipp in making the determination that probable cause existed and this search warrant was valid.

3. **The court did not err in allowing evidence obtained from a search warrant for cell tower records, even though the affidavit was not signed by a law enforcement officer, the trial court properly decided that this was a scrivener's error, and since this warrant was signed by a magistrate the warrant should be allowed pursuant to the good faith doctrine. This search warrant was not even necessary since the cell tower records were under the seven-day limit established under *Carpenter*.**

Relevant Facts

During the pre-trial motion the Appellant raised a motion to exclude all cell tower records obtained via search warrant for the Appellant's *Verizon* phone records. Appellant's issue was that Detective Shipp failed to sign the affidavit that listed the probable cause for this search warrant. Although it was definitely signed by a Magistrate and stated that probable cause was established. During the pre-trial hearing Detective Shipp testified, and stated that not signing the affidavit was just an oversite. (Pre-trial Tr. p. 41 l. 14). Detective Shipp did testify that he presented the affidavit and sworn testimony to the Magistrate. (Pre-trial Tr. p. 41 l. 15-17).

At the conclusion of the hearing the trial court made the following determination:

> "[T]he judge signed on the very piece of paper where the signature of the officer was to be recorded, and clearly indicates Judge Deborah O'Quinn's signature. I do believe that this was a scrivener's error. I believe he testified that he did produce that for her, she signed it. Ironically, the return was signed in that case. But I do not believe that – under the circumstances that are presented me, I just don't believe that – I believe that all the evidence and inferences here point to Judge O'Quinn swearing this witness in. I think he indicated that, and then signed the warrant. I just – I mean, for the life of me, I can't think that Judge O'Quinn would just sign a piece of paper and hand it back to him not have sworn him in, which is what he testified to, he was put under oath and he prepared the document. So sir, I think that ends up being, at best a scrivener's error. I think it complies with law, and I'm going to respectfully deny your motion as it relates to the cell phone dump." (Pre-trial Tr. p. 48 l. 5 – p. 49 l. 3).

Investigator Dylan Hightower investigator for the Fourteenth Circuit Solicitor's Office was qualified as an expert in historical cell site analysis. Investigator Hightower testified that the time

frame of the search warrant where the cell site information was taken was between May 22, 2021, at 7:08am and May 23, 2021, at 1:56am. (Tr. p. 333 l. 7-10). Investigator Hightower testified that the Appellant's phone pinged at 10:16pm around the area where the incident took place. (Tr. p. 337 l. 8-10).

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. *State v. Halcomb,* 382 S.C. 438, 676 S.E.2d 152 (Ct. App. 2009). The admission or exclusion of evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent any abuse of discretion. An abuse of discretion occurs when the trial court's conclusions either lack evidentiary support or are controlled by an error of law. *Winkler,* 388 S.C. at 583, 698 S.E.2d at 601. A search warrant maybe issued only upon a finding of probable cause, and it is the duty of the reviewing court to ensure the issuing official had a substantial basis upon which to conclude that probable cause existed. *State v. Chisholm,* 395 S.C. at 267, 717 S.E.2d at 618.

Discussion

During the course of their investigation law enforcement obtained a search warrant in order to gather records of the Appellant's cell phone from Verizon Wireless. This search warrant was to locate possible pings from cell towers in order to make a determination of the Appellant's whereabouts at the time of the crime. The time that was listed for these records was for May 22, 2021, at 7:08pm until May 23, 2021, at 1:56am. The search warrant was solely for the incident dates. Fourteenth Circuit Solicitor's Office Investigator Dylan Hightower, who was found qualified as an expert in historical call site analysis received these records. Investigator Hightower was able to determine that the Appellant's cell phone pinged in a tower located near the incident

location around 10:16 pm. This is around the time Sergeant Hantz heard gunshots outside of his apartment. (Tr. p. 198 l. 8-12).

During the pre-trial hearings Appellant moved for the trial court to exclude those phone records due to the fact the search warrant was not valid. Appellant argued that the fact Detective Shipp failed to sign the affidavit made this search warrant invalid. Detective Shipp, stated during his pre-trial testimony that not signing the affidavit was just an "oversight." (Pre-trial Tr. p. 41 l. 14). The trial judge made the determination that this was just a scrivener's error and the warrant was lawful due to it being presented to a magistrate under oath and it being signed by the magistrate revealing that there existed sufficient probable cause to allow this search.

In *United States v. Leon,* the United States Supreme Court held, even when a search warrant affidavit fails to contain probable cause, the fruits of that warrant will not be suppressed where the officers who executed the warrant relied on the search warrant in good faith. *U.S. v. Leon,* 468 U.S. 897, 104 S.Ct. 3405 (1984). The correct standard is whether a reasonably trained officer, in light of all the circumstances, would have known that the search was illegal despite the magistrate's authorization. The Appellant argued that there was not sufficient probable cause and that the affidavit was not signed, therefore, making the warrant incomplete.

Testimony was presented by Detective Shipp as he appeared before Magistrate O'Quinn. Detective Shipp's sworn testimony was in order to supplement what was written in the affidavit. The trial court ruled that this was lawful as long as the Magistrate was not only going by the oral testimony. Oral testimony may also be used in this state to supplement search warrant affidavits which are facially insufficient to establish probable cause. *State v. Jones,* 342 S.C. 121, 128, 536 S.E.2d 675, 678 (2000). Since there was sufficient probable cause within the affidavit, and the terms of the affidavit and testimony were true, the use of this search warrant was lawful pursuant

to the good faith doctrine. *Leon,* established that, "pursuant to a warrant will rarely require any deep inquiry into reasonableness, for a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search." *Leon,* 468 U.S. at 922, 104 S.Ct. at 3420.

Leon establishes that an officer reliance on a warrant will **not** qualify as "objectively reasonable" only in four circumstances:

1) Where "the magistrate or judge in issuing the warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. *Id.,* 468 U.S. at 923, 104 S.Ct. at 3405.

2) Where, "the magistrate acted as a rubber stamp for the officers and so 'wholly abandoned his detached and neutral 'judicial role'" *U.S. v. Bynum,* 293 F.3d 192, 195 (4th Cir. 2002).

3) Where a supporting affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Leon,* 468 U.S. at 923, 104 S.Ct. at 3405.

4) Where "a warrant is so facially deficient...i.e. in failing to particularize the place to be search or the things to be seized...that the executing officers cannot reasonably presume it to be valid. *Id.*

United States v. Williams, 422 F.3d 311, 317 (4th Cir. 2008), *See State v. Sachs,* 264 S.C. 541, 216 S.E.2d 501 (1975); *State v. Herring,* 387 S.C. 201, 215, 692 S.E.2d 490, 497 (2009).

There have been no accusations made by the Appellant that false information was presented in the affidavit. Appellant argues that the affidavit just did not present sufficient evidence for there to be probable cause. That was remedied with the sworn testimony supplemented along with the affidavit to establish probable cause. There is no evidence presented that the magistrate "rubber stamped" the warrant prior to its execution. Testimony was presented by Detective Shipp that he presented this affidavit and also testified under oath prior to the magistrate signing the search

warrant. There was no evidence of any "bad faith." With the affidavit and supplemented testimony, the warrant contained sufficient probable cause for a search.

There is no element in the Appellant's argument that reveals the warrant was invalid. The Respondent argues that this Court should affirm the decision of the trial court in allowing the evidence due to it being found through a valid search warrant. If this court does not arrive at the decision that the search warrant was valid, the evidence is still admissible, because the length of the search was not long enough an expectation of privacy pursuant to *Carpenter.*

Respondent received a search warrant to Verizon Wireless for cell phone records from Appellant's cell phone. The purpose of receiving these records were to determine if he was near the location of the crime or somewhere else when this crime was being committed. There was not an intention of following the Appellant in order to infringe on his personal life. That is the reason the search warrant was just for seven hours.

In 5-4 decision the United States Supreme Court decided the case of *Carpenter v. United States,* 585 U.S. 296, 138 S.Ct. 2206 (2018). In *Carpenter,* the United States Supreme Court held for the first time that a person had a legitimate expectation of privacy in acquiring seven days or more of cell-site location information (CSLI). *Id.*

In *Carpenter,* the Supreme Court was faced with a situation where the Government had obtained two warrants under the Stored Communication Act (SCA). The first request was for a one hundred and fifty-two (152) days, the other sought seven days. In *Carpenter* the majority emphasized: "this case is not about 'using a phone' or a person's movement at a particular time." *Id.,* 138 S.Ct. at 2220. "It is about a detailed chronicle of a person's physical presence complied every day, every moment, over several years." *Id.* The Supreme Court reasoned, "Such a chronicle

implicates privacy concerns far beyond those considered in *Smith v. Maryland*[2] or *United States v. Miller*.[3] The same concerns are not present when the prosecution only seeks six days or less of CSLI. The same concerns are not present when the state only request seven hours, as what was done in the present case.

Whether a person has an expectation of privacy in historical CSLI records accessed turns on the significance of the invasion of a protected privacy interest. *See, Carpenter,* 138 S.Ct. at 2217. As the Court explained in *People v. Edwards,* 97 N.Y.S.3d 418, 421-22 (N.Y. Sup. Ct. 2019):

> The Supreme Court had good reason to expressly exempt *short-term* CSLI date from its *Carpenter* decision. Gathering *long-term* CSLI data is much more clearly an invasion of a cellular telephone holder's legitimate expectation of privacy; it is, in a sense, the modern-day electronic equivalent of sending a government spy out to follow the defendant both day and night, wherever he or she goes, in public or in private. *See, Carpenter,* 138 S.Ct. at 2218 ("Whoever the suspect turns out to be, he has effectively been tailed every moment of any day for five years and the police may – in the government's view – call upon the results of that surveillance without regard to the Constitution or the Fourth Amendment").
>
> By way of contrast, in this Court's view, *short-term* CSLI data that is carefully targeted to a specific time in order to determine whether defendant was present at the scene of a crime that was committed in a public place is *not* a search and is therefore not subject to Fourth Amendment warrant requirements.
>
> The difference between long-term and short-term CSLI data is stark: *long-term* data can be linked to filming a person's entire life for weeks, or months, or even years; *short-term* CSLI date is like taking a single snapshot of that person on the street. *See, United States v. Jones,* 565 U.S. 400, 418-19, 132 S.Ct. 945 (2012)(Alito J. concurring)(*short-term* GPS monitoring does not constitute a search, but *long-term* GPS monitoring does); *see also, People v. Weaver,* 12 N.Y.3d 433, 882 N.Y.S.2d 357, 909 N.E.2d 1195 (2009)(distinguishing *short-term* visual surveillance of a car from far more intrusive *long-term* GPS monitoring.)[4]

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[2] No expectation of privacy in records of dialed telephone numbers conveyed by a telephone company. *Smith v. Maryland,* 442 U.S. 735, 99 S.Ct. 2577 (1979).

[3] No expectation of privacy in financial records held by a bank. *United States v. Miller,* 425 U.S. 435, 96 S.Ct. 1619 (1976).

[4] In *Edwards,* the order was for a period of two days of CSLI. The Court found "[i]f any case would seem to fall into that category of short-term CSLI data that the Supreme Court expressly carved out from its *Carpenter* decision, this would appear to be the case." *Id.*, 97 N.Y.S.3d at 421.

Edwards, supra.

A warrant was not required here – like the two days of information in *Edwards* – the seven hours of CSLI requested here is not fraught with the concerns that resulted **in the 5 to 4 decision** in *Carpenter. See also, Sims v. State,* 569 S.W.3d 634, 646 (Tex. Crim. App. 2019), *cert. denied,* 139 S.Ct. 2749 (2019)(Appellant did not have a legitimate expectation of privacy in his physical movements or his location as reflected in the less than three hours of real-time CSLI records accessed by police by pinging his phone less than five times); *Holder v. State,* 595 S.W.3d 691, 703-04 (Tex. Crim. App. 2020)(noting "third party doctrine alone cannot defeat a person's expectation of privacy in at least 23 days of historical" cell phone data); *State v. Hammond,* 996 F.3d 374, 389-92 (7th Cir. 2021), *cert. denied,* 142 S.Ct. 2646 (Apr. 25, 2022)(individuals do not have a reasonable expectation of privacy in their real-time CSLI traveling on public roads and pinged twice during a 6-hour chase)[5]; *United States v. Riley,* 858 F.3d 1012, 1018 (6th Cir. 2017)(the use of 7 hours of GPS location data to find a suspect from whom a valid search warrant had been issued was not a search "so long as the tracking [did] not reveal movements *within* the home (or hotel room), [did] not cross the sacred threshold of the home.); *United States v. Dewifond,* 54 F.4th 578, 580-81(8th Cir. 2022)(no Fourth Amendment violation where police monitored defendant's movements on public roads for 2 days using GPS tracker a cooperating source had consented to being installed); *Edwards, supra (*holding 2 days worth of CSLI did not constitute a search under the Fourth Amendment because the state was not **"using CSLI data in an effort to trace all of defendant's movements or an *extended* period of time as part of a *long-term* investigation into**

[5] In *Hammond* the Court noted that because *Carpenter* did not answer the question of real-time CSLI collection, judges must look to the Court's pre-Carpenter jurisprudence to answer the question at hand.

defendant's whereabouts and conduct."); *United States v. Castellanos,* 2023 WL 2466789 (N.D. Ga. Mar. 10, 2023)(real time CSLI of 18 hours over 2 days did not require a search warrant or constitute a search); *In re Google Location History Litigation,* 428 F.Supp3d 185, 198 (N.D. Cal. 2019)(the location information collected by Google fell outside *Carpenter* as "not all Plaintiff's movements were being collected, only specific movements or locations." (emphasis omitted) reasoning that "[s]uch 'bits and pieces' do[es] not meet the standard of privacy established in *Carpenter.*"); *State v. Ohio v. Mamadou Diaw,* 2024 W.L. 2952122 (Ohio App. 2024)(there was no reasonable expectation of privacy over a single coordinate disclosed by the phone company through an investigative subpoena).

As a result, the majority's clear rationale and statements of what they were holding in *Carpenter,* a warrant was simply not required. Simply put, the United States Supreme Court *even to this day* has not held a search warrant is required in order to obtain seven hours of CSLI from a phone company such as Verizon. The Respondent does not relinquish the argument that the search warrant sent to Verizon for the seven hours of CSLI was valid, however, it this Court finds that that search warrant was not valid, the Respondent will argue that no search warrant was even necessary due to the limited amount of time searched which is less than *Carpenter* requires for this court to find that the Appellant had an expectation of privacy.

The Appellant would like to suppress the evidence found in the CSLI. The Respondent argues that suppression is not a remedy for a violation of the SCA. *United States v. Guerrero,* 768 F.3d 351 (5th Cir. 2014); *United States v. Smith,* 155 F.3d 1051 (9th Cir. 1998); *United States v. Ferguson,* 508 F.Supp.2nd 7 (D.C. 2007); *Sims v. State, supra; Holder v. State,* 595 S.W.3d 691, 697 (Texas Crim. App. 2020).

CONCLUSION

The Respondent argues that decisions made by the trial court were lawful and should be affirmed by this court.

Respectfully submitted,

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