

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

Honorable DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 6150 (S.C. Ct. App. Filed July 1, 2026)

Lower Court Case No. 2022-GS-400-3613, 2022-GS-400-3615

THE STATE,

RESPONDENT,

V.

NEVELLE JOSHUA EBERHART,

APPELLANT

APPELLATE CASE NO. 2023-000234

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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S.C. SUPREME COURT

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 24, 2026.

QUESTION PRESENTED

Whether the Court of Appeals properly found GPS location data which placed petitioner in close proximity to the daytime armed robbery was harmless beyond a reasonable doubt when the victim of the armed robbery failed to identify petitioner as his assailant in a photographic lineup shortly after the incident?

STATEMENT OF THE CASE

Petitioner was charged and formerly indicted by a Richland County grand jury with armed robbery, possession of a weapon during a violent crime, and possession of weapon by a person convicted of a violent crime. R. 1. Petitioner was tried before the Honorable DeAndre Benjamin and a jury on February 6 – 8, 2023. Megan Eigenbrot and Robert Forney represented petitioner and Ruston Neely appeared on behalf of the state. R. 1. Petitioner's counsel moved to exclude any evidence related to his GPS location data (obtained from an ankle monitor) as a violation of petitioner's right to privacy under the South Carolina Constitution and the Fourth Amendment. R. 33, l. 23 – 35, l. 7. The trial court denied suppression. Petitioner was found guilty of armed robbery and possession of a weapon during a violent crime. R. 286, l. 24 - 287, l. 12; 295, ll. 5-12.

Petitioner asserted error before the Court of Appeals in the admission of the GPS location data as well as the trial court's admission of a recorded interview by police of the victim from the day of the robbery.¹ The Court of Appeals properly found petitioner had a reasonable expectation of privacy in the data that contained all of his physical movements and that the lower court erred in admitting the GPS location data. State v. Eberhart, Op. No. 6150 (S.C. Ct. App. July 1, 2026), reh'g denied (Aug. 24, 2026). However, the Court of Appeals erred in finding the admission of the GPS data was harmless and affirming petitioner's convictions. Petitioner sought rehearing on the harmless error finding and the Court of Appeals denied rehearing. This petition for certiorari follows.

¹ The Court of Appeals found no error in the admission of the recorded interview since the victim testified before its admission and the recording qualified as both present sense impression and as an excited utterance exception to the hearsay objection. This holding was not challenged on petition for rehearing.

ARGUMENT

The Court of Appeals erred in finding GPS location data which placed petitioner in close proximity to the daytime armed robbery was harmless beyond a reasonable doubt when the victim of the armed robbery failed to identify petitioner as his assailant in a photographic lineup shortly after the incident.

A. The Court of Appeals properly ruled the State failed to establish an exception to the warrant requirement before obtaining the GPS location data.

The Court of Appeals correctly found that GPS location data is subject to a reasonable expectation of privacy under both the United States Constitution and S.C. Const. art. 1, § 10.

After consideration of the lack of proof of Eberhart's consent to share his GPS data with the government and the heightened considerations surrounding electronic surveillance—in addition to our mindfulness of our de novo standard of review regarding whether Eberhart had a reasonable expectation of privacy—we find the trial court erred in finding that he “entered into the agreement with the bond company, knowing that the bond[] company could share the information with law enforcement” and erred in finding Eberhart had no reasonable expectation of privacy in his data. *See Frasier*, 437 S.C. at 633–34, 879 S.E.2d at 766 (stating the ultimate legal conclusion regarding the reasonable expectation of privacy is a question of law subject to de novo review).

State v. Eberhart, Op. No. 6150, at 10 (S.C. Ct. App. July 1, 2026).

In addition, the Court of Appeals also properly found that the State failed to present any evidence to overcome the presumption that the warrantless search of the GPS data was excused under applicable exception to the warrant requirement. *Id.*, *see also State v. Robinson*, 410 S.C. 519, 530, 765 S.E.2d 564, 570 (2014) (“The state bears the burden to demonstrate that it was entitled to conduct the search or seizure under an exception to the Fourth Amendment's warrant

requirement.”); State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 327 (2011) (“Warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement.”).

B. The Court of Appeals erred in conducting its harmless error analysis.

Having properly found error in the admission of the GPS location data, the Court of Appeals found its admission harmless. “An error is harmless when it could not have reasonably affected the result of the trial.” Matter of Hyman, 447 S.C. 573, 597, 930 S.E.2d 1, 13 (2026). In the present case, location reports of petitioner’s movements were entered into evidence. R. 201, l. 16 – 202, l. 18. During deliberations, the jury asked to obtain a “map of the GPS points.” R. 282, ll. 16 - 24. The victim in the armed robbery not only failed to pick petitioner out of a photographic lineup shortly after the crime occurred, but he also actively selected someone other than petitioner. R. 147, ll. 8-25. While some of the victim’s personal items were found on petitioner during his arrest and petitioner was connected to the moped shown in the armed robbery as noted by the Court of Appeals, those connections were circumstantial evidence of petitioner’s guilt. The only evidence that placed petitioner at the scene of the armed robbery, other than the improperly admitted GPS data, was the in court identification of the victim, an identification hopelessly tainted by his earlier failure to select petitioner during a photographic lineup.

“We do not doubt either the importance or the fallibility of eyewitness identifications. Indeed, in recognizing that defendants have a constitutional right to counsel at postindictment police lineups, we observed that ‘the annals of criminal law are rife with instances of mistaken identification.’” Perry v. New Hampshire, 565 U.S. 228, 245 (2012). An eyewitness

identification in Court with all eyes solely on the accused, tainted by an earlier failure of that witness to select the accused from a photographic lineup, would not support a finding of harmless error. The other pieces of circumstantial evidence supporting guilt noted by the Court of Appeals would not remove the impact on the jury of placing petitioner in physical proximity to the crime scene when the armed robbery occurred. As the state argued in closing, the GPS data was proof of petitioner's guilt that could not be explained away or ignored:

The person there was Nevelle Eberhart. The investigator ran his information. And when he ran his information, he had a GPS device attached to his person, and where did it show that he was? His answer to law enforcement in the interview, when they asked him where he was at the time of the robbery, the day of the robbery, his answer was, "Everywhere." He was not everywhere, he was on Devine Street and King Street where the robbery happened. That's where the GPS puts him. That's not everywhere, that's specific. Is that a coincidence? It's not a coincidence. These are all not coincidences. This is proof.

R. 276, ll. 2 – 14.

To say an error did not contribute to the verdict is “to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record,” *Arnold v. State*, 309 S.C. 157, 166, 420 S.E.2d 834, 839 (1992) (quoting *Yates v. Evatt*, 500 U.S. 391, 403-04, 111 S.Ct. 1884, 114 L.Ed.2d 432 (1991)), and that “the error had little, if any, likelihood of having changed the result of the trial.” *State v. Black*, 400 S.C. 10, 27, 732 S.E.2d 880, 890 (2012) (quoting *State v. Watts*, 321 S.C. 158, 165, 467 S.E.2d 272, 277 (Ct. App. 1996)).

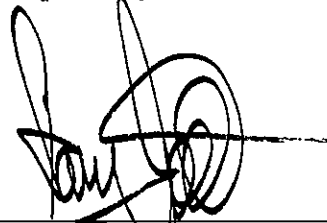
State v. Workman, 443 S.C. 369, 377–78, 905 S.E.2d 119, 123 (2024).

In light of the State's emphasis on the GPS data in closing argument, the jury's request to review the data during deliberations, and the failure of the victim to select petitioner as the assailant shortly after the crime, the Court of Appeals erred in finding the improper admission of the GPS evidence harmless.

CONCLUSION

Petitioner requests that this Court grant the petition and reverse the harmless error finding of the Court of Appeals and remand this matter to the lower court for a new trial.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Gary H. Johnson', is written over a horizontal line.

Gary H Johnson
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of September, 2026.