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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions
The Honorable DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2023-000234

THE STATE, Respondent,

v.

NEVELLE JOSHUA EBERHART Appellant.

Opinion No. 6150 (filed July 1, 2026)

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

On July 1, 2026, this Court issued a published opinion affirming Appellant Nevelle Eberhart's convictions for armed robbery and possession of a weapon during the commission of a violent crime. State v. Eberhart, Op. No. 6150, (S.C. Ct. App. filed July 1, 2026) (Howard Adv. Sheet no. 25 at 11). The majority found the circuit court erred by admitting GPS location data created by an ankle monitor worn by Eberhart while out on bond for unrelated charges. The majority held police violated Eberhart's Fourth Amendment rights because they did not obtain a search warrant before requesting the data from Eberhart's bondsman. The Court affirmed Eberhart's convictions on harmless error grounds. Judge McDonald, concurring in result only, found Eberhart failed to demonstrate a reasonable expectation of privacy in the data and thus no

search occurred. Pursuant to Rule 219 and Rule 221 of the South Carolina Appellate Court Rules, the State respectfully petitions for rehearing and suggests rehearing en banc.

This is a question of exceptional importance.

Rehearing en banc may be granted when the court has "overlooked or misapprehended" an issue and "the proceeding involves a question of exceptional importance." Rules 219 and 211, SCACR. This published opinion effectively creates a new constitutional privacy interest where none should rightly exist. More importantly, the opinion endangers the citizens of this state by severely limiting the ability of law enforcement to monitor the most dangerous criminal defendants who are released pending trial. Rehearing en banc is warranted.

Pretrial GPS monitoring protects victims of violent crime—and the public at large—from dangerous criminals who are released on bond. The majority opinion undermines the efficacy of this important public safety tool by requiring a judicial probable cause determination as a prerequisite to viewing a bonding company's GPS data to ensure a defendant is abiding by the terms of their bond. By requiring probable cause to seek a bondsman's GPS data, the opinion strips GPS monitoring of much of its utility.

This opinion will, at best, result in delays and obstacles to the detection of bond violations by requiring police to seek unnecessary warrants. At worst, it will prevent the government from enforcing bond orders for the most dangerous criminal defendants, placing the State at the severe disadvantage of relying on bondsman to enforce the orders of the court. See State v. Mitchell, 421 S.C. 365, 807 S.E.2d 193 (2017) (affirming estreatment of bond where bondsman failed to take any steps to enforce good behavior provision). This result is contrary to the legislative intent to allow rigorous supervision via GPS monitoring. See S.C. Code Ann. § 17-15-37 (establishing regulations which, inter alia, "allow any law enforcement agency,

including the prosecutor's office, to have access to real-time monitoring" of court-ordered GPS monitoring). This decision has the real potential to make the people of South Carolina less safe.

Further, the opinion establishes an unworkable rule that raises more questions than it answers. What if a circuit court judge wants to know if a defendant is abiding by the conditions of the bond it set? Is the court required to issue a warrant sua sponte? And on suspicion of what crime? A bond violation may not be a criminal offense. The opinion does not even clearly set out when warrants are required, limiting its holding to the "particular circumstances before [the court]." Eberhart, Howard Adv. Sheet no. 25 at 15. Law enforcement needs clear guidance from courts to know when warrants are required. This opinion does not provide that important guidance. Rehearing en banc is warranted to address these important questions.

The majority misapprehended important points of constitutional law.

The majority opinion is wrong on the merits. No warrant was required because no search occurred.

Eberhart failed to demonstrate a reasonable expectation of privacy in the data collected by his GPS monitor. Eberhart did not testify or proffer any evidence in support of his motion. The Court acknowledges this was Eberhart's burden to meet. See Rakas v. Illinois, 439 U.S. 128, 132 n.1 (1978) ("The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure. . . . The prosecutor's argument gave petitioners notice that they were to be put to their proof on any issue as to which they had the burden, and because of their failure to assert ownership, we must assume, for purposes of our review, that petitioners do not own the rifle or the shells." (emphasis added)); State v. Robinson, 410 S.C. 519, 530, 765 S.E.2d 564, 570 (2014) (explaining "the defendant bears the burden to demonstrate that he had an actual and reasonable expectation of

privacy in the place illegally searched" (citing Rakas)); United States v. Bellina, 665 F.2d 1335, 1340 (4th Cir. 1981) ("The burden rests on one who seeks to suppress to prove that his legitimate expectation of privacy has been violated by the challenged search."). But rather than holding Eberhart to his burden, the majority indulged in every presumption in his favor, faulting the State for failing to present evidence to disprove his objectively unreasonable and unsupported privacy claim.

At oral argument, the Court asked the parties whether GPS monitoring was a court-ordered condition of bond. Based on a review of the clerk of court's file, the State represented that this was indeed a court-ordered condition, and the State makes the same representation now. However, neither the bond order nor the GPS monitoring agreement between Eberhart and the bonding company are in the record. The majority opinion places the blame with the State, noting "the agreement between Eberhart and the bond company was not provided in the record on appeal" and explaining the "analysis in this case would be different if this case concerned court-ordered monitoring or if the agreement was included in the record and indicated [the bonding company] could or would share information with law enforcement." The Court explained it was "unable to determine whether the agreement was 'on behalf of the state' or merely an agreement between Eberhart and [the bonding company]." Eberhart, Howard Adv. Sheet no. 25 at 15.

This should have been the end of the analysis. Absent proof of this hypothetical, extraordinarily unusual "agreement" between Eberhart and the bonding company to keep the GPS data confidential, Eberhart failed to show even a subjective expectation of privacy in the data.[1] Nor did Eberhart proffer any testimony about the existence of such an agreement.

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[1] Eberhart, as a party to the agreement, was in the best position to produce the bond agreement. See Wayne LaFave et al, Search & Seizure § 11.2(b) "Burden of proof" (6th ed.) (explaining

Instead, the Court analyzed the case as if the GPS monitoring was not court-ordered, finding "Eberhart had a subjective expectation in the privacy of his GPS data" because "there is no evidence in the record that the monitor was required as a condition of bond by a court, and the State failed to present any evidence that he was informed the government could have access to the data for investigatory purposes unrelated to his bond."[2] Eberhart, Howard Adv. Sheet no. 25 at 16. This analysis turns the Rakas burden on its head, effectively requiring the State to disprove the existence of a privacy interest that has not been proved by the movant and has never been recognized by an appellate court in this State. This was an error of law.

In a footnote, the Court acknowledged the "State's argument that it does not have a burden of proving an exception [to the warrant requirement] until after a defendant shows a reasonable expectation of privacy." But while the Court acknowledged the State's argument, it did not really address it. The Court noted the trial court analyzed the expectation of privacy along with the consent exception to the warrant requirement and held "the trial court did not erroneously shift the burden" to Eberhart to show consent. This analysis confuses the issues. No exception to the warrant requirement need be shown until the defendant establishes that a search occurred by proving he had a reasonable expectation of privacy in the things that were searched. Eberhart's "consent to the bond company" as a condition of his release is relevant to whether he had a reasonable expectation of privacy, but it should not be conflated with consent to search

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"the matter of standing usually concerns the defendant's interest in an expectation of privacy concerning the place searched or the objects seized, about which the defendant will be most knowledgeable").

[2] A "good behavior" provision is a standard provision of bond, and the commission of a subsequent crime is a violation of that provision. See Mitchell, 421 S.C. at 368, 807 S.E.2d at 194 n.1. Bondsmen may be held responsible for violations of good behavior provisions. Id. at 373, 807 S.E.2d at 197. Thus the commission of a robbery while on bond could not be "unrelated to [Eberhart's] bond." Eberhart, Howard Adv. Sheet no. 25 at 16.

because if there was no reasonable expectation of privacy, a search did not occur. Because Eberhart did not produce any evidence of an agreement with the bond company not to share his location data with police (which the Court deemed determinative of whether he possessed a reasonable expectation of privacy), Eberhart failed to meet his burden to show a reasonable expectation of privacy and, by extension, a search.

Not only did Eberhart fail to show a subjective expectation of privacy, such an expectation would not be objectively reasonable. The sole purpose of GPS monitoring is to monitor a person's movements. Eberhart knew his movements were being tracked, and this tracking was directly linked to his ability to be released on bond. No reasonable person would think a bondsman could not share his location with the State, and society would not honor that expectation as reasonable.

The Court relied on Carpenter v. United States, 585 U.S. 296 (2018), to support its holding. But unlike the cell phone which produced the location data in Carpenter, the ankle bracelet was not Eberhart's property. It belonged to the bonding company, which had exclusive control over the monitor and the data it produced. This data was created for the bonding company's benefit, and the State's. It was not Eberhart's to keep private because he had no "substantial possessory interest" in it. Rakas, 439 U.S. at 136; see also Byrd v. United States, 584 U.S. 395, 407 (2018) (discussing "the expectation of privacy that comes from lawful possession and control" of a rental car). This is not the type of data a person "reasonably understands as his own." Chatrie v. United States, 609 U.S.__, slip op. at 25 (June 29, 2026). The data simply was not private in nature.

The majority opinion is unsupported by the text, history, or logic of the Fourth Amendment or the Privacy Clause of the South Carolina Constitution. It must be corrected.

CONCLUSION

This Court should grant rehearing en banc to correct this serious constitutional error.

Respectfully submitted,

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PROOF OF SERVICE

I, Grace Sommer, certify that I have served the within Petition for Rehearing on Appellant by sending an electronic copy to Gary Johnson, II, Esquire, to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.
This 15th day of July, 2026.

Grace Sommer

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